

POPE PIUS XI'S EXTRAORDINARY—BUT
UNDESERVED—PRAISE OF THE AMERICAN SUPREME
COURT

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INTRODUCTION

In 2012, Roman Catholic institutions in the United States were challenged by a new law that many American Catholics deemed not only unjust, but also unconstitutional. In February, the Secretary of Health and Human Services adopted a regulation that generally required employers, including many Catholic institutions, to provide artificial contraception as part of any offered healthcare plan.² Believing such regulation to be an infringement of religious liberty, various Catholic dioceses and other Catholic organizations filed lawsuits in federal court seeking to enjoin the enforcement of the regulation.³

Ninety years ago, in 1922, American Catholics met a similar challenge. In the fall elections of that year, Oregon voters approved a state law compelling all the state's children to attend public schools.⁴ The law would have effectively closed all the Catholic grade schools (and other private schools) in the state.⁵

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2. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, & 45 C.F.R. pt. 147); *see also* Memorandum from Anthony R. Picarello, Jr. & Michael F. Moses, General Counsel to the United States Conference of Catholic Bishops, HHS Regulation and Bulletin on Sterilization/Contraception Mandate (Mar. 7, 2012), <http://www.usccb.org/about/general-counsel/upload/2012-hhs-mandate-public-legal-memo.pdf> (explaining this regulation).

3. Laurie Goodstein, *Catholics File Suits on Contraceptive Coverage*, N.Y. TIMES, May 21, 2012, at A17 (print version appeared on May 22, 2012 edition with the headline *Bishops Sue Over Contraception Mandate*).

4. PAULA ABRAMS, CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION 83 (2009).

5. *Soc'y of Sisters v. Pierce*, 296 F. 928, 938 (D. Ore. 1924) (concluding that the law would "take utterly away from complainants their constitutional right and privilege to teach in the grammar grades").

Emboldened by their success in Oregon, proponents of compulsory public education initiated efforts to adopt similar laws in other states.⁶ In response, Catholics nationwide mobilized; and in Oregon, with the support of the National Catholic Welfare Council, the Society of Sisters of the Holy Names of Jesus and Mary filed a lawsuit in federal court seeking to enjoin the law's enforcement.⁷

The lawsuit was successful, and the federal district court granted the injunction.⁸ On appeal, in *Pierce v. Society of Sisters*,⁹ the Supreme Court unanimously concluded that the Constitution prohibited the states from compelling students to attend only public schools.¹⁰ The law, the Court affirmed, interfered with the right of parents to direct the education of their own children, and the Sisters' right to teach.¹¹

American Catholics rejoiced in the victory.¹² Even the Bishop of Rome joined in the celebration. In his 1929 encyclical letter on Christian education, *Divini Illius Magistri*, Pope Pius XI explicitly praised the Supreme Court's decision. In vindicating the right and duty of parents to direct their own children's education, he cited, as supporting authorities, not only Thomas Aquinas, Canon Law, and papal encyclicals, but also the United States Supreme Court:

This incontestable right of the family has at various times been recognized by nations anxious to respect the natural law in their civil enactments. Thus, to give one recent example, the Supreme Court of the United States of America, in a decision on an important controversy, declared that it is not in the competence of the State to fix any uniform standard of education by forcing children to receive instruction exclusively in public schools, and it bases its decision on the natural law: the child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to educate him and prepare him for the fulfillment of his obligations.¹³

6. ABRAMS, *supra* note 4 at 91–95 (discussing subsequent efforts in Washington state and elsewhere).

7. *Id.* at 130.

8. *Soc'y of Sisters*, 296 F. at 938.

9. 268 U.S. 510 (1925).

10. *Id.* at 535.

11. *Id.*

12. ABRAMS, *supra* note 4, at 201–05.

13. Pius XI, *Divini Illius Magistri* (On the Christian Education of Youth) (Dec. 31, 1929), ¶ 37, available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121929_divini-illius-magistri_en.html [hereinafter *Divini*].

The “important controversy” mentioned here was *Pierce v. Society of Sisters*.¹⁴

I. EXTRAORDINARY PRAISE

Although largely overlooked by scholars,¹⁵ this praise is remarkable in at least four respects: its timing, specificity, authority, and extent. As to its timing, the comment was made thirty years prior to events that would largely reconcile the Church’s Magisterium with the natural rights principles of the American Founding. In the 1960s, the Magisterium embraced, less ambiguously than in the past, modern (and American) notions of individual human rights,¹⁶ especially individual religious freedom.¹⁷ Conversely (from the Vatican’s perspective, at least), America was simultaneously neglecting these very ideals, especially by the Supreme Court’s invalidation of anti-abortion laws, which the Church deemed essential to protect the right to life. But in 1929, both the Second Vatican Council and *Roe v. Wade*¹⁸ were a generation away.

Pius XI’s praise is also striking in its specificity. By citing, and even quoting,¹⁹ a particular Supreme Court decision, Pius XI

14. *Id.* at n.28 (using the title “Oregon School Case”).

15. For a few rare (and only brief) scholarly notices of this passage, see Christopher Wolfe, *The Supreme Court and Catholic Social Thought*, 29 AM. J. JURIS. 45, 50 (1984); Russell Hittinger, *Introduction to Modern Catholicism*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, 3, 19 (John Witte, Jr., & Frank S. Alexander eds., 2006); Patrick McKinley Brennan, *Harmonizing Plural Societies: The Case of LaSallians, Families, Schools—and the Poor*, 45 J. CATH. LEG. STUD. 131, 140 (2006). Paula Abrams, in her extensive history of the *Pierce* case, never mentions this passage. See generally, ABRAMS, *supra* note 4.

16. John XXIII, *Pacem in Terris* (On Establishing Universal Peace in Truth, Justice, Charity, and Liberty) §§ 8, 11 (Apr. 11, 1963) (discussing “that order which should prevail among men,” and stating that “*first* We must speak of man’s rights,” and mentioning, *inter alia*, the “right to live”) (emphasis added).

17. *Id.* §§ 11–27 (detailing various human rights, including “being able to worship God in accordance with the right dictates of his own conscience, and to profess his religion both in private and in public”); accord Second Vatican Council, *Dignitatis Humanae* (Declaration on Religious Freedom) (Dec. 7, 1965).

18. 410 U.S. 113 (1973).

19. The official English translation omits the quotation marks found in the Latin. Pius PP. XI, *Divini Illius Magistri*, 22 ACTA APOSTOLICAE SEDIS - COMMENTARIUM OFFICIALE NO. 2, 55, 60–61 (Feb. 22, 1930), available at <http://www.vatican.va/archive/aas/documents/AAS%2022%20%5B1930%5D%20-%20ocr.pdf>, and more readily available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-

avoided any merely generic or polite compliment. Indeed, he treated the Court as an authority whose pronouncements were worthy of consideration. He even openly credited the Court with providing an accurate restatement of Catholic moral doctrine.

The authoritative character of this praise is even more noteworthy. Unlike other papal recognitions of America, this comment in *Divini* was addressed not merely to Americans, but to all Catholics “on earth.”²⁰ As an encyclical addressed to the worldwide Church, *Divini* had substantially greater authority than a statement made to an individual nation.²¹ The Pope thus touted the United States (and its Supreme Court) as an example to Catholics all around the world—and implicitly reproached those traditionally Catholic countries (like Mexico) where a secularist state had monopolized primary education.²²

Finally, the praise is impressive in its extent. The Court was said to have addressed an “important controversy,” or as more emphatically phrased in the official Latin, a “*gravissimam quaestionem*.”²³ Furthermore, by quoting, with approval, the Court’s answer to this most grave question, the Pope (momentarily) ranked a contemporary and non-Catholic, Justice James McReyn-

xi_enc_31121929_divini-illius-magistri_lt.html [hereinafter *Divini* (Latin version)]. In re-translating Justice McReynolds’s words back into English, the translators did not use McReynolds’s precise words. The Latin translation departed from the English in a few significant respects, and the English translators omitted the quotation marks accordingly in reverse-translation, perhaps in awareness that a faithful translation of *his* words would not faithfully reproduce the Court’s words. See *infra* text accompanying notes 72-85.

20. *Divini*, *supra* note 13 (addressed to “all the faithful of the Catholic world”).

21. MATTHEW BUNSON, OUR SUNDAY VISITOR’S CATHOLIC ALMANAC 246 (2009) (distinguishing an encyclical letter addressed to the whole Church from an encyclical epistle addressed to only a part thereof); Denis D. Cali, *John Paul II’s Encyclicals as Papal Dialectic*, in THE RHETORIC OF POPE JOHN PAUL II, 233, 238 (Joseph R. Blaney & Joseph P. Zompetti eds. 2009) (outlining the relative authority of papal documents).

22. See, e.g., CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 3 (1917) (establishing compulsory secular primary education and forbidding any religious organization from any participation in primary or secondary education, or in the training of teachers, workers, or peasants of any ages); Pius XI, *Acerba Animi* (On the Persecution of the Church in Mexico), Sept. 29, 1932, § 9, available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_29091932_acerba-animi_en.html (decrying the prohibition of classroom religious instruction of children).

23. *Divini* (Latin version), *supra* note 19, at 60. The Latin version is authoritative, as it was this version that was formally promulgated in the *Acta Apostolicae Sedis*.

olds, the author of the unanimous decision,²⁴ alongside Thomas Aquinas.²⁵ In fact, *Pierce* is the only Supreme Court decision “to have made a favorable appearance in a papal encyclical,”²⁶ and the Pope’s reference to the decision may represent the only instance where a pope has given such an honor to any modern, non-Catholic legal authority.²⁷

Furthermore, Pius XI’s endorsement extended not only to the Court, but also to the entire American nation. According to the official English translation, the entire nation was “anxious to respect the natural law in [America’s] civil enactments.”²⁸ America’s Supreme Court, in turn, had juridically recognized this “incontestable right of the family” and “based its decision on the natural law.”²⁹ The Court’s purported reliance on the natural law thus reflected a nationwide commitment.

In fact, this English translation muted the scope of the Pope’s praise, and more particularly, the degree to which he attributed *reverence* to both the American Supreme Court and the Nation.³⁰ According to the official Latin, the Court did not so much “base” its decision *on* the natural law—rather its reasoning was “evidently *taken down from* the law of nature”: “scilicet rationem ex iure naturae *depromptam*.”³¹ So the Court was not looking “down” at the

24. *Pierce*, 268 U.S. at 529.

25. *Divini*, *supra* note 13, ¶¶ 33–37 (quoting both Thomas Aquinas and *Pierce*).

26. Wolfe, *supra* note 15, at 50.

27. More precisely, this authority was *largely* non-Catholic. The Supreme Court in 1925 had only one Roman Catholic justice, whose first name was incidentally *Pierce*—Justice Pierce Butler. John T. Noonan, Jr., *The Catholic Justices of the United States Supreme Court*, 67 CATH. HIST. REV. 369, 369 (1981). Further, the American people, who *indirectly* appointed the members of this Court, THE FEDERALIST NO. 39 (Madison), included a significant Catholic minority.

28. *Divini supra* note 13, ¶ 37.

29. *Id.* ¶ 37. The English version omitted the adverb “juridically” or “legally,” which appeared in the official Latin “Istud...familiae ius...est *legitime* agnitum.” *Divini* (Latin version), *supra* note 19, at 60 (emphasis added).

30. The English translation appears not to be from the Latin, but from the Italian version, which was entitled “Rappresentanti in terra.” The Italian version was written first, with a Latin version published two months later with reportedly “minor changes.” *Papal Encyclicals: Benedict XIV (1740) to John Paul II*, in THE CATHOLIC ALMANAC’S GUIDE TO THE CHURCH 105, 110 (2008). The Italian version refers to those nations that “have taken care to respect the natural law in civil ordinances”: “ha cura di rispettare il diritto naturale negli ordinamenti civili.” Pius XI, *Rappresentanti in Terra* (Dec. 31, 1929), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19291231_rappresentanti-in-terra_it.html.

31. *Divini* (Latin version) *supra* note 19, at 61 (emphasis added).

natural law as a foundation for the decision; rather the Court was looking “up” to the natural law and drawing from its higher *ratio*.

More significantly, according to the official Latin text, the American nation did not merely “respect the natural law” in various “civil enactments,” as the English version stated. Rather, America was one of those nations where “*ius naturae in civili servare regimine sollemne est.*”³² That is, in America, “the safeguarding [*servare*] of the law of nature [*ius naturae*] is ordained [*est...solemne*] in the civil constitution (*in civili...regimine*).” According to the authoritative Latin text, then, the Americans’ approach to the natural law involved not so much *anxiety* as *reverence*. And this reverence was manifest not just in sundry civil “enactments,” but also in the nation’s singular foundational enactment—that is, America’s “civil constitution.”³³

Pius XI, therefore, made at least three striking claims regarding the relationship between the natural law, the American Constitution, and the American Supreme Court: (1) that the Supreme Court, in the language quoted from *Pierce*, accurately restated a natural-law principle; (2) that the whole American nation had ordained this natural-law principle—and even the natural law in general—in the American Constitution; and (3) that the American Supreme Court, in *Pierce*, had relied upon this natural law in deciding the case.

