INVADING THE HOME: CHILDREN, STATE POWER, AND THE GENDERED ORIGINS OF MODERN CONSERVATISM, 1865-1933

By

JULIA BOWES

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ABSTRACT OF THE DISSERTATION

Invading the Home: Children, State Power, and the Gendered Origins of Modern Conservatism, 1865-1933

By JULIA CATHERINE BOWES

Dissertation Directors:

Ann Fabian and Jennifer Mittelstadt

This dissertation explores how the rise of the modern liberal state in the United States challenged male rule in the family by assuming direct responsibility for the governance of children's lives. Between 1865 and 1933, every state introduced compulsory education, child labor and mandatory vaccination laws that set minimum standards for all children. In this period, a diverse array of reformers and state-builders sought to expand the purpose and purview of the state by twinning the "rights of the child" with the "needs of the state." The expansion of the states' powers over children, however, also provoked fierce resistance from a broad range of Americans who argued that the state was usurping the natural rights of fathers and "invading the home." The dissertation traces the emergence of a gendered anti-statist politics rooted in a defense of the sovereignty of the home. By the 1920s, reformers sought to extend the state's powers over children to the federal government and the sovereignty of the home became a central pillar of national anti-statist movements. "Invading the Home" reveals a network of conservative activists composed of unlikely allies, including Boston Brahmins, the Catholic and Lutheran Churches, anti-suffragists, farmers, Southern industrialists, anti-vaccinationists, *laissez-faire* constitutionalists, and Democrats and Republicans alike, who united in a defense of the sovereign family, which proved an effective rallying-cry across class and faith lines to galvanize opposition to the expansion of state power.

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My family has been vital to the completion this project. The willingness of my whole family to travel has made this venture possible, and their visits to the US have been some of the highlights of my time here. My extended family of aunts, uncles, and cousins has been a source of fun, good humour and support since my childhood. When I left Australia for graduate school, I was fortunate to still have four grandparents in my life, and while two have since passed away, their influence on my upbringing no doubt equipped me to with the values and skills to complete it, particularly Pop's example of hard-work and Nan's great love of books. I treasure my time with Grandma and Grandy on my frequent trips home.

My brothers, Tom and Dominic, are now two of my closest friends and advisors, and while they challenged me in my youth, I can only hope that some of their wit and intelligence rubbed off on me. I want to express my deep thanks to my parents, Catherine McMahon and Andrew Bowes, for their love, support and generosity, which has buoyed me since long before graduate school. Their continued encouragement, and adaptability to Skype, made this all possible. (In particular, my mother's willingness to

play time zones and her sharp eye for proofing has so been helpful in crunch times.) In my time at graduate school, I gained an American family (and some family in Japan), and I'd like to acknowledge the support of my in-laws, who have welcomed me into their lives, especially my mother-in-law Peggy McGrath.

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Introduction

"The relationship in law of the father and child, has, during the past century, been completely revolutionized," argued the progressive reformer Sophonisba Breckenridge in her 1934 volume, *The Family and the State.*[1] Breckenridge was one of many reformers in the late-nineteenth and early-twentieth century who actively worked to bring about this revolution. Since colonial times, the governance of children in the United States had been entrusted to fathers under the common law, and courts only intervened to uphold the paternal rights of fathers to the control, custody, and labor of their children. From the mid-nineteenth century onwards, in campaigns for compulsory education laws, child labor laws, and mandatory health programs, generations of reformers sought to establish the paramount role of the state in the governance of children. The introduction of state legislation that directly governed the child not only transformed the role of the state, but also, as Breckenridge recognized, dramatically reconfigured the relationship between the father, the child and the state. By the twentieth century, with the courts, school attendance officers, and factory inspectors all acting in concert as agents of the state, the state instead intervened to uphold the rights of the child by enforcing paternal duties under the threat of criminal sanction.

