



The Supreme Court's Mysterious 1920s Due Process Education Trilogy

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Starting in 1905,¹ the Supreme Court issued a series of opinions holding that state and local laws went beyond the states’ police powers. The laws therefore unconstitutionally infringed on liberties protected by the Fourteenth Amendment’s Due Process Clause. From then until 1923, all of the Supreme

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1. *Lochner v. New York*, 198 U.S. 45 (1905). Some scholars include earlier cases, but I argue that 1905 was the inflection point in David E. Bernstein, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 82 GEO. L.J. 1 (2003); David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005); David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861 (2012); and David E. Bernstein, *Class Legislation, Fundamental Rights, and the Origins of Lochner and Liberty of Contract*, 26 GEO. MASON L. REV. 1023 (2020).

Court's occasional rulings in favor of plaintiffs asserting "substantive" due process claims² involved liberty of contract or property rights.³

In 1923, however, the Court began expanding the scope of its due process jurisprudence. Most prominently, the Court invalidated three laws that regulated or banned private schools.⁴ The Court also gradually broadened the protection of freedom of speech.⁵ This paved the way for the incorporation of the Bill of Rights via the Fourteenth Amendment's Due Process Clause, and the Court's modern protection of unenumerated "fundamental rights" beginning with *Griswold v. Connecticut*.⁶

The first Supreme Court case invalidating a regulation of private schools, *Meyer v. Nebraska*,⁷ involved a Nebraska law prohibiting a school or tutor from teaching a pre-high school student in any language other than English. The Court invalidated the law in a 7-2 opinion. Justice James McReynolds' opinion for the Court noted that the law interfered with the economic rights of the private school and its teachers, and McReynolds cited favorably a long string of liberty of contract decisions, including *Lochner v. New York*⁸ and *Adkins v. Children's Hospital*.⁹

2. The phrase "substantive due process" is anachronistic when applied to the period before the 1940s. The conceptual separation of due process into "substantive" and "procedural" parts arose later. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 103–04 (2d ed. 1998); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 245 (2000).

3. E.g., *Buchanan v. Warley*, 245 U.S. 60 (1917); *Coppage v. Kansas*, 236 U.S. 1 (1915). On *Buchanan*, see David E. Bernstein, *Reflections on the 100th Anniversary of Buchanan v. Warley: Recent Revisionist History and Unanswered Questions*, 48 CUMBERLAND L. REV. 101 (2018); David E. Bernstein, *Philip Sober Restraining Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 799 (1998).

4. The Court's "reliance on substantive due process kept the Court in familiar doctrinal territory, even as it extended the scope of constitutional liberty." PAULA ABRAMS, *CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION* 212 (2009).

5. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); *Stromberg v. California*, 283 U.S. 359, 368 (1931) ("It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."); *Fiske v. Kansas*, 274 U.S. 380 (1927) (unanimously invalidating a criminal conviction as a violation of the right to freedom of speech).

6. 381 U.S. 479 (1965). For a discussion of this evolution, see David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, *supra* note 1.

7. 262 U.S. 390 (1923). There was also a companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923), involving similar issues.

8. 198 U.S. 45 (1905).

9. 261 U.S. 525 (1923).

Meyer built on those cases but refused to limit the scope of liberty protected by the Fifth and Fourteenth Amendments' Due Process Clauses to purely economic freedoms.¹⁰ McReynolds wrote that the Fourteenth Amendment Due Process Clause protects the right "to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience," along with "other privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."¹¹

A unanimous Supreme Court two years later invalidated an Oregon law banning private schooling for children ages 8–16, in *Pierce v. Society of Sisters*.¹² Justice McReynolds's opinion for the Court proclaimed that "under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."¹³

The Court rejected another law targeting private schooling in 1927 in *Farrington v. Tokushige*.¹⁴ *Tokushige* involved a challenge to a law designed to shut down Japanese-language schools in the federal territory of Hawaii. McReynolds, again speaking for the Court, wrote, "The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."¹⁵

This "Education Trilogy" raises several questions of historical interpretation that this Article addresses. First, what explains the Court's sudden turn to what we now call civil liberties, after previously limiting its policing of state government power in due process cases to contract and property rights? Second, why did Justice Louis Brandeis, who almost always voted with Justice Oliver Wendell Holmes in due process cases, decline to join his dissent in *Meyer*? Finally, why did Justice George Sutherland, who

10. Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1532–33 (1998).