II. UNDESERVED PRAISE

These three claims represent descriptions of (1) the natural law, (2) the American Constitution, and (3) the Supreme Court’s decision in *Pierce*. The validity of the first and second claims represents enormously interesting questions. This article, however, will assess only the third description. As will be further discussed below, the Pope’s laudatory description of the *Pierce* Court was largely inaccurate. In truth, the justices who decided *Pierce* were not friends of any natural-law theory. The procedural history of *Pierce*, the *Pierce* opinion itself, and other contemporaneous decisions all demonstrate that the justices had become indifferent, if

32. *Divini* (Latin version) *supra* note 19, at 60–61.

33. Here, the English translation probably relied on the Italian, which likewise speaks of concern (*ha cura*) with respecting (*rispettare*) the natural law in civil ordinances (*ordinamenti civili*). “Tale diritto incontrastabile della famiglia è stato varie volte riconosciuto giuridicamente presso nazioni nelle quali *si ha cura di rispettare il diritto naturale negli ordinamenti civili*. Pius XI, *Rappresentanti in Terra*, *supra* note 30, § 37.

not hostile, to all natural-law theories. In fact, *Pierce* was authored by jurists unfriendly to natural-law principles, whether Catholic or otherwise, and not surprisingly, in the hands of these jurists and their like-minded successors, the *Pierce* precedent would facilitate subsequent judicial decisions adverse to Catholic natural-law teaching.

A. *The Taft Court's Rejection of Natural Law in Pierce*

In describing the *Pierce* Court as devoted to natural-law jurisprudence, Pius XI anticipated the general consensus of later commentators. It is said, for example, that the Court of the 1920s, favored “long standing natural law principles and a Constitution whose meaning is unchanging.”³⁴ Under the leadership of Chief Justice Taft, the Court reportedly used natural-law theory to enforce various rights not established in the Constitution’s text as constitutional liberties. Such liberties included not only the “liberty of contract” reaffirmed by the 1923 decision in *Adkins v. Children’s Hospital of D.C.*,³⁵ but also the right “to establish a home and bring up children” affirmed two months later in *Meyer v. Nebraska*,³⁶ and re-affirmed in *Pierce*.³⁷ These unenumerated familial rights “were treated as fundamental...using the same natural-rights reasoning that had underlain the economic rights cases.”³⁸ Friends and critics of these decisions have largely agreed that the

34. PETER G. RENSTROM, *THE TAFT COURT: JUSTICES, RULINGS, AND LEGACY* 184 (2003).

35. 261 U.S. 525, 545 (1923) (holding “[t]hat the right to contract about one’s affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question”).

36. 262 U.S. 390, 399 (1923) (holding that “[w]ithout doubt, [the ‘liberty’ mentioned in the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”).

37. *Pierce*, 268 U.S. at 529.

38. PHILIP G. PETERS, JR., *HOW SAFE IS SAFE ENOUGH?: OBLIGATIONS TO THE CHILDREN OF REPRODUCTIVE TECHNOLOGY* 122 (2004); David Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L. Q. 1469, 1517 (2005) (claiming that *Pierce* “elaborated the same natural law due process philosophy” found in economic due-process cases).

Taft Court relied on natural-law jurisprudence to assert familial as well as economic rights.³⁹

Yet a reading of the *Pierce* decision in context indicates that the justices consciously shunned any reliance on any natural-law theory, whether called “natural rights” or otherwise.⁴⁰ Nowhere in the opinion did the Court invoke natural law. Here is the full paragraph from which Pius XI excerpted his quotation:

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390 [1923], we think it entirely plain that the Act of 1922 [establishing compulsory public education] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control: as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁴¹

39. Most famously, Justice Hugo Black, dissenting in *Griswold v. Connecticut*, 381 U.S. 479 (1965), objected that two of the cases relied on by the Court, *Meyer* and *Pierce*, were “both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York*.... one of the cases on which he relied in *Meyer*, along with such other long-discredited decisions as....*Adkins v. Children’s Hospital*.” *Id.* at 515 (Black, J., dissenting). See also Christopher Wolfe, *Thomistic Natural Law and the American Natural Law Tradition*, in ST. THOMAS AQUINAS AND THE NATURAL LAW TRADITION: CONTEMPORARY PERSPECTIVES 197, 209 (2004) (commenting that “natural law makes an appearance in...*Pierce v. Society of Sisters*, in which the Court upheld parental rights”); David Wagner, *The Family and the Constitution*, FIRST THINGS, No. 45, at 23, 25–27 (Aug.-Sept. 1994) (referring to the “natural law roots” of *Pierce* and claiming that the Court there “correctly applied the natural law”); Odeana R. Neal, *National Issues: Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL’Y 61, 63–65 (1995) (claiming that *Meyer* and *Pierce* were “premised on a natural law theory” and proceeding to criticize that theory); see also, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 282–83 (1994) (ascribing to the *Meyer* and *Pierce* decisions “the logic of natural rights”).

40. Throughout this paper, we will not attend to the important distinctions between the various theories that look to nature as a source of political norms, whether called natural law, natural rights, or otherwise. As we will argue, the Taft Court and its successors rejected all such theories. See *infra* text accompanying notes 71–85.

41. *Pierce*, 268 U.S. at 534–35.

As this paragraph indicates, the *Pierce* opinion grounded parental rights expressly in a local (American) and merely theoretical concept of liberty, as elaborated by a very recent precedent (*Meyer*—decided two years prior). The *Pierce* opinion included no mention of any connection between this domestic and contemporary positive law and any purportedly universal principle (like natural law), valid in all places and times.⁴²

More notably, the Court conspicuously failed to ground the rights of parents in biological maternity or paternity. Both at common law and in Catholic teaching, the natural character of parental rights arises from (or through) biology, and this natural relationship is the foundation for all natural parental rights, which include education, as well as custody.⁴³ In contrast, the

42. The “reasonableness” standard used here did not necessarily invoke nature. Legal historicists reject natural law and simply hold that “reasonableness” itself varies from time to time. Consider, for instance, comments made by two prominent, contemporary historicists: “[L]egal historicism holds that the conventions determining what is a good or bad legal argument are not fixed, but change over time in response to changing social, political, and historical conditions. The interpenetration of legal norms and historical forces continually reshapes the boundaries of what people in the enterprise of legal argument recognize as the better and the worse legal argument, as well as their sense of what is a plausible legal claim and what is totally off the wall.” Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L. J. 173, 174 (2001). According to this account, “reasonable” is roughly synonymous with “relevant.” *Id.*

43. See, e.g., *Divini*, *supra* note 13, § 30 (stating that “God directly communicates to the family, in the natural order, fecundity, which is the principle of life, and hence also the principle of education to life, together with authority, the principle of order”); *Moritz v. Garnhart*, 7 Watts 302, 303 (Pa. 1838) (affirming that “[t]hough a bastard be not looked upon as a child for any civil purpose, the ties of nature are regarded in respect to its maintenance” and that “[t]he putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody” and citing with approval cases holding “that a putative father has a natural right to the care and education of his illegitimate child” even though the child’s natural mother has a superior custodial right); *Osborn v. Allen*, 26 N.J.L. 388, 392 (N.J. 1857) (declaring that “[t]he great natural duties of parents to their children, maintenance, protection and education, are all recognized at common law, and to some extent enforced by statute” and that “[t]he duties of protection and education are left by our law to rest simply where the law of nature has placed them”); *Hole v. Robbins*, 53 Wis. 514, 519 (1881) (holding that under Wisconsin’s adoption statute, a natural parent loses only the natural rights expressly enumerated in the statute, *viz.*, “the right of the natural parent to the personal control, education and maintenance of the child” but that the natural parent retains any natural rights not expressly listed in the statute, such as the parent’s right to inherit from that child upon that child’s early death); *Whalen v. Olmstead*, 61 Conn. 263, 269–70 (1891) (affirming, in discussing a law

Pierce Court indicated that custody was itself the foundation, and on this foundation rested the right to educate the child: The “right” and “duty” to educate a child belonged to all those “who nurture him and direct his destiny.”⁴⁴ Accordingly, this “liberty” was coextensive with this control: “to direct the upbringing and education of children *under their control*.”⁴⁵

Consistent with this understanding, the Court equated the rights of non-natural legal “guardians” with those of natural “parents;” both control children, and therefore both equally enjoy the “liberty” of directing their wards’ education.⁴⁶ The Court’s opinion thus indicated that the right to direct a child’s education results not from a natural familial relation, but simply as a necessary concomitant to the power of custody, however defined and assigned.⁴⁷ For the Court, it was not natural parenthood that gave both custodial and educational rights; it was custodial power—whether resulting from biology, positive law, or otherwise—that gave educational rights.

allowing a poor parent to temporarily commit her children to the custody of the state, that “the utmost possible consideration [must] be paid to those natural affections which exist between parent and child, and it should ever be an object of the law to promote and foster such affections” but explaining that at times “the natural and common law right of the parent to the control, custody, maintenance and education of his minor child [may be] surrendered, abridged or forfeited to the state as *parens patriae*,” whereby the state “stands *in loco parentis*”); *State v. Bailey*, 157 Ind. 324, 329 (1901) (upholding Indiana’s compulsory education law by stating that “[t]he natural rights of a parent to the custody and control of his infant child are subordinate to the power of the State, and may be restricted and regulated by municipal laws” and that “[o]ne of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth, [so if] he neglects to perform it, or willfully refuses to do so, he may be coerced by law to execute such civil obligation”); *Hummel v. Parrish*, 43 Utah 373, 383 (1913) (referring to “the presumptive right of the natural parent” to direct and ensure the “physical, intellectual, social, moral, and educational training and general welfare and happiness of the child”).

44. *Pierce*, 268 U.S. at 535.

45. *Id.* at 534–35 (emphasis added).

46. *Id.* at 534.

47. Parenthetically, we might note that the Court’s claim as to this necessary concomitance does not seem terribly persuasive. It is unclear how either prudence or justice, still less the Constitution, forbids a state from separating the duties of bodily custody and care from those of intellectual formation. The state may, it seems, reasonably conclude that the best interests of the child or society require the state to assign one or more legal guardians the duties of bodily care, but to reserve to other guardians, or itself, the duties of education, or vice-versa, or to distinguish and distribute various rights and duties to multiple parties in various other ways.

At the same time, by asserting that the child's custodians (whether natural parents or otherwise) are those who "direct" the child's "destiny," the Court suggested that children do not have, by nature, a fixed natural end or destiny that oriented and limited parental authority. Rather, adult control over children seemingly involved an expansive authority not only to guide the child toward his natural *telos* by teaching him to perform his pre-established duties, but also to "direct" (or even choose) that destiny. *Pierce* affirmed that a child's guardians "direct his destiny" rather than direct him *toward* a destiny established by nature's Author.⁴⁸

The absence in the *Pierce* opinion of any reference to law, rights, duties, or ends rooted in nature, especially biological parenthood, was glaringly conspicuous in light of both the history of the case and the very precedent (*Meyer*) relied on by the Court. Two plaintiffs had brought the case in federal district court, the Society of Sisters of the Holy Names and the Hill Military Academy, seeking to enjoin Oregon Governor Walter Pierce (and other state officials) from enforcing a new Oregon law requiring all children to attend public schools. The district court granted the injunction on the express basis of the "*natural* and inherent right [of parents] to the possession, nurture, control, and tutorship of their *offspring*."⁴⁹

On appeal to the Supreme Court, the plaintiff-appellees relied prominently on parental natural rights. The Society of Sisters entitled the first section of their brief, "Natural Rights of Liberty and Property Secured by the Constitution"; and under this heading,

48. Others have indicated that this power to choose a child's destiny belongs to the child himself, or the state, and not the child's parents or guardians. *Compare* *Casey v. Planned Parenthood of Se. Pa.*, 503 U.S. 833, 851–52 (1992) (arguing that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" and that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society"), *and id.* at 869 (declaring that "the urgent claims of the woman to retain the ultimate control over her destiny and her body [are] implicit in the meaning of liberty"), *with* Editorial, *Father Blakely States the Issue*, *NEW REPUBLIC*, June 29, 1916, *excerpted in* *AMERICAN PROGRESSIVISM: A READER* 135, 137 (Ronald J. Pestritto & William J. Atto eds. 2008) (criticizing Catholic schools and arguing that "there are other destinies besides those conceived [by Catholicism], and that the power to choose and control destiny is the ambition of democrats educated in the age of science").