The "revolution" that Breckenridge described was fundamental to the expansion of state power in the United States, as every state in the country enacted laws that set minimum standards for the education, labor, and health of children. In the late-nineteenth and early-twentieth century, the unique status of children as rights-bearing dependents paved the way for a great expansion of the authority and function of the states. Children were the "wards of the state," as the Oregon Supreme Court put it in 1906, and in contrast to adults, were thus subject to the "unlimited" supervisory powers

[1] Sophonisba Breckinridge, *The Family and the State* (Chicago: The University of Chicago Press, 1934), 231.

of the state.[2] Between 1867 and 1900, thirty-two states introduced compulsory education laws, every state north of the Mason-Dixon line.[3] In that same period, twenty-eight states also enacted laws that prohibited or restricted child labor.[4] By 1915, twenty million children aged between four and fourteen, or one fifth of the total population of the United States, attended public schools each day under state compulsion. The growing state apparatus of public schools provided a unique site for health reformers to enact far-reaching public health campaigns as well. By 1923, thirty-nine states had made school medical inspections compulsory.[5] Truant officers, factory inspectors, school superintendents, and school nurses and physicians all became agents of the state who regularly intervened in children's lives.

The regulation of children constituted one of the most active fields of state building in the Progressive Era. Despite great regional variation, by 1918, every state in the union had adopted a compulsory school attendance law and by 1929 every state prohibited children under the age of fourteen from working in factories.[6] A diverse array of reformers, from ministers and maternalists to socialists and nativists, found a common cause in educational, labor, and health reform movements that championed the "rights of the child." Indeed, the rights of the child and the needs of the state became synonymous as reformers and legislators alike came to embrace a new conception of the state as the ultimate guardian of children. Many reformers argued that state laws that upheld the rights of children safeguarded the future of the state by ensuring that the minds of "its citizens in embryo" were educated, that their bodies were saved from

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[2] *State v. Shorey,* 48 Ore. 396 (1906).
[3] Michael S. Katz, *A History of Compulsory Education Laws* (Bloomington: The Phi Delta Kappa Education Foundation, 1976), 17-22.
[4] "Proceedings of the National Child Labor Committee Annual Conference: A Report on Twenty-Five Years, 1929" box 13, National Child Labor Committee Papers, Library of Congress, Washington D.C.
[5] Tracy Lynn Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012), 135.
[6] Katz, *A History of Compulsory Education Laws*; "Child Labor Curbs to be Celebrated: Progress of Quarter Century to be Discussed Here at White House Conference," *New York Times,* December 15, 1929, 20.

debilitating labor and immune from destructive diseases.[7] Given the state's vital investment in the wellbeing of children, reformers insisted that the rights and interests of the state trumped parental rights as they strongly asserted the supremacy of the state over the family. The idea that the perpetuity of the nation rested upon the rights of children ultimately gave rise to broad-based national reform movements that sought to extend state powers over children to the federal government. In the 1910s, Congress passed two federal child labor laws. After the Supreme Court struck down both laws, in the 1920s a constitutional amendment to grant Congress the power to regulate the labor of all children under the age of eighteen was submitted to the states for ratification while Congress debated multiple proposals to extend federal powers over education as well.

In each and every one of these realms of state building, however, advocates met fierce resistance from citizens who argued that the state was usurping the rightful prerogatives of the father to govern his child. State regulation of children became a focal point for anti-statist politics in the late nineteenth-and early twentieth-century. In particular, child-centered reforms provided fertile ground for a gendered anti-statist politics rooted in a defense of the sovereignty of the white male-headed home. The idea that the father as head of the household had the right and responsibility to govern his child to the exclusion of the state-- a concept I call "paternal sovereignty"-- was deeply engrained in the cultural, religious and political world of the nineteenth century Americans.[8] Between 1865 and 1933, ideas about paternal sovereignty evolved into an argument against the expansion of state power at local, state and federal levels. In the late

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[7] Joseph Henry Crooker, *The Public School and the Catholics* (Madison: H.A. Taylor, Printer and Stereotyper, 1890), 10.

[8] Paternal sovereignty is a corollary of the legal principle of coverture that gave husbands powers over his wife, and in many parts of the United States, the powers that slave owners held over their slaves as well. For analyses of role that coverture played in the development of liberalism, and specifically how it shaped citizenship in the United States, see Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988) and Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1999). For an excellent synthesis on how the liberal "individual" was imagined as and legally constituted to be the white, able-bodied, property-owning male, see Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York: Cambridge University Press, 2010), and the bibliographic essay 159-206.

nineteenth century, Irish Catholic immigrants in Illinois, Mormons in Utah, and white Protestant Southerners in Virginia all opposed state-level compulsory schooling and mandatory vaccination laws on the same grounds: the state had usurped the "natural rights" of fathers, and "invaded the home."