11. *Meyer*, 262 U.S. at 399–400.

12. 268 U.S. 510 (1925). This case was decided together with *Pierce v. Hill Military Academy*. The military academy was secular, showing that, contrary to a later Supreme Court opinion's revisionist take, religious freedom was not at the heart of the opinion. See *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (alluding to *Pierce* as a case involving a statute targeting a religious minority).

13. 268 U.S. at 534–35.

14. 273 U.S. 284 (1927).

15. *Id.* at 298.

was generally part of the “conservative” bloc on the Court, join Holmes in *Meyer*? These questions are investigated below.

I. EXPLAINING THE COURT’S (CIVIL) LIBERTARIAN TURN

It would be unfair and anachronistic to dismiss the Taft Court as reactionary and hostile to civil liberties. Nevertheless, the Court was not a consistent defender of individual rights. For example, in 1927 the Court voted 8-1 to allow Carrie Buck to be sterilized because of purported genetic imbecility.¹⁶ Until *Meyer*, meanwhile, the Court had never invalidated a state law as beyond the states’ police powers on due process grounds unless the underlying infringement was on contract or property rights.

This raises the question of why the Justices voted to invalidate the law at issue in *Meyer* 7-2, and then proceeded to unanimously invalidate the laws at issue in *Pierce* and *Tokushige*. Each decision went well beyond protecting economic actors from over-regulation. As discussed below, three relevant factors that help explain these decisions are hostility to the Ku Klux Klan; a post-World War I backlash against Progressive statism; and the Justices’ need to cultivate allies among America’s (overlapping) immigrant and Catholic populations.

A. Hostility to the Ku Klux Klan

The laws invalidated in the Education Trilogy were part of a wave of attacks across the country on private schooling. The leading force behind this wave was a revived Ku Klux Klan that focused on anti-Catholicism, but that was also hostile to Jewish and Black Americans.¹⁷ Justice Pierce Butler, who was Catholic, undoubtedly had a low opinion of the Klan.¹⁸ In fact, the Klan had opposed Butler’s confirmation to the Supreme Court on anti-Catholic grounds. Justice Louis Brandeis, who was Jewish, also had personal reasons to despise the Klan.

But Butler and Brandeis were not the Klan’s only opponents on the Court. As a violent organization with strong support among less-educated populists, the Klan naturally attracted the enmity of temperamentally (and to some extent ideologically) conservative jurists.

16. *Buck v. Bell*, 274 U.S. 200 (1927).

17. For a discussion of the Klan’s influence, with a particular focus on its crucial support for the Oregon law that became the subject of *Pierce v. Society of Sisters*, see Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle over Compulsory Public Education* (2009). More generally, see WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927* (1994).

18. William Howard Taft to Bellamy Storer, Sept. 20, 1923, https://www.loc.gov/resource/mss42234.mss42234-256_0020_1177/?sp=1094&st=image.

Chief Justice William Howard Taft, for example, loathed the Klan, and told a correspondent in 1923 that its revival “should cause us humiliation, and arouse in us an earnest wish to suppress such lawlessness as it evidently encourages, and to discourage, so far as we can, the unfounded and unjust prejudices against three classes said to be the object of their enmity.”¹⁹ Taft expressed his hope that the popularity of this “very objectionable organization” would soon fade.²⁰

Several years later, Taft reiterated his hostility to the Klan. He told another correspondent that Hampton University, where he was president of the Board of Trustees, was facing hostile legislation because “there are a lot of cranks in Virginia who are getting excited on the subject of race intermingling. It is an outgrowth of the Ku Klux business and the insanity of race prejudice.”²¹

Taft’s hostility towards the Klan was reinforced by his favorable opinion of the Catholic Church. He believed that the Church played an important role in encouraging good behavior among working-class immigrants. Taft wrote, “I have long regarded the Catholic Church as one of the bulwarks of our society. So too, are the Protestant churches. But the Catholic Church has an influence with a large class of people who but for its saving restraint would be likely to be dangerous members of the community.”²²