49. *Soc'y of Sisters of Holy Names v. Pierce*, 296 F. 928, 932 (D. Ore. 1924) (emphasis added). Elsewhere in the opinion, however, the court spoke of the constitutional right of "guardians" as well as parents "to send their children and wards to such schools as they may desire." *Id.* at 933.

the Sisters argued “that the parent has a natural right to the custody and control of his children, [including] the right to direct and control their education,” for the “family, with the parents’ authority over and duty to care for the children...existed before governments began and perhaps will outlive them.”⁵⁰ At oral argument, their Catholic attorney William Guthrie likewise argued “the right of parents to send their children to private schools of their choice [as] a fundamental, natural, and sacred right.”⁵¹ His colleague, John Kavanaugh, also called parental rights “vital and fundamental [and] not derivative. These natural rights existed before constitutions were made. They were not created by constitutions, but...certainly secured and protected by them.”⁵²

One of the *amicus* briefs—filed by the Seventh Day Adventists—was devoted primarily to vindicating the natural rights of parents. In the first and largest section of the brief, entitled “Natural Rights,” the Adventists argued as follows: “As expressed in the Declaration of Independence, our natural rights are endowments of the Creator. Among these endowments is the right to bring in children, rear and educate them. The family was the first institution established by the Creator among men. He also established the first educational system and put it in the family.”⁵³

50. OREGON SCHOOL CASES: COMPLETE RECORD 304, 322, 323 (1925) (Brief of appellee Society of Sisters of the Holy Names).

51. *Id.* at 653 (transcript of oral argument); *see also id.* at 663–64 (claiming that “[f]irst and foremost, the law involves the sacred rights of parents in the discharge of their duty to educate their children, a truly sacred right and duty, which [Blackstone and Pufendorf declared] was the greatest of all the rights and duties of parents”).

52. *Id.* at 673 (transcript of oral argument).

53. *Id.* at 593, 596 (Brief of William A. Williams as *amicus curiae* and on behalf of the North Pacific Union Conference of Seventh-Day Adventists). Prominent Catholic jurists made similar comments. For instance, Chief Judge of the D.C. Circuit, Constantine Smyth, remarked as follows: “We learn from the Bible that children come from above and are given to their parents that they may be raised in the knowledge, love and the fear of God to the end that they may attain heaven.... For children to act in harmony with the divine plan it is necessary that they be instructed how to do it. This is self-evident. Where, primarily, rests the duty of that instruction? Not on the state. Then it must be upon the parents. Nature, as well as revealed religion, teaches that it is a sacred duty for the execution of which God will hold parents to a strict accountability.... It follows that the duty to educate necessarily implies the right to do so. As the duty is a sublime one, so is the right. No right is more fundamental or precious.” *Distinguished Speakers Discuss Problems of Education*, NAT’L CATH. WELFARE COUNCIL BULL., Oct. 1923, 22–24, at 23.

Governor Pierce and the other defendant-appellants did not contradict the existence of natural parental rights. Indeed, their attorneys conceded—even proclaimed—the existence of supra-constitutional parental rights, and acknowledged these rights to be “inherent” (though without using the precise term “natural”).⁵⁴ Still, they argued, these inherent rights were “subject to the paramount right of the state to exercise control over minors” in all “matters relating to the general welfare of such children and of the public.”⁵⁵

Therefore, in deciding the appeal, the Supreme Court was well aware of the extensive, prominent, and (largely) uncontroverted natural-law claims set forth by the district court, the plaintiffs, and *amici*. Indeed, the *Pierce* Court cited a recent case in which the Court had expressly affirmed the natural rights and duties of parents. In *Meyer v. Nebraska*,⁵⁶ the Court (through McReynolds) had held unconstitutional a state law prohibiting the teaching of foreign languages to children.⁵⁷ McReynolds there alluded to the natural-law principle according to which there was an integral relationship between marriage, procreation, and educational authority: the parent had a “*natural duty* to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.”⁵⁸ “Corresponding” to this natural duty, said the Court, was a “right of control”⁵⁹ that was among those familial and other fundamental rights secured by both the common law and the Fourteenth Amendment’s Due Process Clause:

[T]he liberty guaranteed to the plaintiff in error by the Fourteenth Amendment.... denotes not merely freedom from bodily restraint but

54. OREGON SCHOOL CASES: COMPLETE RECORD, *supra* note 50, at 127 (Brief of Appellant Pierce) (acknowledging that “[a] parent beyond dispute has an important ‘right’ in his power of control over his children, a right which is fully protected by the laws of the different states (but not the Fourteenth Amendment)”; *id.* at 157 (prominently beginning a section of the brief with the following statement: “The inherent right of parents to the custody and control of their minor children is recognized and protected in every civilized nation,” but that “in matters relating to the general welfare of such children and of the public the rights of the parents are subject to the paramount right of the state to exercise control over such minors”).

55. *Id.* at 157 (Brief of Appellant Pierce).

56. 262 U.S. 390 (1923), *cited in Pierce*, 268 U.S. at 534–35.

57. *Id.* at 403.

58. *Id.* at 400 (emphasis added).

59. *Id.*

also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of *happiness* by free men.⁶⁰

Note that in *Meyer*, unlike *Pierce*, one reads an express statement that the common law and the Constitution served merely to *recognize* and *guarantee*, respectively, these natural familial rights, but not to *establish* or *create* them.⁶¹ Conversely, in *Meyer*, unlike *Pierce*, one finds no mention of any fundamental rights of non-parental guardians. Furthermore, unlike *Pierce*, which defined parental authority to include even the power to determine the child's "destiny," the *Meyer* opinion indicated that natural (and common law) rights are ordered to a pre-established natural end or destiny; that is, these rights are all essential to the pursuit of *happiness*.⁶²

Clearly, Justice McReynolds was mindful of *Meyer* in writing the *Pierce* opinion. He had authored the *Meyer* opinion, and the *Meyer* precedent was the express basis for the *Pierce* holding that the Constitution secures "the liberty of parents and guardians to direct the upbringing and education of children under their control."⁶³ In fact, "[u]nder the doctrine of *Meyer v. Nebraska*" are the words that begin the paragraph setting forth this holding.⁶⁴

60. *Id.* at 399 (emphasis added).

61. *Accord* *Butler v. Perry*, 240 U.S. 328, 333 (1916) (unanimous opinion of McReynolds, J.) (holding that "[t]here is no merit in the claim that a man's labor is property, the taking of which without compensation by the State for building and maintenance of public roads, violates the due process clause of the Fourteenth Amendment, [for that] Amendment was intended to preserve and protect fundamental rights *long recognized* under the common law system") (emphasis added).

62. Consider, for instance, the words of the most famous student and teacher of the common law: "[The Creator] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has....graciously reduced the rule of obedience to this one paternal precept, 'that man should pursue his own true and substantial happiness.'" 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 40–41 (1766).

63. *Pierce*, 268 U.S. at 534–35.

64. *Id.* at 534.

Indeed, McReynolds not only looked back to *Meyer* in writing the *Pierce* opinion, but had anticipated *Pierce* in writing the *Meyer* opinion. The Oregon law overturned in *Pierce* had been adopted in the fall before the Court decided *Meyer*; in express anticipation of a challenge to that law, attorney William Guthrie had submitted an *amicus* brief in *Meyer*.⁶⁵ In this brief, he alerted the Court to the prospective challenge and asked the Court to vindicate parents' rights in the face of this and other laws that violated the "God-given and constitutional right of a parent to have some voice in the bringing up and education of his children."⁶⁶ According to Guthrie, such state coercion did violence to the natural relationship between parent and child: "The love and interest of the parent for his child, such a statute condemns as evil; the instinctive preferences and desires of the child itself, such a law represses as if mere manifestations of an incorrigible or baneful disposition."⁶⁷ Anglo-American law, Guthrie added, had long ago repudiated "the notion of Plato that in a Utopia the state would be the sole repository of parental authority and duty and the children be surrendered to it."⁶⁸

The evidence is clear that Justice McReynolds gave serious attention to Guthrie's brief. Most notably, in *Meyer*, McReynolds adopted Guthrie's condemnation of Platonic education whereby the polity monopolized the raising of the young.⁶⁹ More broadly, as one scholar has noted, it was Guthrie who successfully "persuad[ed] the Court to view state restriction on foreign-language teaching in the broader context of state efforts to monopolize education."⁷⁰

65. ABRAMS, *supra* note 4, at 118–20 (2009).

66. Brief of William D. Guthrie as Amicus Curiae Supporting Plaintiff-Appellees, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (quoting *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039, 1043 (Neb. 1914)), *quoted in* ABRAMS *supra* note 4, at 120.

67. *Id.*, *quoted in* Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1078 (1992).

68. *Id.*, *quoted in* ABRAMS, *supra* note 4, at 119–20.

69. ABRAMS, *supra* note 4, at 121 (stating that the Court "explicitly extracted Guthrie's argument that Anglo-Saxon society had repudiated the Platonic ideal of state control of child rearing and education"); *Meyer*, 262 U.S. at 401–02.

70. ABRAMS *supra* note 4, at 162–63. Both Clarence Darrow and Arthur Mullen, the attorneys who represented Meyer in the appeal, believed that Justice McReynolds had initially opposed Meyer's appeal, but switched his vote because of the implications of the case for compulsory public education, implications raised in Guthrie's brief. ARTHUR F. MULLEN, WESTERN DEMOCRAT 225 (1940).

The circumstantial evidence then strongly indicates that in *Pierce*, the Court's failure to mention natural rights was conscious and even deliberate. The Court knowingly reformulated parental rights by basing them not on natural law, as recognized in the Anglo-American common law, but on contemporary and American positive law, *viz.*, a single recent judicial precedent defining the American "theory of liberty." According to this theory, any person who happened to have the power to control a child and even direct that child's "destiny," whether that person was natural parent, legal guardian, or otherwise, must have, as a necessary concomitant, the right to educate that child and prepare him for other "obligations" indefinitely defined. The Court thus tacitly, but clearly, rejected the purportedly universal principle by which a parent has, by nature, the duty (and corresponding right) to educate, as well as control, his or her biological offspring, and that this right and duty serves a destiny fixed by nature and nature's Author—the child's happiness.

B. The Pope's Loose Translation of Pierce

Pius XI seems to have been somewhat aware of the incongruence between Catholic natural-law teaching and the *Pierce* opinion. Notably, his quotation of *Pierce* omitted all the words in the paragraph before "any general power," and thus omitted any mention of (1) the *Meyer* precedent, (2) the American "theory of liberty," or (3) the equal rights of non-natural, legal guardians.⁷¹

Moreover, even the passage Pius XI did quote was loosely translated⁷² into Latin so as to make the language more consistent with Catholic teaching. Justice McReynolds had written that there was no "general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."⁷³ In

71. *Divini* (Latin version), *supra* note 19, at 61.

72. Pius XI spoke English poorly. CHARLES R. GALLAGHER, VATICAN SECRET DIPLOMACY: JOSEPH P. HURLEY AND POPE PIUS XII 86 (2008). Still, given his knowledge of Italian and Latin, his education, and the fact that the key terms in the quotation used Latinized words, such as "parents," "guardians," "creature," etc., it is likely that he could have participated extensively in the English-to-Latin translation, by either supervising it or even completing it himself.

73. *Pierce*, 268 U.S. at 535.

contrast, Pius XI's Latin, closely translated back to English, read as follows:

The Supreme Court of the United States, in resolving a most grave question, decreed that "there is no general power of the State of determining one and the same form, according to which the youth must be educated, and of compelling this [youth] so that it must be instructed by public schools only," because of this reason evidently taken down from the law of nature: "The child is not a mere thing procreated by the State: those who nourish and guide him have the right, conjoined with the noblest duty, of educating him and preparing him for the performance of [his] duties."⁷⁴

Despite the quotation marks, the Latin must be considered a loose paraphrase, because it differs from the original English in at least three important respects.

First, the Pope eliminated any suggestion that a child was, even in the merest sense, a possession or "creature of the state." While McReynolds had spoken of the state's effort to "standardize its children,"⁷⁵ the Pope eliminated the possessive "its" before "the youth" (*iuventus*, which replaced the Court's "children"). More notably, the Pope translated, "[t]he child is not the mere creature of the state," as "the child is not a mere thing procreated by the State."⁷⁶ As Jay Bybee has pointed out, to say that "the child is not the 'mere' creature of the state is not to say that the child is not a

74. The official Latin, which used angle-quotation marks, read as follows: "Summum Foederatarum Americae Civitatum Tribunal, cum gravissimam quaestionem dirimeret, edixit: « nullam generalem potestatem Civitati esse unius eiusdemque formae decernendae, ad quam iuventus educi debeat, huiusque cogendae ut in publicis tantummodo scholis instituatur », ob hanc scilicet rationem ex iure naturae depromptam: « Puer non est mera res a Civitate procreata; qui eum alunt ac dirigunt, ius habent, cum nobilissimo officio coniunctum, ipsius educandi et ad officiorum perfunctionem comparandi »." *Divini* (Latin version), *supra* note 19, at 61.

75. I am indebted to Martha Minow's analysis for noting the significance of the use of the possessive "its": "Not to make too much of a single word, this conception is embodied in the possessive pronoun that the Court attached to children." Martha Minow, *Before and After Pierce, A Colloquium on Parents, Children, Religion and Schools*, 78 U. DET. MERCY L. REV. 407–23, 415 (2001). Elsewhere, she has explained, "the Court's announcement that the state lacks power to standardize 'its' children, who are not 'mere' creatures of the state implied more retention of state interest and control over children than the explicit holding of the Court revealed." Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 950, 965 (1987).