By the turn of the century, those disparate cries had begun to coalesce into a national movement. In the 1890s, the Democratic Party adopted "parental rights" as a part of its national election platform to unite the interests of its constituents in the urban North and rural South. In the 1910s, the National League for Medical freedom, emboldened by local and state-based networks of anti-vaccinationists and parents who opposed compulsory school medical examinations, were able to defeat the proposal for a federal Bureau of Health, arguing that it would give the federal government the power to "invade the home." By the 1920s, both child labor and compulsory education became lightening rod issues in national politics and paternal sovereignty became a pillar of national anti-statist campaigns. The conservative citizens' lobby, the Sentinels of the Republic, a forerunner to the American Liberty League, capitalized on beliefs in paternal sovereignty to bring together a cross-faith and cross-class movement to defeat the Child Labor Amendment in the Northeast. In the Midwest and West, the Catholic and Lutheran churches joined forces to mount legal challenges to state education laws that resulted in parental rights being recognized as a "fundamental liberty" under the Fourteenth Amendment in *Pierce v. Society of Sisters* (1925).

This dissertation argues that both the project of state building and the development of anti-statism in the United States grew out of a contest over paternal power. By telling these two stories together, "Invading the Home" recovers a central and enduring conflict over whether the ultimate responsibility for the child rested with the family or the state. It was a conflict that reverberated far beyond the individual parents and parties involved. The debate over how far the state's authority should extend over

the lives of children drew in a diverse range of actors from socialists and radical women's rights activists to *laissez-faire* constitutionalists and Gilded-Age industrialists, as well as politicians of every persuasion: Democrats, Republicans and Progressives. Indeed, the question of the governance of the child became a key litmus test in demarcating the very boundaries of state power. In recovering this conflict, this project exposes both the gendered contours of state formation and gendered origins of anti-statist politics by tracing how patriarchal prerogatives became paternal state functions.

To bring that conflict into view, the project traverses and weaves together topics that have been treated separately by historians within the fields of the history of childhood, education, law, labor, medicine and state formation. By placing these topics within a single frame, the dissertation reveals the common impulses and connections between education, health and child labor reform movements that the historical actors -- both advocates and opponents -- saw at the time, which have subsequently been obscured from view: that these reform movements were related projects that all sought to extend the powers of the state over the child by asserting the supremacy of the state over the family.[9] "Invading the Home" approaches state building from the vantage point of the reformers themselves who self-consciously viewed their campaigns as an effort to increase the centralized powers and capacity of "the State." From their perspective, municipal ordinances, state legislation and federal initiatives concerning children were all vital and connected measures for the "self-defense" of the "the State." [10] Examining the

[9] The dissertation rests upon but reorients a rich set of literatures on schooling, labor, and health to reveal the central and gendered role that conflicts over paternal power played in the development of public schooling, child labor laws and school medical programs. For examples of excellent recent works that have addressed the history of schooling and child labor reforms separately, see Steffes, *School, Society, and State* and Elizabeth Marjorie Wood, "Emancipating the Child Laborer: Children, Freedom, and the Moral Boundaries of the Market Place, 1853-1938" (PhD diss., University of Chicago, 2011).

[10] In his essay on the myth of the "weak" American state, William Novak suggests that historians of the American state should set aside classical interpretative models of state formation and instead seek to understand how the American state developed by looking at what the state did. Here, I want to suggest that historians can also gain a new understanding of state formation by studying how historical actors themselves conceived of and argued for new realms of state power. William J. Novak, "The Myth of the

enactment and interaction of compulsory education, child labor and mandatory health laws as integral parts of a common state-building project, the dissertation reveals a robust and recurring political discourse regarding how far the powers of the state ought to extend over the family.

Furthermore, it is only when the campaigns of different reformers who marshaled the rights of the child are placed side-by-side that we can see the patterns that emerged in the opposition to state-building projects and the crucial role that ideas about paternal sovereignty played in the development of anti-statist politics. Historians of labor and schooling, for example, have noted in passing that reformers were met with the cry of "parental rights" in their campaigns.[11] "Invading the Home" reveals the persistence and salience of these arguments about parental rights as a common thread in disparate legal and political conflicts from the 1870s through the 1930s at every level of government. The dissertation explores the set of claims and assumptions about the relationship between the family and the state that underpinned the language of "parental rights" to reveal the ideological coherence and power of paternal sovereignty as a gendered political idea.[12] While scholars of the colonial and antebellum period have long noted the role that the household played as a form of government, this project shows

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'Weak' American State," *The American Historical Review* 113, no. 3 (2008): 752-772, especially 765 on this point.