Justice Willis Van DeVanter, meanwhile, in private correspondence criticized the modern Klan for combining the racial hatred of the post-Civil War era in the South with the anti-Catholicism and Nativism of the Know-Nothings and the American Protective Association. The Klan, Van DeVanter opined, not only spread hostility to Catholics, Jews, and African Americans but it was lawless—it tried to take into “its own hands the punishment of what some of its members conceived to be crimes.”²³

The Taft Court as a whole showed its distaste for the KKK in 1928 in its opinion in *New York v. Zimmerman*.²⁴ *Zimmerman* upheld a state law targeting the Klan by depriving its members of anonymity. The law required

19. *Id.*

20. William Howard Taft to Bellamy Storer, Dec. 27, 1923, https://www.loc.gov/resource/mss42234.mss42234-259_0020_1205/?sp=990&st=image.

21. Taft to Helen Manning, Mar. 15, 1926, https://www.loc.gov/resource/mss42234.mss42234-280_0020_1230/?sp=1112&st=image.

22. William Howard Taft to Bellamy Storer, Dec. 27, 1923, https://www.loc.gov/resource/mss42234.mss42234-259_0020_1205/?sp=990&st=image.

23. Van DeVanter to James J. Hill, Nov. 28, 1928, *quoted in* M.B. Carrott, *The Supreme Court and Minority Rights in the Nineteen-Twenties*, 41 NW. OHIO Q. 144, 148 (1969).

24. 278 U.S. 63 (1928).

any group of twenty or more members that required its members to swear an oath to submit a membership list to state officials. Labor unions and benevolent orders were exempted from this requirement. The Klan challenged the law as a violation of its Due Process rights.

Van Devanter wrote an opinion for an eight-Justice majority upholding the law. He concluded that states may regulate organizations with oathbound memberships, so long as the regulations were reasonable and aligned with the rights of others and the public welfare. The New York law in question met those criteria, so the law did not violate the Due Process Clause.²⁵

The plaintiffs had also argued that the law violated the Equal Protection Clause. The law, they claimed, was unconstitutional because “the statute discriminates against the Knights of the Ku Klux Klan and other associations in that it excepts from its requirements several associations having oath-bound membership, such as labor unions [and various other associations].”²⁶ Van Devanter agreed with the court below that a law distinguishing between the KKK and other associations was not illicit, arbitrary discrimination. Unlike other associations, the Klan, “the principal association” regulated, had a “manifest tendency” to “make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights and public welfare.”²⁷ Van Devanter quoted the lower court as describing the Klan as an organization that “functions largely at night, its members disguised by hoods and gowns and doing things calculated to strike terror into the minds of the people.” Moreover, he continued, it’s “a matter of common knowledge that the [KKK engages in] activities tending to the prejudice and intimidation of sundry classes of our citizens.”²⁸

Justice McReynolds declined to join the majority opinion. But even he, a racist and antisemite, did not claim that the law was unconstitutional. Rather, he argued the Court lacked jurisdiction to hear the case.²⁹

The only change in the Court’s composition between *Meyer* and *Zimmerman* was Harlan Fiske Stone replacing Joseph McKenna in early 1925. It’s fair to surmise that the Justices had a low opinion of the Klan, and this influenced its decisions in *Meyer* and *Pierce*.

B. Backlash Against Progressive Statism

Another factor that influenced the Court’s Education Trilogy was a backlash against progressive statism and its related agenda of concentrating

25. *Id.*

26. *Id.* at 73.

27. *Id.* at 75.

28. *Id.*

29. *Id.* at 77 (McReynolds, J., dissenting).

political power in the federal government. This more radically statist branch of progressivism had welcomed the government's assertion of control over much of the economy during World War I, and sought to preserve and extend it after the war. This repulsed most Americans, leading to Warren Harding winning a smashing victory in 1920 on the platform of a return to normalcy. The Court became more aggressive about enforcing the right to liberty of contract,³⁰ but also expanded its due process jurisprudence to other rights, including the right of parents to direct their children's education.

Many Progressives advocated a national, secular educational system, run by the federal government.³¹ Local parochial schools were a barrier to that vision. Progressives thus found common cause with Nativists and the Klan in opposing private grade-school education, especially when directed by religious groups. All three groups instead favored mandatory public education, with the goal of homogenizing the population's beliefs with the goal of creating better (and more malleable) American citizens.³²

This very statist vision of education helps explain why Justice McReynolds, despite his own strong prejudices,³³ was so adamant in his opposition to laws cracking down on private schools. In his opinions in *Meyer* and *Pierce*,

30. *E.g.*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (invalidating a minimum wage law that applied only to women).

31. KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 270 (2004). Robert Post cites a letter from William Allen White as an illustration of the "innocent confidence of progressives:"

I think the big thing to do now is quietly organize a hundred or so fellows who are dependable and who may take such steps as are necessary after the war to serve all the economic and social campaigns that the war brings to us. I think price fixing should be permanent, but not done by Wall Street. I think the government should tighten its control either into ownership or operation of the railroads. *I think that labor arbitration should be a permanent thing, and that we should federalize education through universal training, making it a part of the system of education.*

ROBERT POST, *THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930* (2024) (emphasis supplied).

32. KERSCH, *supra* note 31; *Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1018 (1992) ("The guiding sentiment . . . seems to have been an odd commingling of patriotic fervor, blind faith in the cure-all powers of common schooling, anti-Catholic and anti-foreign prejudice, and the conviction that private and parochial schools were breeding grounds of Bolshevism.").

33. For a discussion of McReynolds that acknowledges his prejudices while debunking some hoary myths about him, see Franz Jantzen, *From the Urban Legend Department: McReynolds, Brandeis and the Myth of the 1924 Group Photograph* 40 J. SUP. CT. HIST. 325 (2015).

McReynolds made his hostility to the progressive vision of education clear. In *Meyer*, he wrote:

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.³⁴

In *Pierce*, he added:

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.³⁵

C. The Need for Allies Against Attacks on the Court

The Court's Education Trilogy can also be explained in part by the Justices' need for political allies against Progressive attempts to reduce the Court's power.³⁶ Senator Robert LaFollette, for example, running as the Progressive Party candidate for president in 1924, advocated the direct election of federal judges and giving Congress authority to overturn Supreme Court decisions.³⁷ Legislative attacks on private schools were also motivated in significant part by suspicion of and hostility to immigrant and Catholic populations.³⁸

The Court could win allies within those populations by blocking anti-private school legislation. While this could also cost the Court support among Nativists, intensity of feeling in favor of private schools was surely overall much higher among religious and cultural minorities that utilized those schools compared to the intensity of the opposition to these schools. Put another way, the Court's protection of the availability of private schools would be much more likely to win it strong support among those

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

35. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

36. See Carrott, *supra* note 23.

37. See KENNETH CAMPBELL MACKEY, *THE PROGRESSIVE MOVEMENT OF 1924*, at 144 (1947); WILLIAM G. ROSS, *A MUTED FURY* 193–217 (1994); see also 62 CONG. REC. 9076 (1922) (reprinting Senator LaFollette's speech calling for a ban on lower federal courts' invalidating laws and for Congress to have the authority to overturn Supreme Court decisions).

38. RICHARD E. MORGAN, *THE SUPREME COURT AND RELIGION* 46–48 (1972); ROSS, *supra* note 37, at 142–43, 149–51.

who wanted and often used such schools than it would be to cause strong hostility among private schools' opponents.³⁹

Chief Justice Robert Taft consistently complained about progressive attacks on the Court.⁴⁰ Meanwhile, he showed keen awareness that the Court's opinions in the Education Trilogy could win it allies against these attacks. In 1924, during LaFollette's campaign, Taft proposed to the editor of the *St. Louis Globe-Democrat* that the paper highlight to its readers the Court's protection of the right to teach German. He suggested that the paper editorialize that this opinion was in sync with a court of appeals ruling invalidating the Oregon law that would later reach the Supreme Court in *Pierce*:

I think it might be well to point out, for the purpose of illustrating the argument you make in reference to personal rights and the protection of the Court, the case of *Mayer vs. Nebraska*, 268 US. 390, and *Bartles vs. Iowa*, 362 U.S. 404, in which we held that the forbidden for the teaching of German in private school under the eighth grade, or requiring of school branches to be taught in such schools in the English language was a violation of the right of liberty under the 14th Amendment. The Circuit Court of Appeals of the 9th Circuit has held that that amendment has been violated by the Oregon law, which abolishes parochial schools, Lutheran and Catholic, and requires all children to go to the public schools. I should think that this illustration would convince people, especially among your readers, that they have some rights that they would rather not entrust to the Legislature or to Congress to violate.⁴¹

Four years later, with a bill pending to limit federal court jurisdiction pending in Congress, Taft suggested to his brother, Henry, that he try to get the *New York Times* to editorialize against it:

39. For the basic public choice model of how prejudicial legislation with broad but shallow support can be passed over the objections of a minority that is strongly opposed, see Jennifer Roback, *Racism as Rent Seeking*, 27 *ECON. INQUIRY* 661, 670 (1989).