76. *Divini* (Latin version), *supra* note 19, at 61.

creature of the state in some sense.”⁷⁷ By his translation, however, Pius XI avoided any such suggestion. And by juxtaposing “State” and “procreated,” the Pope highlighted, by contrast, the state’s utter incapacity to “procreate,” still less “create,” children. For Pius XI, the state in no sense procreates, still less creates children; only God creates children, and only parents procreate—by that fecundity God confers directly to the family.⁷⁸

Second, Pius XI underscored the biological basis for parental rights. He translated “those who nurture him” as “those who *nourish* him,” using the verb *alere*,⁷⁹ which primarily means, “to nourish,” or even “to breastfeed,” and is the root of the English word “alimentary.”⁸⁰

Third, the Pope stripped the passage of the suggestion that a child’s “destiny” and “obligations” are indeterminate, and to be selected by his or her custodians. He translated “those who....direct his destiny” as simply “those who...direct him.”⁸¹ For Pius XI, the Creator has fixed and ordained each child’s natural (and supernatural) destiny: communion with that same Creator.⁸² To the same effect, while the Court had said that parents have the right and “high duty....to recognize and prepare him for additional

77. Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 912 (1996).

78. *Divini*, *supra* note 13, §§ 6, 30, 32 (teaching that children are “created by God to His image and likeness and destined for Him,” that “God directly communicates to the family, in the natural order, fecundity, which is the principle of life, and hence also the principle of education to life, together with authority, the principle of order,” and that thus the family “holds directly from the Creator the mission and hence the right to educate the offspring, a right inalienable because inseparably joined to the strict obligation, a right anterior to any right whatever of civil society and of the State, and therefore inviolable on the part of any power on earth”). See also, Pius XI, *Casti Conubii* (On Christian Marriage) § 12 (Dec. 31, 1930), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-conubii_en.html (remarking “how great a gift of divine goodness and how remarkable a fruit of marriage are children born by the omnipotent power of God through the cooperation of those bound in wedlock”); *id.* at § 15 (urging parents to “receiv[e] these children with joy and gratitude from the hand of God,” and to “regard them as a talent committed to their charge by God”).

79. *Divini* (Latin version), *supra* note 19, at 61.

80. 1 OXFORD ENGLISH DICTIONARY 318–19 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (explaining that the word “alimentary” is derived ultimately from the Latin verb *alere*).

81. *Divini* (Latin version), *supra* note 19, at 61.

82. *Divini*, *supra* note 13, § 6 (teaching that children are “created by God to His image and likeness and destined for Him”).

obligations,”⁸³ Pius XI wrote that parents have the right, conjoined “with the *nobilissimo* duty, of educating and preparing him for [his own] duties.”⁸⁴ The Pope thus (1) added the verb “educate,” (2) deleted the verb “recognize,” (3) eliminated the indeterminacy suggested by the adjective “additional,” and (4) made the object of the parents’ preparation the *performance* of the child’s pre-established duties, and not the duties themselves.⁸⁵ For Pius XI, nature’s Author already determines the child’s duties, like his corresponding destiny; therefore, the role of parental education is simply to prepare the child to perform these pre-established duties. In the same vein, the Pope used the same word, *officiium*, to translate both the “duty” of parents and the “obligations” of children, probably to emphasize that these moral qualities are of the same genus—having a common source and purpose—nature’s Author.

C. *The Taft Court’s Conscious Abandonment of Natural-Law Reasoning*

Although Pius XI was thus seemingly aware of the incongruity between the *Pierce* opinion and Catholic natural-law reasoning, he was no doubt unaware of the procedural history that indicated that this incongruity was not accidental; instead the *Pierce* Court had tacitly, but consciously, repudiated natural-law theory as a basis for parental rights. But why did the *Pierce* Court do so? An immediate motive, no doubt, was to obtain the concurrence of Justice Oliver Wendell Holmes, who had dissented with Justice George Sutherland in *Meyer*.⁸⁶ Holmes was a prominent and harsh critic of natural-law jurisprudence.⁸⁷ While Sutherland’s conversion in *Pierce* seemingly came easily,⁸⁸ Holmes apparently needed

83. *Pierce*, 268 U.S. at 535.

84. *Divini* (Latin version), *supra* note 19, at 61.

85. Note that the official English translation reflected this latter change: parents “have the right, coupled with the high duty, to educate him and prepare him for the fulfillment of his obligations,” and therefore the English translators of the official Latin rightly omitted the quotation marks around what had become a paraphrase. *Divini*, *supra* note 13, § 37.

86. *Meyer*, 262 U.S. at 403.

87. See generally, Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40–44 (1918).

88. Sutherland wrote in June 1925 that the “decision of our Court [in *Pierce*] was the only possible one. There was never any division of sentiment in the Court from the beginning.” Letter from George Sutherland to William H. Church (June 8, 1925), *quoted in* ABRAMS *supra* note 4, at 200.

some persuading to make the decision unanimous.⁸⁹ Holmes surely would have been reluctant to join an opinion endorsing natural law—what he had publicly called “that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”⁹⁰

Yet a review of contemporaneous Supreme Court decisions indicates that it was not just Holmes who rejected natural-law reasoning. *Pierce*’s omission of any reference to nature represented more than a *pro hac vice* silence, adopted merely to accommodate Holmes’s idiosyncratic distaste. Rather, in the years before and after *Pierce*, the whole Taft Court demonstrated an increasing and conspicuous hostility toward natural-law theory.

The Supreme Court had once embraced natural law. In the three decades before Taft’s appointment as Chief Justice in 1921, natural law had enjoyed something of a revival in the Court’s jurisprudence. While from the 1820s through the 1880s, the Court had entertained natural law reasoning with decreasing frequency,⁹¹ beginning in the 1890s, the Court gave such reasoning an important, even central, role. In particular, the Court expressly invoked natural-law concepts in (1) defining the minimal, fundamental rights that must be extended to inhabitants of the newly-acquired insular territories that were “unincorporated” and whose inhabitants thus did not enjoy full constitutional rights,⁹² (2) de-

89. *Abrams*, *supra* note 4, at 200. A week after the decision, Chief Justice Taft cryptically wrote a friend, “I can tell you sometime how we made the Court unanimous.” Letter from William H. Taft to Charles P. Hillis (June 9, 1925), *quoted in ABRAMS supra* note 4, at 200.

90. Holmes, *supra* note 87, at 41 (1918).

91. See David R. Upham, *Protecting the Privileges of Citizenship: Founding, Civil War, and Reconstruction*, in CHALLENGES TO THE AMERICAN FOUNDING: SLAVERY, HISTORICISM, AND PROGRESSIVISM IN THE NINETEENTH CENTURY 139–160, at 150, 154 (Ronald J. Pestritto & Thomas G. West eds. 2005) (noting that according to the Lawyers’ edition of the Supreme Court reports, the terms “natural law” or “law of nature” or “natural right” (when used in the moral and non-scientific sense), appear forty-one times in five cases during the 1820s, but in only one case of the 1880s. See *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205 (1887), where the reference appeared in the lawyer’s argument, not the justices’ opinions.

92. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 280 (1901) (holding that Congress could acquire territory (e.g., Puerto Rico) without extending the full constitutional privileges of citizenship to the inhabitants thereof, and assuaging the fear that by such a holding, Congress might adopt “unjust and oppressive legislation, in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism,” by claiming that “[t]here are certain principles of natural justice inherent in the Anglo-Saxon character which need no expres-

scribing the minimal procedural rights required by the Due Process Clause,⁹³ (3) extending that Clause to embrace the non-procedural “liberty of contract,”⁹⁴ and (4) construing other non-procedural economic rights.⁹⁵

The salient reliance on natural-law concepts prevailed through the 1910s. For example, in the 1917 case of *New York Central R.R. Co. v. White*,⁹⁶ the Court sustained New York’s workers compensation statute in the face of a challenge that the law violated the natural liberty of contract and thus the Due Process Clause. The appellants argued “both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.”⁹⁷ In a unanimous opinion, the Court rejected this contention, and relied partly on the natural law. The Court explained that the police power encompassed the authority to enforce the natural-law norm prohibiting an individual from alienating, by

sion in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests”); *Rasmussen v. United States*, 197 U.S. 516, 531 (1905) (Brown, J., concurring) (affirming that under *Downes*, the United States must secure to a territory’s inhabitants “the natural rights of their inhabitants to life, liberty and property” but need not grant them full constitutional rights).

93. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) (defining minimal due process as including any guaranty “of such a nature that it must be included in the conception of due process,” that is, whether the guaranty is “a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government”).

94. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897) (quoting with approval Justice Joseph Bradley’s remark in *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884), that “[t]he right to follow any of the common occupations of life is an inalienable right” embraced within the general right to pursue happiness vindicated in the Declaration of Independence); *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding a maximum-hours law for miners, and “[r]ecognizing the difficulty in defining, with exactness, the phrase ‘due process of law,’” but stating that “it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man’s property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defence”).

95. See, e.g., *United States v. Perkins*, 163 U.S. 625, 628 (1896) (stating that “the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents”).

96. 243 U.S. 188 (1917).

97. *Id.* at 196–97.

agreement or otherwise, his or her inalienable rights to bodily integrity and life:

It cannot be doubted that the State may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be ‘natural and inalienable’; and the authority to prohibit contracts made in derogation of a lawfully established policy of the State respecting compensation for accidental death or disabling personal injury is equally clear.⁹⁸

In other words, the very law of nature that established the right to acquire property by labor contract also prohibited an individual from contractually alienating his life or limb. This natural-law prohibition thus set limits to the natural liberty of contract—limits that could, to some extent, be properly enforced by civil authority.

Two years later, a divided court upheld Arizona’s worker’s compensation law, which imposed greater (and thus more controversial) liability on employers. The majority reaffirmed the *White* opinion but acknowledged that some employment regulations might violate the Fourteenth Amendment, which prohibited the states from interfering “arbitrarily and unreasonably, and *in defiance of natural justice*, with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.”⁹⁹ The majority emphasized the absence of punitive damages in Arizona’s law and conceded that to thus punish a faultless employer would indeed have been “contrary to natural justice.”¹⁰⁰ Neither Holmes nor anyone else on the Court expressly dissented from these propositions.¹⁰¹

98. *Id.* at 207.

99. *Arizona Employers’ Liability Cases*, 250 U.S. 400, 421–22 (1919) (emphasis added).

100. *Id.* at 422.

101. One of the dissenting justices, McReynolds wrote, “[i]n the last analysis, it is for us to determine what is arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and in spirit our Constitution.” *Id.* at 450. The only hint of disagreement from the Court’s use of natural law came, not surprisingly, in a separate concurrence filed by Holmes (joined by Brandeis and John Clarke). Holmes mentioned, with apparent disdain, “some argument made for the general proposition that immunity from liability when not in fault is a right inherent in free government” but answered that “if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder [such

So at the close of the 1910s, the justices of the Supreme Court apparently still believed in one or more theories of natural law. But the legal academy did not. For all their disagreements, the various legal theories of the time, whether designated positivism, formalism, law-as-science, pragmatism, realism, or historicism, were united in their rejection of all natural-law theories.¹⁰² The contemporaneous academic literature was replete with the confident denunciation of natural law as invalid and deservedly obsolete. “Natural law is dead...and good riddance!” rang the pronouncement in countless scholarly publications.¹⁰³ Among the

policy].” *Id.* at 431–32. Still, Holmes expressly joined in the majority opinion that mentioned “natural justice.” *Id.* at 434.

102. See, e.g., Albert W. Alschuler, *Historic Proponents and the Critics of Higher Law From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491, 497 (2009) (concluding that “[t]he jurisprudential revolution of the late nineteenth century was not a revolt against formalism, [but] a revolt against natural law,” and noting that “Holmes and his supposed nemesis Christopher Columbus Langdell agreed far more than they differed”).