[11] The immense literature on schooling, labor and health has overwhelmingly focused on the reformers. For examples of passing references to parental rights as opposition to such reforms, see Walter I. Trattner, *Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in America* (New York: Quadrangle Books, 1970)*,* 84-85; Bryan Simon, *A Fabric of Defeat: The Politics of South Carolina Millhands 1910-1948* (Chapel Hill: University of North Carolina, 1998), 18-21. On schooling, see Steffes, *School, Society, and State,* 141-152. On school medical exams, see William Reese, *Power and the Promise of School Reform: Grassroots Movements During the Progressive Era,* revised ed., (New York: Teachers College Press, 2002), 200-210; Richard Meckel, *Classrooms and Clinics: Urban Schools and the Protection and Promotion of Child Health, 1870-1930* (New Brunswick: Rutgers University Press, 2013), 73-74. Of course, ideas about parental rights and paternal sovereignty surfaced in a wide range of policy debates, for a brief account of their role in the campaign against the Sheppard-Towner Act, see Kriste Lindenmeyer, *A Right to Childhood: The U.S. Children's Bureau and Child Welfare, 1912-46* (Urbana: University of Illinois Press, 1997), 102-103.

[12] I came to the conceive of paternal rights over children as "paternal sovereignty" in the same way that women's historians first came to refer to the home as a "separate sphere" in the 1970s; through the language that nineteenth-century Americans used themselves in referring to "family government," the "family-state," or the family as its own "empire." See Nancy Cott,"Review of A Shared Experience: Men, Women, and the History of Gender," *American Historical Review* 105, no. 1 (February 2000): 17.

that well into the twentieth century many Americans continued to view the family as the most fundamental and local form of self-government, and defended it as such.[13]

This dissertation offers a new perspective on the relationship between race, the family and the state by examining how state laws that set minimum standards for all children subjected all families, including the legitimate white-male headed family, to the supervisory powers of the state. Reform movements that marshaled the "rights of the child" overwhelming focused on white children.[14] While compulsory school attendance laws were universal in construction, education reformers who advocated for their adoption in the late nineteenth century had a clear target in mind: the children of foreign-born parents in urban cities where immigrant populations were swelling. Reformers were particularly anxious to assimilate the children of German and Irish-Catholic immigrants through education in public schools, and they sought to use the strong arm of the law to achieve that end. At the same time, the racial politics of the South blocked the introduction of compulsory attendance laws for decades.

In the early twentieth century, while black children were disproportionately represented in agricultural labor, the movement to end child labor focused on the child labor force in industry, comprised almost exclusively of native-born white children and the children of European immigrants.[15] The focus on white children proved to be a double-edged sword, however. While reformers argued that federal child regulations would give Congress the power to protect all children, anti-statists turned that argument

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[13] This scholarly emphasis dates back to John Demos, *A Little Commonwealth: Family Life in Plymouth Colony*, (Oxford: Oxford University Press, 1970). The key work in this field is Carole Shammas, *A History of Household Government in America* (Charlottesville: University of Virginia Press, 2002), which treats the history of household dependents together and argues that household government was the primary experience of government for the vast majority of Americans from colonial times to the mid-nineteenth century.

[14] The concept of Progressivism for "whites only," and the relationship between Progressivism and segregation, has long been a central problematic in literature on Progressive reformers, dating back to C. Vann Woodward's *Origins of the New South, 1877: A History of the New South* (Baton Rouge: Louisiana State University Press, 1951). For a recent synthesis over Progressivism that tackles the issue of segregation head on, see Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (New York: Free Press, 2003).

[15] Shelley Sallee, *The Whiteness of Child Labor Reform in the New South* (Athens: University of Georgia Press, 2004).

on its head, insisting that it would give Congress the power to invade all homes, even the homes of respectable white male-headed families.