40. E.g., William Howard Taft to Charles P. Taft, II Sept. 10, 1922, https://www.loc.gov/resource/mss42234.mss42234-245_0020_1180/?sp=412&st=image&r=0.022,0.235,0.52,0.325,0 (expressing concern about Sen. LaFollette's hostility to the Court, and expressing hope that the "Progressive radicals" can be isolated); William Howard Taft to Robert Taft, Nov. 4, 1923, https://www.loc.gov/resource/mss42234.mss42234-258_0020_1206/?sp=250&st=image ("We have to be very careful these days because the enemies of the Court are up and doing and seizing every sort of excuse for attacking us"); William Howard Taft to George T. Knott, Nov. 23, 1923, https://www.loc.gov/resource/mss42234.mss42234-258_0020_1206/?sp=859&st=image (expressing concern about "attacks on the Court by those who would like to take away our powers or limit our jurisdiction").

41. Taft to Casper P. Yost, Sept. 11, 1924, https://www.loc.gov/resource/mss42234.mss42234-267_0020_1192/?sp=626&st=image.

You might also enlarge upon the fact that such a bill as this would destroy the jurisdiction in those cases which McReynolds wrote from Oregon and from Nebraska on the right of the Catholics to maintain separate schools and the right of the Germans to maintain separate education in German. If it gets thereof the Germans and the Irish and the Negroes to the appreciation of the importance of them of maintaining the jurisdiction of the trial courts, we can make the Democrats a bit chary of burning their fingers in such a revolutionary proposal.⁴²

The extent to which other Justices shared Taft's keen awareness that the Education Trilogy would help the Court win allies among ethnic and religious minorities is unclear. But it's certainly plausible that this consideration played at least a marginal role in the Court's decisions.

II. EXPLAINING JUSTICE BRANDEIS'S AND JUSTICE SUTHERLAND'S VOTES IN *MEYER*

Among prominent legal Progressives, only Justice Brandeis, who joined the majority opinion, endorsed the decision in *Meyer*. Justice Sutherland, meanwhile, broke from his allies on the Court to join Holmes's dissent. Below, I speculate that Brandeis's vote can be explained by his Jewishness, his general belief in the importance of education, and an idiosyncratic factor—he attended a German-language school founded by his father. Justice Sutherland's dissenting vote is more mysterious.

A. *Justice Brandeis's Vote with the Majority in Meyer v. Nebraska*

Leading Progressive jurists opposed the result in *Meyer v. Nebraska*. Justice Oliver Wendell Holmes, Brandeis's usual ally in due process cases, dissented in *Meyer*. Felix Frankfurter, a protégé of Brandeis, wrote fellow Progressive Learned Hand that while he considered “such know-nothing legislation as uncivilized,” he would have sided with Holmes instead of “vesting power in those nine individuals in Washington.”⁴³ Hand concurred. He opined that if a state legislature wished to “make a jackass of itself”

42. William Howard Taft to Henry W. Taft, Apr. 7, 1928, https://www.loc.gov/resource/mss42234.mss42234-301_0020_1251/?sp=84&st=image.

43. GERALD GUNTHER, *LEARNED HAND* 322 (2011). Frankfurter later praised Holmes's dissent in *Bartels* as an example of Holmes's “deference to legislation with which he has no sympathy, Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 HARV. L. REV. 121, 153 n.84 (1927), though it's not at all clear that Holms was unsympathetic to the law. Over two decades later after the Court issued *Meyer*, Justice Frankfurter told one of his Supreme Court colleagues that the *Meyer* dissenters were correct. Letter from Justice Frankfurter to Justice Rutledge, Jan. 22, 1944, *quoted in* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking and the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 48 (1979).

by enacting misguided Americanization measures, the Court should not intervene.⁴⁴

Like Holmes, Frankfurter, Hand, and other progressives, Brandeis generally opposed using the Due Process Clauses to limit government regulatory power.⁴⁵ Indeed, Brandeis privately advocated the repeal of the Fourteenth Amendment's Due Process Clause, and at times repeal of the entire Fourteenth Amendment.⁴⁶ Brandeis also, however, argued that so long as the Due Process Clause exists, it must protect fundamental rights besides property and liberty of contract.⁴⁷ Even that, though, does not explain why he voted to invalidate Nebraska's law.