103. See, e.g., ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 92 (1921) (contrasting the “theory of today” according to which law serves to define and balance competing “interests” with the benighted understanding of the eighteenth century, which “confused the interest, which the law recognizes in whole or in part and seeks to secure, with the right by which the law gives effect to the interest when recognized and to the extent of the recognition,” for “[n]atural rights mean simply interests which we think ought to be secured”); A.G. Keller, *Law in Evolution*, 28 YALE L.J. 769–83, at 769, 771 (1919) (praising Holmes’s repudiation of natural law and asserting “the truth of the matter” viz., “that ‘natural law’ exists about as little as ‘natural rights,’ or any other of those philosophical figments that have not been checked up with realities” and that “law, like all other living things, is evolutionary, persisting only as it secures adjustment to a changing environment” and thus cannot be based on any purported “absolutes, finalities, and universals”); Lindsay Rogers, *The Legal Literature of the War*, 5 VA. L. REV. 92, 108 (1918) (claiming that because “writers on political philosophy [have] substantially agreed that the ‘law of nature’ is a myth and that man has no natural rights, it is hardly a method that will appeal to reason to base [a declaration of the rights of nation-states] upon the outgrown conceptions of the Declaration of Independence”); Edward W. Tuttle, *The Courts and Social Legislation*, 2 SW. L. REV. 81–97, at 86, 89 (1917) (attributing to Blackstone’s enduring and noxious influence “[t]he continued belief of judges and lawyers in natural law and natural rights long after the philosophy of natural law....has been thrown into the scientific discard” and explaining that “[t]he modern philosophic conception of law is that it is a ‘means to an end’ and is not the expression of fixed and immutable principles of natural justice”); Edward W. Tuttle, *The Courts and Social Legislation*, 2 SW. L. REV. 81–97, at 86, 89 (1917) (stating that “[a]lthough it had considerable vogue in the days of Natural Law, few people now believe in this superstition of inherent limitations arising out of our form of government”). Fisher, the author of this letter was a recent Harvard Law graduate who would later argue before the Supreme Court in a major case on the Double Jeopardy Clause, *Bartkus v. Illinois*,

most prominent and acerbic of the critics was William Graham Sumner,¹⁰⁴ Taft's undergraduate teacher at Yale, whom Taft had identified as one of his most important influences.¹⁰⁵

Not surprisingly, Taft and his colleagues would soon follow suit.¹⁰⁶ By 1923, the Taft Court yielded to the apparent *zeitgeist*,¹⁰⁷ submitted to the consensus of the scholars, and began treating "natural rights" as a peculiar, unfamiliar, even strange concept. In that year, in a unanimous opinion authored by Taft, the Court referred to a "so-called natural right"—more specifically, the claim that a patentee's right to use his own invention is a "*so-called nat-*

359 U.S. 121 (1959). Kenan Heise, Obituary, *Walter T. Fisher, 99, Lawyer, Ex-chief Of ICC*, CHICAGO TRIBUNE, Aug. 29, 1991, available at http://articles.chicagotribune.com/1991-08-29/news/9103040565_1_illinois-commerce-commission-illinois-court-mr-fisher. Cf. B. F. Wright, Jr., *American Interpretations of Natural Law*, 20 AM. POL. SC. REV. 524–47, at 545–46 (1926) (pretending, feebly, to defend the "natural law" by arguing that "the important thing about [natural law is] the fact that it is nothing more nor less than man's way of expressing his desire to find a solution for the insoluble, a formula to stand for the great political unknown, or, to put it differently, the attempt to find some higher source for the principles of justice than the will of the individuals who, for the moment, determine the positive law of the state" and placing in scare quotes the word "truth" with reference to the natural law). *But see*, Clyde Eagleton, *The Current Status of International Law*, 69 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY, 203–215, at 204 (1930) (reporting that "natural law is dead" but wondering "[w]hat phoenix is rising from these sad ashes").

104. William Graham Sumner, *Rights*, in *EARTH-HUNGER AND OTHER ESSAYS* 79–83, at 81 (1913) (arguing that "rights" are merely "philosophical propositions implicit in the *taboos*, and to the modern way of thinking, they seem to be assumed in them; but they were never formulated or thought by anybody before the taboo was started" and adding that, in the same way, "modern philosophers invented the notion of 'natural' rights to bring in the jural notions in advance of the law") (emphasis added).

105. DAVID HENRY BURTON, *TAFT, HOLMES, AND THE 1920S COURT: AN APPRAISAL* 26 (1998) (reporting Taft's recollection that Sumner had, more than any other professor, "stimulated my mental activities").

106. *See* Tuttle, *supra* note 103, at 86–89 (explaining the discrepancy between the courts and the academy by the dominant place that legal education had recently accorded to Blackstone, and thus suggesting that this discrepancy would prove to be temporary); cf. Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C.L. REV. 1, 5 n.9 (1991) (identifying the years between 1920 and 1937 as the "late phase of the *Lochner* era, when it lost its jurisprudential moorings").

107. In a 1913 essay, Felix Frankfurter urged precisely such an accession to "*zeitgeist*" and a rejection of "[s]o-called immutable principles" such as the "liberty of contract." Frankfurter, *The Zeitgeist and the Judiciary*, in *FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION*, 1–7, at 3–4 (Philip B. Kurland ed. 1970) [hereinafter *FRANKFURTER ESSAYS*].

ural right, not dependent on statute, but [which arises] under the common law, and has no peculiar federal source or protection other than any other right of liberty or property.”¹⁰⁸ The Taft Court acted *sua sponte* in thus disowning the concept of natural rights. The lower courts and counsel had all used the term “natural right” without the qualifier “so-called,” and without any scare quotes, irony, or apparent controversy.¹⁰⁹ Indeed, just a decade earlier, Chief Justice Edward White, Taft’s immediate predecessor, whom Taft himself had appointed as Chief, had likewise declared that “[t]he natural right of any one to make, vend and use his invention which but for the patent law might be invaded by others, is by that law made exclusive, and hence the power is conferred to exclude others from making, using or vending the patented invention.”¹¹⁰

Beginning in that same year (1923), the Court almost never invoked natural law or natural rights. One of the few exceptions was *Meyer*, decided a few months later. *Meyer* proved to be the last case of the Taft era where *any* justice (even in dissent) expressly affirmed, in his or her own words, the existence of any *natural* “right,” “duty,” or “law.” Advocates continued to use these terms for a time,¹¹¹ but the justices did not.

Furthermore, since Taft’s departure from the Court in 1930, one finds only two instances (both before 1950) where any Supreme Court justice has authored a formal opinion where he identified, in his own words, a natural right, duty, or law; both times

108. *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 34 (1923) (emphasis added).

109. *Id.* (setting forth argument of counsel sharply distinguishing the patentee’s “natural right to make, use and vend” from “the right to exclude”); *Nye Tool & Mach. Works v. Crown Die & Tool Co.*, 276 F. 376, 377 (7th Cir. 1921) (affirming that an inventor has a “natural or common-law right” to use his own invention); *Nye Tool & Machine Works v. Crown Die & Tool Co.*, 270 F. 587, 588 (D. Ill. 1921) (declaring that “inasmuch as the patentee has the natural right to make, use, and sell everything which he makes, the only thing he receives by virtue of his patent is the right to exclude others from exercising his natural rights”).

110. *Henry v. A.B. Dick Co.*, 224 U.S. 1, 52 (1912) (White, C.J., dissenting).

111. Besides the arguments set forth in *Pierce*, see *supra* text accompanying notes 49-53; see, e.g., *Stebbins v. Riley*, 268 U.S. 137, 140 (1925) (noting that “it was argued by the appellant, on the one hand, that there was a natural right to inheritance entitled to the protection of the due process clause of the Fourteenth Amendment, and by the appellee, on the other, that the legislative authority could deny wholly the privilege of inheritance and consequently could place unlimited burdens upon it” but concluding that “we do not find it necessary to discuss the issue thus raised”).

the purported natural right was the freedom of speech.¹¹² As a general rule, since 1923, justices have mentioned natural law or natural rights only to identify an obsolete and discredited jurisprudence¹¹³ or to make (or deny) accusations of reliance on the same.¹¹⁴

112. *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936) (Court opinion of Sutherland, J.) (affirming that the freedom of the press involves “the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests”); *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 242 (1949) (Reed, J., dissenting) (referring to “the natural right of free expression or of assembly, guaranteed by our Constitution”). Hadley Arkes has argued that the Taft Court, and Justice Sutherland in particular, was devoted to natural law reasoning. Yet despite the title of his work, “The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights,” Arkes does not cite any case where Justice Sutherland expressly invoked *nature* as a source of rights or law. ARKES, *supra* note 39. My own research has identified no case other than *Grosjean*, just cited. Sutherland and his conservative colleagues did, however, later invoke an anti-historical approach to “liberty” in their losing battle for economic rights in the 1930s—an approach at variance with their triumphal quasi-progressive approach to economic liberty in the 1920s. Yet this anti-historical approach did not involve an invocation of *nature*. Compare, e.g., *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398, 449 (1934) (Sutherland, J., dissenting) (declaring that a constitutional provision “does not mean one thing at one time and an entirely different thing at another time”), with *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 553 (1923) (majority opinion of Sutherland, J.) (affirming that while the Court had once endorsed minimum-wage laws that discriminated on the basis of sex, “[i]n view of the great — not to say revolutionary — changes which have taken place.... we [can no longer] accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances” for to “do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine”).

113. *Coolidge v. Long*, 282 U.S. 582, 609 (1931) (Roberts, J., dissenting) (contending that “no one has the natural right either to own property or to transfer it to others at his death, but derives the power so to do solely from the State”); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 580 (1937) (asserting that “natural rights, *so called*, are as much subject to taxation as rights of less importance”) (emphasis added); *Hague v. C.I.O.*, 307 U.S. 496, 511 (Opinion of Roberts, J.) (writing that “[a]t one time it was thought that [the Privileges and Immunities Clause] recognized a group of rights which, according to the jurisprudence of the day, were classed as ‘natural rights’; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State”); *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (affirming that the immunity provided by a statute of limitations “is not what now is called a ‘fundamental’ right or what used to be called a ‘natural’ right of the individual”); *Watson v. Emp’rs Liab. Assurance Corp.*, 348 U.S. 66, 79 n.2 (1954) (Frankfurter, J., concurring)

(stating that in the 1850s, “[p]hrases like ‘natural justice’ or ‘natural reason’ or ‘the principles of the social compact’ were in fashion at that time for stating intrinsic limitations on the exercise of all political power” but that “[m]ore recently, the power of this Court to strike down legislation has been more acutely analyzed and less loosely expressed”).

114. Justice Black frequently accused Justice Frankfurter and other colleagues of continued reliance on the natural law. *See, e.g.*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324–26 (1945) (Black, J., dissenting) (claiming that the majority was “[s]uperimposing the natural justice concept on the Constitution’s specific prohibitions” by interpreting the Due Process Clause to require a state’s exercise of jurisdiction over a defendant to comport with “fair play” and “substantial justice”); *Adamson v. California*, 332 U.S. 46, 69 (1947) (Black, J., dissenting) (objecting that the selective incorporation theory gave the Court “boundless power under ‘natural law’ periodically to expand and contract constitutional standards to conform to the Court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental liberty and justice’”); *Griswold v. Connecticut*, 381 U.S. 479, 511–12 (1965) (Black, J., dissenting) (attributing to some of his colleagues the notion that the Court may “invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court’s belief that a particular state law under scrutiny has no ‘rational or justifying’ purpose, or is offensive to a ‘sense of fairness and justice,’” and stating that if “these formulas based on ‘natural justice,’ or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary”) (notes omitted); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 675 (1966) (Black, J., dissenting) (disagreeing with the Court’s invalidation of a state poll tax, in part because the Court “seems to be using the old ‘natural-law-due-process formula’ to justify striking down state laws as violations of the Equal Protection Clause”). Justice Frankfurter often sparred with him but consistently disavowed natural-law theories. *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 169–71 (1952) (Frankfurter, J.) (holding that “due process” protects rights so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty” and insisting that “[d]ue process of law thus conceived is not to be derided as resort to a revival of ‘natural law’”) (citations and quotations omitted); *see also* Frankfurter, *The Zeitgeist and the Judiciary*, in FRANKFURTER ESSAYS, *supra* note 107, at 4, 7 (contending, in a 1913 essay, that “what are now deemed immutable principles once, themselves, grew out of living conditions,” and that the law must disregard any such “shibboleths” because “legislation is essentially empirical, experimental”); Frankfurter, *John Marshall and the Judicial Function*, in FRANKFURTER ESSAYS, *supra* note 107, at 533–57, at 542 (praising Marshall for using terms like “natural law” merely as “literary garniture,” and not as “a guiding means for adjudication”). For more recent cases, *see* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 168 (1996) (Souter, J., dissenting) (arguing that the Court’s construction of the Eleventh Amendment reflected the discredited “idea that ‘first principles’ or concepts of ‘natural justice’ might take precedence over the Constitution or other positive law”); *Alden v. Maine*, 527 U.S. 706, 763–67 (1999) (Souter, J., dissenting) (making a similar, more elaborate argument); *id.* at 734 (majority opinion) (upholding state sovereign immunity and contending that “[w]hether the dissent’s attribution of our reasoning and conclusions to natural law results from analytical confusion or rhetorical device, it is

D. Buck v. Bell and the Court's Definitive Rejection Of Natural Law

Any doubt that the Taft Court had decisively lost interest in natural-law jurisprudence, whether Catholic or otherwise, was resolved by the Court's rejection of the appeal of Carrie Buck in *Buck v. Bell*,¹¹⁵ decided in May 1927, just two years after *Pierce*.¹¹⁶ Buck was a resident at the Virginia State Colony for Epileptics and Feeble Minded. By an administrative order, she was to be subject to forced salpingectomy (cutting and removal of the fallopian tubes), following an administrative process, without a jury trial, and without any finding of criminal liability.¹¹⁷ She appealed to the courts of law. After the Virginia Supreme Court upheld the order,¹¹⁸ she appealed to the Supreme Court.

Before the Supreme Court, her attorney, Irving Whitehead, argued prominently that the ordered salpingectomy would violate "the inherent right to go through life with full bodily integrity, possessed of all those powers and faculties with which God has endowed [her]. The right to bodily integrity existed before either State or Federal Constitution was adopted and is as old as Anglo-Saxon civilization."¹¹⁹ Whitehead insisted that the Fourteenth Amendment merely recognized and secured this "inherent right of mankind to go through life without mutilation of organs of generation"—a right that "needs no constitutional declaration."¹²⁰ Whitehead expressly disavowed any claim of a right to procreate,

simply inaccurate"); *id.* at 758 (objecting that "[i]n an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law").