Historical accounts to date have focused overwhelmingly on how the state's powers were used to police, intervene in, and structure the family life of female-headed, Native American, black, and mixed-raced households as well as the lives of orphaned and wayward children. These works demonstrate how the class, race or religion of the parents has been used to deny parental rights through, for example, the establishment of Native American boarding schools or the operation of juvenile courts.[16] "Invading the Home" focuses instead on milder but much far-reaching expressions of the state's power over parents, illuminating how the expansion of state power rested on the assumption of paternal power over children. It was in this arena that the most pervasive and effective opposition emerged, rooted in the presumed right of the white male head of the household to govern his home.[17]

The dissertation further offers a new vantage point on the relationship between gender, the family and the state. The works of women and gender historians on the ideology of separate spheres and the role maternalists played in building the welfare state transformed our understandings of the family and the state, particularly by debating the ways that race, class, and ethnicity both complicate and enrich our understanding of women's relationship to the domestic sphere and the role of women as state-builders.[18]

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[16] See, for example, Margaret Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia 1880-1940* (Lincoln: University of Nebraska Press, 2011); Linda Gordon, *The Great Arizona Orphan Abduction* (Cambridge: Harvard University Press, 2001); Laura Briggs, *Somebody's Children: The Politics of Transnational and Transracial Adoption* (Durham: Duke University Press, 2012).

[17] Legal scholar Jill Hasday has argued there is a bifurcated law of parenthood, with one prong known as "family law" that is predicated on a common law principle of non-interference with "legitimate" families, and a second prong known as "poor law" that routinely interferes with "illegitimate" families. Jill Elaine Hasday, "Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations" *Georgetown Law Journal,* 299 (2002): 300-384. This project adds to our understanding of the family and the state by considering how state laws affected "legitimate" families.

[18] Key works on separate spheres include Barbara Welter, "The Cult of True Womanhood: 1820-1860," *American Quarterly* 18, no. 2 (1966): 151-194; Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835* (New Haven: Yale University Press, 1997); Mary Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* (Cambridge: Cambridge University Press, 1981). On

Yet, in the fruitful debates in these fields, the relationship between men and the home and the importance of the regulation of manhood to state formation have largely fallen out of view.[19] "Invading the Home" builds off these works by widening the frame to reveal the contested relationship between men, the family and the state that comes into view when we study children as the object of state-building projects.

By focusing on how the regulation of children affected the relationship between white men and the state, this dissertation advances three arguments about gender and state formation, and the relationship between the family and the development of anti-statist politics. First, "Invading the Home" demonstrates the central role that both children and the family played in state formation well before early twentieth-century Progressive-era reforms.[20] In the aftermath of the Civil War, the states directly expanded their authority, capacity and bureaucratic reach by deepening their responsibility for the governance of children's lives in education, labor and health.[21] Emphasizing the critical

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maternalism and the welfare state, see Barbara Nelson, "The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid," in *Women, the State, and Welfare* ed. Linda Gordon (Madison: University of Wisconsin Press, 1990); Robyn Muncy, *Creating a Female Dominion in American Reform, 1890-1935* (New York: Oxford University Press, 1991); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in United States*, (Cambridge: Belknap Press, 1995). On how the experiences of working-class women and women of color challenge the literature on separate spheres and on maternalism, see, among many others: Nancy Hewitt, "Beyond the Search for Sisterhood: American Women's History in the 1980s," 10, no.3 (1985): 299-32; Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present* (New York: Basic Books, 1985); Deborah Gray White, *Ar'n't I a Woman?: Female Slaves in the Plantation South* (New York: Norton, 1985); Eileen Boris, *"The Power of Motherhood: Black and White Activist Women Redefine the Political,"* in Seth Koven and Sonya Michel eds., *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (New York: Routledge, 1993); Linda Gordon, *Pitied but Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (New York: Free Press 1994); Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917-1942* (Ithaca: Cornell University Press, 1995).

[19] In particular, my thoughts here have been influenced my Michael Willrich's critique of, and intervention in, the literature on women and the welfare state that had overwhelmingly focused on how the state regulated womanhood. See Michael Willrich, "Home Slackers: Men, the State, and Welfare in Modern America," *Journal of American History* 87 (September 2000): 460–89, especially 463 where he argues that "enforcing male responsibility was (and is) central to the broader, regulatory enterprise of welfare as a mode of governance, whose object is not merely to provide a modicum of economic security to citizens but also to keep legitimate claims upon the public purse to a minimum."

[20] Recently, historians have noted the connections and continuities between reforms in Gilded Age and Progressive Era, and Rebecca Edwards has suggested that we should conceive of the period between 1870 and 1920 as the "long Progressive Era." *New Spirits: Americans in the Gilded Age, 1865-1905* (New York: Oxford University Press, 2006); Susan J. Pearson, "A New Birth of Regulation: The State of the State after the Civil War," *The Journal of the Civil War Era*, 5, no. 3, (September 2015): 422-439.