Robert Post argues in *The Taft Court: Making Law for a Divided Nation, 1921–1930*, that Brandeis's vote can be explained by his belief in republican democracy.⁴⁸ Brandeis agreed with Holmes that courts should defer to legislation, but their underlying rationales differed. Unlike Holmes, Brandeis didn't support judicial deference because he thought that statutes reflected the prevailing opinion of society and that democracies should be governed by such prevailing views. Rather, Brandeis supported judicial deference

44. *Id.* See generally Note, *Constitutional Law—"Liberty" Under Fourteenth Amendment—Validity of Foreign Language Statutes*, 22 MICH. L. REV. 248, 251 (1924) (accusing the majority of reverting to an "individualism now rather generally discredited").

45. As extensively detailed by Barry Cushman, the Taft Court Justices typically labeled as "conservative" held a spectrum of generally moderate but progressive political views before joining the Court. Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559–60 (1997); David E. Bernstein, "Substantive" Due Process: It's Complicated, 95 TEX. L. REV. 1, 3 (2016). Arguably, then, the battle on the Court in the 1920s and early 1930s involved, on one side, moderate Progressives who sought to preserve some traditional limitations on government authority (particularly in light of the surge in federal power during World War I) while mostly acceding to the growth of progressive regulation. Their opponents were more radical progressives who denied that the Constitution put any inherent, judicially enforceable constraints on the scope of government authority. Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489 (1998) (discussing the influence of World War I on the Court); Harry G. Hutchison, Lochner, *Liberty of Contract, and Paternalism: Revising the Revisionists?*, 47 IND. L. REV. 421, 423 & nn.22–23 (2014) (noting that the Court mostly upheld progressive legislation); Logan E. Sawyer III, *Creating Hammer v. Dagenhart*, 21 WM. & MARY BILL OF RTS. J. 67, 87 (2012) (suggesting that moderate progressives of the time have been wrongly described as conservatives, and describing their desire to preserve some traditional constitutional limitations on government power).

46. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 320.

47. *Id.*

48. ROBERT POST, *THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930* (2024).

because he saw legislation as both the training ground and the result of self-government. For Brandeis, judicial respect for legislation was an extension of respecting democracy itself. Unlike Holmes, Brandeis believed courts should proactively intervene to safeguard constitutional rights essential for upholding democracy.⁴⁹

In particular, according to Post Brandeis sought to empower citizens to competently fulfill their role as “rulers” in a democratic state. In *Meyer*, Justice McReynolds argued that measures like those used in Sparta to mold ideal citizens by controlling education were incompatible with the principles underlying American institutions. Post suggests that this sentiment reflected republican ideals that Brandeis fully shared.⁵⁰

This strikes me as at best only a partial explanation of Brandeis’s vote in *Meyer*. One still has to account for Brandeis’ general support for judicial deference, even in civil liberties matters,⁵¹ and his loathing of the liberty of contract line of cases, which were cited prominently in *Meyer*.

As noted previously, the Klan’s involvement in anti-school legislation likely struck Brandeis as particularly problematic (though the same consideration did not deter Frankfurter, also Jewish, from arguing that the law should have been upheld.)⁵² Beyond that, my speculation is that Brandeis’s vote reflects his background as the son of German-speaking Bohemian immigrants. Brandeis attended a German-speaking school in Louisville, founded by his father.⁵³

In a companion case to *Meyer*, *Bartels v. Iowa*, Holmes wrote that “if there are sections in the state where a child would hear only Polish or French or German spoken at home, I am not prepared to say that it is unreasonable

49. *Id.*

50. *Id.* at 320.