115. 274 U.S. 200 (1927).

116. In his book praising Justice Sutherland and devoted to a restoration of Sutherland's "Jurisprudence of Natural Rights," Arkes makes no mention whatsoever of *Buck*, nor of Justice Sutherland's silent concurrence with Justice Holmes's opinion in that case. *See generally*, ARKES, *supra* note 39.

117. *See* *Buck v. Bell*, 130 S.E. 516, 516 (Va. 1925) (quoting and describing the law).

118. *Id.* at 520.

119. Brief of Appellant at 6-7, *Buck v. Bell*, 274 U.S. 200 (1927), available at http://digitalarchive.gsu.edu/cgi/viewcontent.cgi?article=1095&context=col_facpub.

120. *Id.* at 9-10. This argument was a virtual quotation, without citation, of an assertion made by a dissenting judge in a Michigan case involving a similar statute. *Smith v. Command*, 204 N.W. 140, 149 (Mich. 1925) (Weist, J., dissenting).

still less a right to sexual autonomy¹²¹—a fact that seems to have escaped the notice of many modern commentators.¹²² If anything, it was the *proponents* of compulsory sterilization who championed the practice as a way of facilitating the sexual autonomy of the mentally retarded—such measures freed the individuals and society of the dangers of “undesirable” human beings that might result from such intercourse.¹²³

Although not citing *Meyer*, Whitehead effectively said that bodily integrity was a natural right “long recognized at common law.” Indeed, at the close of his brief, he adopted Guthrie’s successful tactic in *Meyer* in invoking the awful specter of Platonic utopia, which not only abolished parental custodial rights, but also prescribed eugenic homicide.¹²⁴ “A reign of doctors will be inaugurated....and the worst forms of tyranny practiced. In the place of the

121. Brief of Appellant, *supra* note 119, at 13 (disavowing any claim “that this plaintiff is contending for the right to procreate” and “conced[ing] that the State has the power to segregate and thereby deprive them of the ‘power to procreate’”).

122. This misunderstanding is virtually ubiquitous. See, e.g., John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 414 n.22 (1983) (identifying *Buck* as a case “dealing directly with a right to procreate”); Andrew B. Coan, *Reproductive Rights, Human Rights, and the Human Right to Health: Article: Assisted Reproductive Equality: An Institutional Analysis*, 60 CASE W. RES. 1143, 1146 (2010) (asserting that the Court has “squarely addressed the due process right to procreate” only in *Buck*); Joe Zumpano-Canto, *Nonconsensual Sterilization of the Mentally Retarded in North Carolina: An Ethics Critique of the Statutory Standard and its Judicial Interpretation*, 13 J. CONTEMP. HEALTH L. & POL’Y 79–111, 82 n.10 (1996) (citing *Buck* for the proposition that the “eugenics approach to sterilization of the mentally disabled....subordinate[d] sexual autonomy for the sake of preventing genetic transmission of mental deficiencies”).

123. See, e.g., *Bell*, 130 S.E. at 517–18 (noting the factual finding that sterilization does not “interfere with [Buck’s] sexual desires or enjoyment” and modestly noting that without sterilization, “she must be kept in the custodial care.... for thirty years, until she is sterilized by nature, during which time she will be a charge upon the State,” but that if “sterilized under the law, she could be given her liberty”). Justice Holmes’s famous correspondent, Harold Laski, ridiculed opponents as fretting about Buck’s chastity. Letter from Harold Laski to Oliver Wendall Holmes (May 7, 1927), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 939 (Mark DeWolfe Howe, ed. 1953) [hereinafter HOLMES-LASKI LETTERS] (noting, with reference to Holmes’s opinion in *Buck*, that Laski’s problems “are less interesting than settling whether a feeble-minded Virginian is to remain virgin, but, as Carlyle said, they make ‘bonny fetchin’”).

124. PLATO, THE REPUBLIC 136–41 (Greek §§ 457d–464b) (Alan Bloom trans. 1968).

constitutional government of the fathers we will have set up Plato's Republic."¹²⁵

The Taft Court's response to this natural-rights claim was sheer disdain. Taft assigned the writing of the opinion to the justice that was famously contemptuous of all natural-law jurisprudence: Justice Holmes.¹²⁶ All but one justice joined Holmes's opinion.¹²⁷ And consistent with his well-known disdain, Holmes did not bother to even mention Buck's natural-rights argument.¹²⁸ Rather, Holmes contented himself with highlighting certain procedural safeguards and relying on precedent. He affirmed that compulsory sterilization was as lawful as two other, well-established practices—the military draft and compulsory vaccination¹²⁹—both of which practices had been endorsed in *Jacobson v. Massachusetts*.¹³⁰

Not only Holmes's deafening silence, but also his analogies to vaccination and the military draft, clearly signaled the Court's rejection of traditional natural-law jurisprudence. In making the analogy to vaccination, Holmes obfuscated an important distinction of natural-law reasoning: the distinction between the strengthening, on the one hand, and the impairing, on the other, of the body's natural functions (here, the body's natural immunity and natural fertility respectively). Here the Court in *Jacobson* had been attentive to this difference. Although approving the general application of compulsory vaccination, the Court added that the judiciary might "interfere and protect the health and life [of a particular individual] if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination

125. Brief for Plaintiff in Error at 18, *Buck*, 274 U.S. 200.

126. Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in Buck v. Bell*, 43 CATHOLIC LAW. 125, 126 (2004).

127. *Buck*, 274 U.S. at 208 (noting Butler's dissent without opinion).

128. One contemporary Catholic critic of the Virginia statute, but reluctant supporter of the Court's decision, noted this strange silence: "In its decision, the Court does not even refer to the claim that the right to life....includes the right to 'bodily integrity,' nor to the claim that the latter right, existing anterior to the Constitution, is beyond the reach of the state's police power. Apparently there is no constitutional ground upon which either of these claims could be plausibly upheld." John A. Ryan, *Unenumerated Natural Rights*, 5 COMMONWEAL 151–52, at 151 (June 15, 1927). The author, however, conceded that if previous judicial decisions had established that the right of "bodily integrity" was part of the right to life or liberty, then "the present case must have been decided differently." *Id.* at 152.

129. *Buck*, 274 U.S. at 207.

130. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death.”¹³¹ In other words, compulsory vaccination was lawful only for the average person whose bodily health would be enhanced, or at *least* not impaired, as a result. But universal compulsory vaccination was problematic (if not unconstitutional) if it seriously harmed the health of a particular individual.¹³² In sum, *Jacobson* did not endorse the principle that the government could intentionally sacrifice the bodies of the innocent for the needs of society. It was not until the 1920s when American scientists and jurists would successfully advance such a notion.

More seriously, in making the analogy to military conscription, Holmes obfuscated the distinction between the *risking* and *taking* of innocent human life and limb. According to Holmes, “the public welfare may call upon the best citizens for their lives. It would be strange if it could not *call upon* those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.”¹³³ In comparison, Holmes noted, the compulsory taking (or cutting) of the fallopian tubes seemed a small “sacrifice.” Holmes’s verbal phrase “call upon....for their lives” blurred the

131. *Jacobson*, 197 U.S. at 39.

132. Indeed, to some extent, as applied to the average person, the vaccination law in *Jacobson* arguably represented a declaration and enforcement of the individual’s natural duty to preserve himself and others (if consistent with his own preservation), as endorsed by such theorists as Locke by “Reason,” which is the “Law of Nature,” each person is “*bound to preserve himself*,” and not to quit his station willfully; so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, *to preserve the rest of mankind.*” John Locke, *An Essay Concerning the Original, Extent, and End of Civil Government*, in JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271, § 6 (Peter Laslett ed. 1960) (emphasis added). Similarly, compulsory education laws had been justified as the government’s simply obliging recalcitrant parents to fulfill their natural duty to educate. See, e.g., *Meyer*, 262 U.S. at 400 (affirming that “it is the natural duty of the parent to give his children education suitable to their station in life” and noting that “nearly all the States, including Nebraska, enforce this obligation by compulsory laws”); *In re Sharp*, 96 P. 563, 566 (Idaho 1908) (denying that compulsory education laws violate any right of the child or parent, for by such laws “the state is only demanding and enforcing obedience to both the natural duties and obligations of the parent or guardian as well as the legal duties and obligations demanded by society and the public welfare”); *State v. Bailey*, 157 Ind. 324, 329 (1901) (affirming that “[o]ne of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth, [so if] he neglects to perform it, or willfully refuses to do so, he may be coerced by law to execute such civil obligation”).

133. *Buck*, 274 U.S. at 207 (emphasis added).

difference between coercive risking, via the draft, and coercive taking, by human sacrifice.

Yet here again, the Court in *Jacobson* had seemed aware of this distinction. The Court indicated that by conscription the government *takes* (for a time) an individual's liberty, but only *risks* his life and limb: "he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and *risk the chance* of being shot down in its defense."¹³⁴

Indeed, consistent with his conflation of taking and risking human life, Holmes indicated (without expressly stating) that the state could, if necessary to the public interest, even *take* the lives, as well as the reproductive organs, of innocent defective persons. The taking he endorsed was either by action (albeit as punishment for crime), or by omission, even without any criminal liability: "It is better for all the world, if instead of waiting to *execute* degenerate offspring for crime, or to *let them starve* for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."¹³⁵

Holmes here veiled the radical nature of his views by carefully avoiding the precise word "take" in connection with human life. Yet, in making this argument, Holmes apparently relied on one or more scientific and legal scholars that had been more candid. In 1922, Dr. Harry Hamilton Laughlin, a leading eugenicist, defended his proposed sterilization law with reference to the alleged power of the state to kill persons, even persons innocent of a crime, if the public interest should so require:

A state does not hesitate in the interests of organized society to take the life of an individual. This in modern practice is always in punishment for crime, but crime is not the only type of anti-social or of socially ineffective conduct. Crime is, it is true, the only type of such behavior which carries blame with it. But the other types of social inadequacy equally destructive to the security and vigor of the nation, while not carrying blame, carry pity, shame, chagrin, ineffectiveness, and degeneracy.¹³⁶

Dr. Laughlin noted, with qualified approval, that euthanasia, or "non-punitive death," was a common method "in some of the less

134. *Jacobson*, 197 U.S. at 29 (emphasis added).

135. *Buck*, 274 U.S. at 207 (emphasis added).

136. HARRY HAMILTON LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 338 (1922).

advanced communities” to serve the needs of society by removing the “members least necessary to the life of the tribe.” Still, he preferred a “more enlightened and humane” method that would make such killing unnecessary—to limit the “reproduction of degenerates by eugenical sterilization.”¹³⁷

In preferring non-punitive maiming to non-punitive homicide, Laughlin did not identify any natural right to life. The only natural right, if any, belonged to the race. He argued that “a democracy, in order to live, must be willing to investigate new social remedies, to try them out and to accept those which prove adequate to promoting national effectiveness and racial vigor—the general welfare, it is called in law.” Such “novel social legislation” is necessary, for

[w]ith all species, including man, the life and well-being of the race or nation, as a whole, are vastly more important than the unrestricted and unsocial conduct of the individuals who compose the race, because experience has proven that in the long run individual effectiveness and happiness is assured and promoted only by individual subordination and occasional personal sacrifice.¹³⁸

By this argument, and by his use of scare quotes, Laughlin tacitly but firmly rejected traditional natural-law reasoning, whether Catholic, Lochean, or otherwise.¹³⁹

Besides Laughlin, another of Holmes’s forerunners was Michigan Law Professor Burke Shartel, the architect of Michigan’s 1923 sterilization law.¹⁴⁰ In 1926, Professor Shartel published a widely circulated article in defense of the statute.¹⁴¹ Shartel was probably

137. *Id.* at 338–39.

138. *Id.* at 339.

139. Human nature, for Laughlin, was an adversary to be overcome, not an authority to be obeyed. For instance, he quoted with approval the remark of California’s attorney general that the beneficial institution of marriage required a fierce “battle with natural law and animal impulse.” *Id.* at 326. The only authoritative law of nature he recognized was the law of national self-preservation: “Self-preservation is the first law of nature with organized society as well as with individuals. If our society is to persist, it must purge itself of socially inadequate individuals—those who do not contribute to the welfare of the social organization.” *Id.* at 438. Accordingly, he placed in scare quotes the term “natural right”: “[E]ugenical sterilization takes away from the individual the natural ability, and by some held ‘the natural right’ to reproduce.” *Id.* at 454.

140. Burke Shartel, *Sterilization of Mental Defectives*, 34 MICH. L. REV. 1-21, n.4 (1925) (disclosing that “[t]he writer drew the Michigan Act”).