[21] See also Susan J. Pearson, *The Rights of the Defenseless: Protecting Animals and Children in Gilded Age America* (University of Chicago Press, 2011).

role that local government and the states played in the development of the American state in the late nineteenth century, the dissertation shows that state governments expanded their supervisory powers over the exercise of family government in a manner that both pre-dated and later paralleled the expanding role the federal government played in supervising the state government.[22] Indeed, by legislating the duties of fathers, the states entrenched the role the family played as a delegated form of governance.[23] The dissertation adds to the work of political historians who have sought to dispel the myth of a "weak state" by probing the nature, power and reach of the state in diverse domains of American life, including the public works, the military, the economy, American Indian affairs, westward expansion, foreign policy and in supporting and subsidizing both public and private works.[24] In that literature, the regulation of children and family has largely been "hidden in plain sight."[25] In particular, while scholars have paid increasing attention to the importance of the police powers in expanding state power, surprisingly little attention has been given to perhaps one of the most active arenas in which states used

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[22] On the role of the states in state formation, see Pearson, *The Rights of the Defenseless*; Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton: Princeton University Press, 2015); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: The University of North Carolina Press, 1996).

[23] Here I add to the literature on marriage as a form of delegated government, see Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000); Priscilla Yamin, *American Marriage: A Political Institution* (Philadelphia: University of Pennsylvania Press, 2012); Shammas, *A History of Household Government.*

[24] William J. Novak, "The Myth of the 'Weak' American State," *The American Historical Review* 113, no. 3 (2008): 752-772.

[25] I borrow the term "hidden in plain sight" from Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009) and by that I mean that the importance of the child to Progressive reformers has long been a central to our understanding of Progressivism. For example, Robert Wiebe argues "If humanitarian progressivism had a central theme, it was the child. He united the campaigns for health, education and a richer city environment, and he dominated much of the interest labor legislation…" *The Search for Order* (New York: Hill and Wang, 1967), 169 or as Michael Katz put it, "Almost overnight, it seemed, children became the symbol of a resurgent reform spirit, the magnet that pulled a diverse collection of causes and their champions into a new loose, informal— but very effective— coalition," Michael Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America,* rev. ed., (New York: Basic Books, 1996), 117. It is not a large leap to connect those works on reformers to recent accounts of state formation, but nonetheless those connections have not yet been fully drawn. Susan Pearson, *The Rights of the Defenseless* is a recent work that has begun this project.

their police powers in the late nineteenth century: to establish public schools and regulate the health and labor of children.[26]

Second, this dissertation points not only to new areas of state building but also to the power of anti-statism as an important force in state formation. "Invading the Home" shows how the contest between reformers who envisaged a larger role for the state and their anti-statist opponents was both generative of the political outcomes that shaped the state, and the place of the child and the white male-headed family within it.[27] Opponents of compulsory schooling, labor and health laws developed and mobilized the concept of paternal sovereignty in order to delay, stymie, and limit state interventions in the family at the state level, especially in the South. By the 1920s, anti-statists mobilized ideas about paternal sovereignty to arrest the expansion of the federal government, and to carve out a constitutionally protected zone of familial privacy, demonstrating the powerful role that paternal sovereignty played in shaping the architecture of the modern liberal state.

Through an analysis of the pervasive and powerful opposition to Progressive reforms, rooted in ideas about paternal sovereignty, "Invading the Home" helps explain the persistence of state policies that promoted the white-male-headed family in the liberal state. Numerous women and gender historians have analyzed how the investment of the "interlocking networks" of white middle-class maternalists in the white male-

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[26] On the police powers, see in particular Gerstle, *Liberty and Coercion.* Before the recent revival in studies of state formation, educational historians and political scientists had noted the odd omission of schooling from narratives of American statecraft. See David Tyack and Thomas James, "State Government and American Public Education: Exploring the 'Primeval Forest,'" *History of Education Quarterly* 26, no. 1 (1986): 39-69; Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge University Press, 2004), 236-237. For important recent works on schooling and state formation, see Steffes, *School, Society, and State* and Michael Callaghan Pisapia,"Public Education and the Role of Women in American Political Development, 1852-1979" (PhD. Diss. University of Wisconsin-Madison, 2010).