51. Brandeis’s devotion to civil liberties has been greatly exaggerated. See David E. Bernstein, *From Progressivism to Modern Liberalism in Constitutional Law: Louis D. Brandeis as a Transitional Figure*, 89 NOTRE DAME L. REV. 2029 (2014). Among other things, he generally voted with the government in Fourth Amendment cases and enthusiastically joined the majority in *Buck v. Bell*. *Id.*

52. Frankfurter, in fact, seems to have taken pride in not allowing his Jewish origins to affect his judicial rulings. In his dissent in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (Frankfurter, J., dissenting), he wrote:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.

53. See LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* 20–21 (1984).

to provide that, in his early years, he shall hear and speak only English at school.”⁵⁴ Holmes concluded that the law “appears to me to present a question upon which men reasonably might differ, and therefore I am unable to say that the Constitution of the United States prevents the experiment’s being tried.”⁵⁵

Brandeis was likely understandably offended by the notion that it was “reasonable” to think that being educated in German or other foreign languages was contrary to the public interest. He surely objected to the Nebraska legislature deeming German-language grade schools such as the one he attended to be un-American.

B. Explaining Sutherland’s Dissenting Vote in Meyer

Justice George Sutherland was not a consistent vote for limitations on government power, but he did generally vote with the more conservative Justices when they voted to invalidate government regulations in due process cases. His decision to join Justice Holmes’s dissent in Meyer is therefore surprising.⁵⁶

Professor Barbara Woodhouse explains Sutherland’s vote as a product of him being “a Westerner, a senator from Utah, a strong proponent of states’ rights, and wary of federalization of local problems.”⁵⁷ At oral argument, Sutherland asked whether private schools have right to teach particular religious doctrine. Meyer’s attorney replied that they did so long as the religion did not advocate something morally “wrong,” such as polygamy. Perhaps, Woodhouse speculates, Sutherland, “concluded that it was better to eschew entirely constitutional protection than to have First Amendment protection that favored dominant religions and excluded unusual or unpopular practices.”⁵⁸

Relatedly, Sutherland’s parents were English immigrants to the United States who immigrated to Utah because they were Mormon converts. They later left the church, but Sutherland was educated at the Mormon Brigham

54. *Meyer*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

55. *Id.*

56. And indeed, he wrote the majority opinion in one of the Court’s most controversial due process decisions, *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923), decided the same year as *Meyer*. See David E. Bernstein, *Revisiting Justice George Sutherland, the Nineteenth Amendment and Equal Rights for Women*, 20 GEO. J. L. & PUB. POL’Y 140 (2022).

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

58. *Id.*

Young Academy, later Brigham Young University.⁵⁹ Perhaps he objected to Meyer's attorney's suggestion that only mainstream religious schools should get constitutional protection.

I find these explanations unsatisfying. As a child of lapsed Mormons, defender of Mormon rights as Senator from Utah, and a graduate of Mormon schools,⁶⁰ Sutherland should have been sympathetic to the Lutheran and Catholic schools that were being targeted by hostile reformers. For now, Sutherland's vote remains a mystery.

III. CONCLUSION

The Education Trilogy cases were important milestones in American constitutional history. They protected private schools, religious and otherwise, from the threat of closure in many states. This preserved educational freedom for parents who preferred private education for their children. As a constitutional matter, the Trilogy became the foundation of a due process jurisprudence that moved beyond liberty of contract, property rights, and police power considerations to a broader protection of fundamental rights.⁶¹

This Article has described external forces that may have motivated this shift—revulsion at the Ku Klux Klan, backlash against Progressive statism, and the Justices' need to cultivate allies among ethnic and religious minority populations. This Article also reviews the idiosyncratic biographical factors that may have led Justice Brandeis to join the majority in *Meyer*. Brandeis' vote with the majority helped prevent the education cases from becoming another battle in the war between the more Progressive and more conservative Justices. This in turn allowed future liberal Justices to rely on *Meyer* and *Pierce* in protecting fundamental rights under the Fourteenth Amendment's Due Process Clause while still, like Brandeis, expressing contempt for *Lochner*.

None of this discussion has relied on high constitutional theory. But while high constitutional theory surely plays a role in Supreme Court decision-making, the Justices are human, and like everyone else feel the pull of both historical circumstances and personal experiences.

59. Edward L. Carter & James C. Phillips, *The Mormon Education of a Gentile Justice: George Sutherland and Brigham Young Academy*, 33 J. SUP. CT. HIST. 222 (2008).

60. *Id.*

61. See Bernstein, *Conservative Origins*, *supra* note 1.