141. At his death, his colleagues at the University of Michigan celebrated his “pioneer treatment” of involuntary sterilization and noted that the article “re-

Holmes's more likely source; like Holmes, Shartel had justified civil sterilization by specific analogy to the state's killing of the mentally handicapped, either by capital punishment or by permitting them to die.¹⁴² Unlike Holmes, Shartel was more explicit in asserting that modern jurisprudence had redefined the police power to allow the *taking* of human life, even innocent human life, as "social need" might dictate. Shartel insisted that any claim of "inviolable" natural rights was inconsistent with "any *modern* theory of rights or constitutional limitations," for according to all such theories, "[i]f the social need be great enough, the state can deprive of liberty....or it may *take life* (as it does as a penalty for a crime or by drafting into the military service and exposing to death, etc.)."¹⁴³

In a similar vein, Bell's Supreme Court brief had openly invoked, with qualified approval, the ancient practice of eugenic homicide, and more specifically, "expos[ing] to the elements the more puny infants that they might not grow up to lives of suffering and to burden the State."¹⁴⁴ The indication here, as with Laughlin and Shartel, was that the state could justly kill innocent individuals, whether infants or adults, if necessary to the state interest; yet modern sterilization was preferable, not because such non-punitive homicide was *unjust* or *unconstitutional*, but because surgical sterilization was more *humane*.¹⁴⁵

Of course, sterilization, and especially compulsory sterilization, was inconsistent with Catholic natural-law teaching. After the decision, the National Council of Catholic Men prepared, for

ceived wide attention and was republished in three other journals." *Memorial Resolution by Law School Faculty Concerning Burke Shartel*, 66 MICH. L. REV. 1089-94 (1968), available at http://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Documents/Burke_Shartel/burke_shartel_by_memorial_resolution_by_law_school_faculty.pdf.

142. Shartel, *supra* note 140, at 551.

143. *Id.* at 551-52 (emphasis added). One is left to wonder what other forms of homicide might be encompassed by that final "et cetera."

144. Brief of Appellee at 18, *Buck*, 274 U.S. 200, available at http://digitalarchive.gsu.edu/cgi/viewcontent.cgi?article=1035&context=col_facpub.

145. Bell's attorney argued as follows: "If as tradition tells us some of the ancients exposed to the elements the more puny infants that they might not grow up to lives of suffering and to burden the State, the idea of limiting in some way the propagation of the unfit is not altogether new. Has human progress in the development of surgery and of the science of heredity and eugenics brought it to pass that a like end may be accomplished more humanely and even with benefit to the already afflicted individual?" *Id.*

Whitehead's use, a motion for rehearing, which was summarily denied.¹⁴⁶ Three years after *Buck*, Pius XI himself condemned any eugenics policy that deprived human persons of a "natural faculty by medical action despite their unwillingness," for by such a policy, the state acts "against every right and good [by] arrogat[ing] to itself a power over a faculty which it never had and can never legitimately possess."¹⁴⁷

Not surprisingly, the sole Roman Catholic on the Court, Pierce Butler, provided the only dissent in *Buck*.¹⁴⁸ Butler did not write an opinion,¹⁴⁹ and his motives remain unclear.¹⁵⁰ Holmes speculated that Butler's religious scruples had crippled his legal judgment: "I bet you Butler is struggling with his conscience as a lawyer on this decision....He knows the law is the way I have written it. But he is afraid of the Church. I'll lay you a bet that the Church beats the law."¹⁵¹ There is, however, significant reason to dispute this account of Butler's motives.¹⁵²

146. PAUL LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL*, 179–81 (2010). Lombardo cites the petition as "the finest effort in Carrie Buck's defense." *Id.* at 181.

147. Pius XI, *Casti Conubii* (On Christian Marriage), Dec. 31, 1930, § 68, *available at* http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html. In the subsequent paragraphs of this encyclical, Pius XI elaborated this position: "Public magistrates have no direct power over the bodies of their subjects; therefore, where no crime has taken place and there is no cause present for grave punishment, they can never directly harm, or tamper with the integrity of the body, either for the reasons of eugenics or for any other reason.... Furthermore, Christian doctrine establishes, and the light of human reason makes it most clear, that private individuals have no other power over the members of their bodies than that which pertains to their natural ends; and they are not free to destroy or mutilate their members, or in any other way render themselves unfit for their natural functions, except when no other provision can be made for the good of the whole body. *Id.* §§ 70–71; *accord* Thomas Aquinas, *SUMMA THEOLOGIAE*, pt. II-II, q. 65, art. 1 (n.d.) (arguing that maiming is lawful in only two instances—(1) by order of civil authority, but only as punishment for crime, or (2) by the individual's consent, but only if the limb is diseased and its removal is necessary to preserve the rest of his body).

148. *Buck*, 274 U.S. at 208.

149. *Id.*

150. Thompson, *supra* note 126, at 135–43.

151. David J. Danelski, *Pierce Butler*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 81–85, at 83 (Melvin I. Urofsky ed. 1994) (including this quotation).

152. Butler's singular and taciturn approach to due process was further evidenced in *Palko v. Connecticut*, 302 U.S. 319 (1937), where he provided a silent and sole dissent to the Court's holding that constitutional due process does not prohibit a state from executing a person pursuant to a second trial for the same

In *Buck*, the Court rejected not only Catholic natural-law teaching, but also its own natural-law teaching. Just ten years before *Buck*, a unanimous Supreme Court had explained that “[o]f course, we cannot ignore the question whether [a challenged law] is arbitrary and unreasonable, from the standpoint of natural justice.”¹⁵³ Yet in *Buck*, the Court simply ignored Buck’s appeal to natural justice. And just four years before *Buck*, the Court in *Meyer* had embraced William Guthrie’s call to repudiate Platonic education.¹⁵⁴ Yet in *Buck*, the Court ignored Irving Whitehead’s call to reject Platonic eugenics.

Furthermore, a decade earlier, the Court had affirmed the “natural and inalienable” character of personal bodily integrity, and the state’s corresponding authority to “prohibit and punish self-maiming and attempts at suicide [and] prohibit a man from bartering away his life or his personal security.”¹⁵⁵ This understanding had been reflected in the common-law crime of self-maiming (often treated as a species of mayhem).¹⁵⁶ This special

offense. *Id.* at 328-29. His aversion to such legal process did not seem peculiarly Catholic, nor peculiarly fearful. In any case, many opponents of coercive sterilization were non-Catholics. Indeed, Holmes and other eugenicists blamed opposition to their progressive proposals not just on the Catholic Church, but also on the general “conservatism of American public opinion,” which was reflected in the initial, adverse reaction by the courts and public opinion. Frances Oswald, *Eugenical Sterilization in the United States*, 36 AM. J. SOCIOLOGY, 65-73, at 68-69 (1930). Interestingly enough, a decade before passing the anti-Catholic compulsory public schooling law at issue in *Pierce*, the largely non-Catholic voters of Oregon repealed by referendum the legislature’s compulsory sterilization statute. *Id.* at 69. Holmes himself elsewhere noted the strongest opposition was among “the religious” in general, and not merely Catholics. See Letter from Oliver Wendall Holmes to Harold Laski (Apr. 25, 1927), in HOLMES-LASKI LETTERS, *supra* note 123, at 937-38 (stating that “the religious are astir” over the Virginia sterilization statute); Letter from Oliver Wendall Holmes to Harold Laski (July 23, 1927), in HOLMES-LASKI LETTERS, *supra* note 123, at 964 (announcing “[c]ranks as usual do not fail” and reporting that one such crank had “told me I was a monster and might expect the judgment of an outraged God for [the *Buck* decision]”). Laski, for his part, indicated that religious fundamentalism, and a religious belief in chastity, had motivated opponents. Letter from Harold Laski to Oliver Wendall Holmes (May 7, 1927), in HOLMES-LASKI LETTERS, *supra* note 123, at 939-41 (replying that Laski’s problems “are less interesting than settling whether a feeble-minded Virginian is to remain virgin, but, as Carlyle said, they make ‘bonny fetchin’” and closing his letter with the following sentence: “Sterilize *all* the unfit, among whom I include *all* fundamentalists”) (emphasis in original).

153. *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 202 (1917).

154. See *supra* text accompanying notes 67-70.

155. *New York Cent. R.R.*, 243 U.S. at 207.

156. According to Coke, the “the life and members of every subject are under the safe guard and protection of the King,” such that, where, for instance, “a

character of life and limb was suggested in the Court's seminal liberty-of-contract decision in *Allgeyer v. Louisiana*.¹⁵⁷ In that case, the Court's expansive definition of "liberty" had qualified the right "to use" one's faculties by the phrase "in all lawful ways," but left unqualified the "right of the citizen to be free in the enjoyment of all his faculties."¹⁵⁸ The qualified right to *use* one's bodily faculties was thus distinguished from the more absolute right to retain (or "enjoy") these faculties.

The suggestion in the pre-1920 cases was that Carrie Buck, like every human being, owned her life and body as owner-trustee of an inalienable and indefeasible trust granted by nature's Author. In contrast, she could own mere property in fee simple, and therefore, such property could be alienated or even destroyed by mere human authority, whether by the individual in exercising

young, strong and lusty rogue, to make himself impotent, thereby to have the more color to begge, or to be relieved, without putting himself to any labour, caused his companion to strike off his left hand,...both of them were indicted, fined and ransomed therefore." *People v. Clough*, 17 Wend. 351-52 (N.Y. Sup. Ct. 1837) (quoting Coke and discussing this case with reference to the crime of mayhem). *Cf. People v. Butler*, 8 Cal. 435, 449 (1857) (defining the crime of self-mutilation as an abdication of duty to the state, for "[a]s the State has an interest in every one, and every one owes a duty to the State, no man has the right to destroy himself, or to render himself incapable of performing his duty to his country"); *Ah Lim v. Territory of Washington*, 24 P. 588, 590 (Wash. 1890) (stating that "[i]f a man willfully cuts off his hand or maims himself in such a way that he is liable to become a public charge, no one will doubt the right of the state to punish him; and if he smokes opium, thereby destroying his intellect and shattering his nerves, it is difficult to see why a limitation of power should be imposed upon the state in such a case"). But as early as 1935, courts were declaring, for instance, that neither suicide nor self-mutilation was against "public policy" so as to incorporate into any insurance policy the implied provision invalidating any claim arising from such self-destruction. *Aetna Life Ins. Co. v. DuBarry*, 12 F. Supp. 664, 666 (D. Ore. 1935).

157. 165 U.S. 578 (1897).

158. *Id.* at 589. As Buck's attorneys pointed out in her petition for rehearing, this definition of "liberty" "would seem completely to comprehend the earlier definition of life given by Mr. Justice Field in the dissenting opinion in *Munn v. Illinois*, 94 U.S. 113." Petition for Rehearing, *Buck*, 274 U.S. 200 (No. 6). In *Munn*, Field had defined "the term 'life' [as] something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision." *Munn*. 94 U.S. at 142.

her own free discretion, or by the state, in exercising its limited regulatory and taking authority. Yet in *Buck*, the Court brushed aside the appellant's invocation of such inalienable bodily rights and showed no interest in distinguishing either (1) the individual's rights to life and limb from her rights to liberty or property, or (2) the state's power to enforce the duty to preserve one's body from the state's power to destroy part (or even all) of the body. In a nutshell, with *Buck*, what had once been a crime at natural (and common) law could now be compelled by force of a constitutional and otherwise valid statutory law.¹⁵⁹

The Taft Court's decision in *Buck*, therefore, was consistent with what was implied in *Pierce*: natural-law concepts no longer played any major part in the Court's jurisprudence. For this reason, Holmes celebrated his *Buck* opinion as "getting near the first principle of real reform."¹⁶⁰ Some of his contemporaries likewise recognized that the case illustrated the "complete revolutionizing of the conception of 'due process of law,'" by rejecting "natural rights" in favor of "pragmatist thinking."¹⁶¹ Or as Thomas Neumayr has more recently concluded, *Buck v. Bell* reflected not conservative "judicial restraint," but the rejection of natural law in favor of "faith in progress."¹⁶²

III. THE LEGACY OF *PIERCE*

Pierce not only exemplified this new jurisprudence, but also fostered it. In this way, *Pierce* arguably influenced, to some extent, much of the Supreme Court's subsequent due-process jurisprudence. First, *Pierce* played a significant, but covert role in

159. Some commentators have ascribed a "liberty to procreate" argument to Buck's counsel. See sources cited *supra* note 122. Justice Blackmun suggested the same in his approbatory citation to *Buck* in *Roe v. Wade*, 410 U.S. 113, 154 (1973) (citing *Buck* as rejecting the claim that "one has an unlimited right to do with one's body as one pleases"). Yet Buck's counsel expressly disavowed any such argument and "concede[d] that the State has the right to segregate the feeble-minded and thereby deprive them of the 'power to procreate.'" Brief of Appellant, *supra* note 119, at 13.

160. Letter from Oliver Wendall Holmes to Harold Laski (May 12, 1927), in HOLMES-LASKI LETTERS, *supra* note 123, at 941-42.

161. Fowler Vincent Harper, *Some Implications of Juristic Pragmatism*, 39 INT'L J. OF ETHICS, 269-290, at 285-86 (1929).

162. Thomas Neumayr, *After Holmes: Natural Law, Legal Positivism, and the Path of the Law* 1, at 9, (Feb. 22, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1766856 (paper presented at the 2011 Western Political Science Association Annual Meeting (Apr. 20, 2011)).