[27] Elizabeth Sanders makes the argument that what is often considered anti-statism is in fact a rejection of one type of governance, but still "statist" in attempting to bring about a different form of governance. As Jacobs and Zelizer have argued, anti-statism is a force that "shaped the structure of the federal government in particular ways." Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999); Meg Jacobs and Julian Zelizer, "The Democratic Experiment: New Directions in American Political History" in *The Democratic Experiment: New Directions in American Political History,* eds. Meg Jacobs, William J. Novak, and Julian E. Zelizer (Princeton: Princeton University Press, 2003), 2.

breadwinner norm limited the scope and reach of welfare policies.[28] This dissertation extends our understanding of why liberal welfare policies were so circumscribed, by revealing the interlocking networks of predominantly male anti-statist activists, who mobilized ideas about paternal sovereignty across a broader realm of policy debates in order to oppose the liberal state. The dissertation thus recovers an important component of the political terrain and gendered dynamics of the Progressive Era.

Finally, the dissertation reveals the extent to which gendered ideas about the traditional family influenced the development of anti-statist politics by tracing the recurring role of paternal sovereignty in political disputes. The importance of patriarchal ideas about the family has been acknowledged in numerous historical works about politics and the state. Historians of suffrage have noted the importance of ideas about family government to anti-suffrage campaigns.[29] Others have shown that gendered ideas about the family and men's rights played a critical role in defining partisan divisions in the late nineteenth century.[30] Finally, scholars studying gender and the Red Scare have noted the apparent resurgence of patriarchal ideals about family government in the politics of anti-feminists in the 1920s.[31] This project extends that body of work by providing a sustained analysis of the role that ideas about paternal sovereignty played in politics and state formation from the Civil War through to the 1920s. Patriarchal ideas

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[28] Muncy, *A Female Dominion*; Gordon, *Pitied But Not Entitled*; Mink, *The Wages of Motherhood*; and (for a broader focus on policymakers) Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (Oxford: Oxford University Press, 2001).

[29] Aileen Kraditor, *The Ideas of the Women's Suffrage Movement, 1890-1920* (New York: Columbia University Press, 1965); Reva Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115, no. 4 (2002): 948-1046; Rebecca Ann Rix, "Gender and Reconstitution: The Individual and Family Basis of Republican Government Contested, 1868-1925" (PhD diss., Yale University, 2008).

[30] Rebecca Edwards, *Angels in the Machinery: Gender in American Party Politics from the Civil War to the Progressive Era* (New York: Oxford University Press, 1997); Rebecca Edwards, "Domesticity versus Manhood Rights: Republicans, Democrats, and 'Family Values' Politics, 1856-1896" in *The Democratic Experiment: New Directions in American Political History*; Kristen Hoganson, *Fighting for American Manhood: How Gender Provoked the Spanish-American and Phillipine-American Wars* (New Haven: Yale University Press, 2000).

[31] Kim E. Nielsen, *Un-American Womanhood: Antiradicalism, Antifeminism, and the First Red Scare* (Columbus: Ohio State University Press, 2001); Kristen Delegard, *Battling Miss Bolsheviki: The Origins of Female Conservatism In The United States* (Philadelphia: University of Pennsylvania Press, 2010); Erica Ryan, *Red War on the Family: Sex, Gender and Americanism in the First Red Scare* (Philadelphia: Temple University Press, 2015).

regarding the rights of the father surfaced repeatedly from the 1860s through the 1920s in diverse public policy debates. While historians usually bracket the 1920s as a period of conservative backlash to the Progressive Era, this dissertation instead emphasizes the continuous and consistent backlash to child-centric state building projects from the 1870s through to the 1920s.[32] In this story, then, the 1920s represented the culmination of both statist and anti-statist movements decades in the making. As the dissertation shows, the relation of the male-headed family to the state reverberated far beyond the debates over suffrage and marriage, and played an influential political role in the decades preceding and following the Red Scare.

Indeed, ideas about paternal sovereignty operated as a critical and effective building block for the development of anti-statist networks in the 1920s and 1930s. The Sentinels of the Republic, a conservative citizen's lobby founded in 1922, mobilized ideas about paternal sovereignty to forge coalitions between disparate and unlikely allies, including Boston Brahmins, the Catholic and Lutheran Churches, anti-suffragists, anti-vaccinationists, Southern industrialists, farmers, *laissez-faire* constitutionalists, and disaffected Democrats and Republicans. The Sentinels not only galvanized cross-class and cross-faith movements against the expansion of the federal government in the 1920s, they went on to become a key organization in the small and overlapping networks of anti-New Deal conservative lobby groups in the 1930s.