Buck v. Bell. Before *Pierce*, seemingly every federal or state judge that considered compulsory sterilization laws assumed or asserted that under constitutional due process, the only circumstance, if any, in which a government could cut and disable a person's bodily organs, was as punishment for a crime whereof the person had been duly convicted.¹⁶³ But in the months following *Pierce*, the supreme courts of Michigan and Virginia became the first courts to affirm that non-punitive dismemberment could be consistent with due process of law.¹⁶⁴ The Supreme Court's decision in *Buck* affirmed the Virginia decision.¹⁶⁵

The procedures endorsed in *Buck* violated a long and settled usage and mode of proceeding,¹⁶⁶ viz, that governmental deprivation of a person's bodily integrity could occur, if at all, only following a jury trial with a finding of criminal liability. Noncriminal, or civil, dismemberment, like civil deprivation of life, seemed utterly unprecedented.¹⁶⁷ Since the eighteenth century, American gov-

163. See, e.g., *Smith v. Bd. of Examiners of Feeble-Minded*, 88 A. 963, 966 (N.J. 1913) (striking down a sterilization statute on equal protection grounds, and noting the "very important and novel question whether it is one of the attributes of government to essay the theoretical improvement of society by destroying the function of procreation in certain of its members who are not malefactors against its laws"); *Davis v. Berry*, 216 F. 413, 416-19 (S.D. Iowa 1914) (holding as inconsistent with due process a statute imposing sterilization on previously-sentenced offenders, and claiming the law represented "a legislative act which inflicts punishment without a jury trial"); *id.* (Smith, J., concurring) (claiming that to impose such sterilization upon a person subject to civil detention, and "unconvicted of any crime" would "clearly" deprive that person of due process); *Williams v. Smith*, 131 N.E. 2, 3 (Ind. 1921) (striking down a civil sterilization statute on the grounds that the individual was denied a hearing, but noted other possible due process violations, including the "infliction of pains and penalties by the legislative body through an administrative board" rather than by criminal jury trial).

164. *Smith v. Command*, 204 N.W. 140, 144 (Mich. 1925); *Bell*, 130 S.E. at 518-19.

165. *Buck*, 274 U.S. at 207 (deciding that "[t]here can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law").

166. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856) (affirming that "due process of law" requires conformity with such customary procedures).

167. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (1766) (stating that "this natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority, [yet life may] be frequently forfeited for

ernments rarely deprived individuals of their bodily integrity, and only as punishment whereof the party had been duly convicted.¹⁶⁸

Even after the proto-progressive 1884 decision in *Hurtado v. California*,¹⁶⁹ when the Supreme Court inaugurated a due-process jurisprudence freed from traditional usages and modes of proceeding¹⁷⁰—the Court still insisted that criminal process must respect certain fundamental natural rights.¹⁷¹ Law was “to a certain extent, a progressive science,” but “the cardinal principles of justice [were] immutable.”¹⁷² Due process allowed adjustment of common-law procedures, but only within the bounds of the natural law.

With *Buck*, however, the Court departed from both the antebellum and post-*Hurtado* understandings in disregarding both natural rights, as well as customary procedures.¹⁷³ The progressives on the Court plainly acknowledged, and even celebrated, this revolutionary aspect of *Buck*. Of the eight justices in the majority in *Buck*, it was only the three progressives, Holmes, Brandeis, and Stone, who would later cite *Buck* with approval. More significantly, they approved the decision *precisely* for its rejection of traditional rights and old taboos, in favor of scientific, experimental, and progressive public policy.¹⁷⁴ Most notably, in his famous dis-

the breach of those laws of society, which are enforced by the sanction of capital punishments”).

168. See, for instance, the following comments made in 1820 by Chief Justice Ambrose Spencer, of New York’s highest court: “The expression, *jeopardy of limb*, was used in reference to the nature of the offence, and not to designate the punishment for an offence; for no such punishment as loss of limb was inflicted by the laws of any of the states, at the adoption of the constitution. Punishment by deprivation of the limbs of the offender would be abhorrent to the feelings and opinions of the enlightened age in which the constitution was adopted, and it had grown into disuse in *England*, for a long period antecedently. We must understand the term, ‘jeopardy of limb,’ as referring to offences which, in former ages, were punishable by dismemberment, and as intending to comprise the crimes denominated in the law, felonies.” *People v. Goodwin*, 18 Johns. 187, 201 (N.Y. Sup. Ct. 1820) (emphasis in original).

169. 110 U.S. 516 (1884).

170. *Id.* at 530–31 (proclaiming that the Constitution was “made for an undefined and expanding future” and indicating that compliance with traditional proceedings was a sufficient but not a necessary condition).

171. *Id.* (stating that legislative innovations must protect certain “principles of liberty and justice”).

172. *Holden v. Hardy*, 169 U.S. 366, 385–87 (1898).

173. See *supra* text accompanying notes 153–68.

174. In stark contrast, some contemporary scholars have attributed the *Buck* decision to Holmes’s “deference to legislative will,” *Victoria Nourse, in RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 31 (2008), or to “deference [to] measures whose aim was to promote public morality,”

senting opinion in *Olmstead v. United States*,¹⁷⁵ Justice Brandeis argued that the Constitution's provisions, such as the Due Process Clause, must be "adapt[ed] to a changing world" to meet "modern conditions."¹⁷⁶ Citing *Buck*, he explained that constitutional due process was flexible enough to allow new procedures that "a century ago, or even half a century ago, probably would have been *rejected as arbitrary and oppressive*."¹⁷⁷ Justices Holmes and Stone endorsed Brandeis's opinion.¹⁷⁸ The implication was stark—the Court could and should creatively interpret the Constitution to permit what the Framers of the Fourteenth Amendment would have called *arbitrary* and *oppressive*. So for Brandeis, for instance, progress might enlarge individual rights, including the "right to be let alone" in one's "spiritual nature," "feelings" and "intellect,"¹⁷⁹ but might also contract traditional bodily rights.

As noted above, *Pierce* paved the way for *Buck*, because *Pierce* tacitly but emphatically ostracized the restraints of both natural law and common law from the Due Process Clause.¹⁸⁰ So it was not surprising that *Buck*'s appeal to bodily rights "long recognized at common law"¹⁸¹ fell on deaf ears. Before *Pierce*, the Court had pledged to safeguard the public against any law that was "arbitrary and unreasonable, from the standpoint of natural justice."¹⁸²

MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S, at 48 (2001).

175. 277 U.S. 438 (1928).

176. *Id.* at 472 (Brandeis, J., dissenting).

177. *Id.* (quotations omitted) (emphasis added).

178. *Id.* at 469 (Holmes, J., dissenting); *id.* at 488 (Stone, J., dissenting). Stone later endorsed *Buck* in *Skinner v. Oklahoma*, 316 U.S. 535, 544–45 (1942) (Stone, C.J., concurring). For these justices, the Constitution's flexibility should go both ways, by permitting not only the expulsion of such old shibboleths as the inalienable right to bodily integrity, but also the incorporation of new rights, such as expanded rights of privacy. *Id.* at 472 (Brandeis, J., dissenting). Scholars have tended to treat Brandeis's *Olmstead* dissent as adverse to his silent concurrence in *Buck*. See, e.g., Melvin I. Urofsky, *Louis Dembitz Brandeis*, in 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 173, 177 (Paul Finkelman ed. 2006) (contrasting Brandeis's dissent in *Olmstead* with his concurrence in *Buck*, characterizing the latter case as reflecting the fact that Brandeis was "[c]onservative in many ways [and] a man of his times"). Yet Brandeis's dissenting opinion in *Olmstead* indicates that he viewed both enhanced privacy rights for the mind (*Olmstead* dissent) and contracted bodily rights (*Buck* majority opinion) as complementary, and consistent with progress. *Id.*

179. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

180. See *supra* text accompanying notes 40-70.

181. *Meyer*, 262 U.S. at 399.

182. *New York Cent. R.R.*, 243 U.S. at 202.

After *Pierce*, the Court effectively announced that it would now endorse (enthusiastically)¹⁸³ a law that past generations would have rejected as not only “arbitrary and unreasonable” but even “arbitrary and oppressive.”¹⁸⁴

Most famously, *Pierce* was a progenitor of the Supreme Court’s decisions declaring that the Due Process Clause protects a right to engage in extramarital sexual acts,¹⁸⁵ a right to purchase, possess, and use artificial contraception in the course of both marital and extramarital sexual intercourse,¹⁸⁶ and a right to abortion.¹⁸⁷ Here, *Pierce*’s precedential paternity is well known,¹⁸⁸ and in each case was proudly acknowledged by the Supreme Court.¹⁸⁹ To say the least, these decisions do not seem consistent with Catholic natural-law teaching.

Some scholars, however, dispute *Pierce*’s paternity. Hadley Arkes, for instance, has insisted that *Roe v. Wade* “would have been patently outside any scheme of ‘right’ that emerged from the New Deal or the jurisprudence of liberalism.”¹⁹⁰ Yet as we have

183. *Buck*, 274 U.S. at 207 (declaring that “[t]hree generations of imbeciles are enough”).

184. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

185. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (affirming that constitutional liberty “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” which intimate conduct includes homosexual sodomy).

186. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that laws prohibiting married couples from using artificial contraception violates their constitutional liberty); *Eisenstadt v. Baird*, 405 U.S. 438, 447–55 (1972) (holding that laws prohibiting the *distribution* (not merely the use) of artificial contraception to *unmarried* persons violates those persons’ constitutional liberty).

187. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

188. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 743 (1989) (writing that *Pierce* and *Meyer* are “the true parents of the privacy doctrine”); accord, Bernstein, *supra* note 38, at 1517.

189. *Griswold*, 381 U.S. at 482 (citing *Pierce* first among other cases supporting its conclusion that the Fourteenth Amendment secures certain unenumerated rights that are “peripheral” to the enumerated rights of speech, religion, etc.); *Eisenstadt*, 405 U.S. at 457 (Douglas, J., concurring); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847–49 (1992) (citing *Pierce* and other cases to rebut the position “that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified” and to support the claim “that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood”); *Lawrence*, 539 U.S. at 564 (citing *Pierce* first case among precedents supportive of the “broad...substantive reach of liberty under the Due Process Clause”).

190. Arkes, *supra* note 39, at 282.

seen, *Pierce* served to liberate the Court's jurisprudence from the restraints of natural and common law. After *Pierce*, in large measure, "liberty" could now set sail, with the Court at the helm, moved by the winds of history.

Where the Court, long liberated from natural law, will take our Due Process Clause, is unpredictable. In *Lawrence v. Texas*,¹⁹¹ Justice Kennedy, writing for the Court majority seemed confident that the future would be one of ever-expanding liberty: "[L]aws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."¹⁹² Yet as the past century has demonstrated, it is not *freedom* but *history* that has been set loose. And while history giveth, history also taketh away. History might identify as oppression what was once deemed necessary, as Justice Kennedy proclaimed (with reference to anti-sodomy laws). But history might also turn former oppression into necessity, as Justice Brandeis frankly and happily avowed with reference to compulsory sterilization.

CONCLUSION

On January 22, 1899, Pope Leo XIII issued the encyclical condemning Americanism.¹⁹³ Seventy-four years to the day later, the American Supreme Court issued its decision condemning anti-abortion laws. Some might argue that the decision provided bitter vindication of the Pope's warning. The history provided above, however, suggests a different history—that it was the Court's *abandonment* of "Americanism" (or at least American natural-rights teaching) that led to *Roe*.

Pierce provided a moment of apparent convergence between American jurisprudence and Catholic natural-law teaching. Yet this convergence proved ephemeral, for the American judiciary and the Catholic Church were moving in opposite directions, and merely crossed paths. Catholic teaching was becoming increasingly reconciled with the American natural-rights tradition, while the American judiciary was growing increasingly estranged from it.

191. 539 U.S. 558 (2003).

192. *Id.* at 579.

193. Leo XIII, *Testem Benevolentiae Nostrae* (Concerning New Opinions, Virtue, Nature And Grace, With Regard To Americanism) (Jan. 22, 1899), available at <http://www.ewtn.com/library/PAPALDOC/L13TESTE.HTM>.

In response to the *Pierce* decision, most American Catholic leaders rejoiced.¹⁹⁴ Yet Father John J. Burke, the Paulist head of the National Catholic Welfare Council,¹⁹⁵ was more cautious: “A careful reading of the decision should sober those who are inclined to be drunk with enthusiasm.”¹⁹⁶

The lesson of *Pierce* should caution sobriety today. Like their predecessors in the 1920s, Catholic institutions appear threatened by novel legislation, then laws prohibiting the operation of Catholic schools, now laws compelling Catholic institutions to cooperate materially in artificial contraception and abortion. Like their predecessors, many American Catholics have concluded that such laws violate their rights, under not only the natural law, but also the Constitution. Still, whatever the judicial outcome, American Catholics should be under no illusion that their nation’s judiciary is friendly to Catholic natural-law teaching. American Catholics should place limited faith in their judicial princes.

194. ABRAMS, *supra* note 4, at 201–05.

195. The Council had provided significant financial assistance in the litigation. *Id.* at 98.

196. *Id.* at 204 n.26 (quoting Letter from William Burke to William Kavanaugh (June 10, 1925)).