The gendered anti-statism that developed in response to the growing state regulation of children therefore provides a new genealogy of the development of twentieth-century conservatism.[33] Tracing the lineage of anti-statist causes from the

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[32] Here, I agree with Morton Keller who writes that the 1920s is generally treated as the "time set apart from the Progressive Past and the New Deal future. But as our historical perspective lengthens, we can see more clearly that the notion of that the First World War sharply split the early twentieth century into two periods is a strained and artificial one." Morton Keller, *Regulating a New Society: Pubic Policy and Social Change in America 1900-1933* (Cambridge: Harvard University Press, 1994), 5.

[33] Over the past decade, many historians have worked to reveal the long roots of twentieth-century conservatism. Most have emphasized race, communism and tax as triggers. For an overview, see Kim

1920s into the 1930s, the dissertation reveals the fundamental importance of ideas about freedom of the family to a conservative political ideology that championed "individual rights" and "liberty."[34] The analysis also reveals the long relationship between religious organizations and right-wing politics that converged to influence the politics of the family.[35] By concluding the story in the 1930s where existing narratives on the origins of conservatism begin with anti-New Deal groups, "Invading the Home" argues that the idea that white men had a fundamental right to govern their family free from state interference was at the heart of an emerging ideology opposed to the liberal state.[36]

Structure and Chapter Outlines

"Invading the Home" is structured around a series of case studies in which the state extended its authority over children's lives. Each chapter explores a different topic that derived from the legislative powers of the state: over schooling, health, and labor respectively, as well as the drive to extend the federal government's powers over labor and schooling. In each chapter, the dissertation tracks controversies that erupted in different parts of the country at different historical moments, using legislative debates, the records of reformers, legal cases and newspaper reports to reconstruct how the battles unfolded in a particular locale. The dissertation is structured both thematically and chronologically, tracing how one set of reforms, such as the expansion of state schooling

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Phillips-Fein, "Conservatism: A State of the Field," *Journal of American History* 98 (December 2011): 723-743.

[34] In a complementary fashion to the work of African-American historians that revealed the racial origins of a politics that celebrated "individual" freedom, this dissertation provides an analogue in revealing the gendered dimensions of that political discourse. Kevin M. Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* (Princeton: Princeton University Press, 2013); Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in post-war Detroit* (Princeton: Princeton University Press, 2014); Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* (Princeton: Princeton University Press, 2013).

[35] Daniel Williams, *God's Own Party: The Making of the Christian Right* (New York: Oxford University Press, 2010).

[36] Kim Phillips-Fein, *Invisible Hands: The Makings of the Conservative Movement from the New Deal to Reagan* (New York: W.W. & Norton, Inc., 2009). In demonstrating the the connections, ideologically and organizationally, between free market conservatism and family conservatism, my argument echoes the argument that Robert Self makes about the politics of the family in the late twentieth century conservatism, Robert Self, *All in the Family: The Realignment of American Democracy Since the 1960s* (New York: McMillan Press, 2010).

in the 1870s, for example, led to another, such as the use of public schools as a site for public health campaigns in the early twentieth century.

The chapters chart the incremental way the state expanded its power over children, as well as the anti-statist networks that developed in tandem. No one chapter tells the full history of the legislative history of each subject, but by surveying several areas in which the state expanded its authority over the child, and by moving between different frontiers of conflict, I hope what is lost in depth in this approach is made up for by what is gained in breadth. The dissertation taken as a whole reveals striking uniformity in the arguments marshaled both for and against expanding state powers, despite their disparate origins, contexts and protagonists

The first chapter traces the legal, religious and political origins of the concept of paternal sovereignty and the emergence of a dominant political discourse in the mid-nineteenth century that challenged the idea that the patriarchal family had any place to play in a modern state. By examining how a diverse array of public figures, from Florence Kelley to Hebert Spencer and Woodrow Wilson, weighed in on this debate, the chapter recovers a central political debate in the late-nineteenth century about what role the male-headed family ought to play in the modern state that would continually surface in the conflicts over the governance of the child.

The second chapter explores how this debate played out in conflicts over the expansion of public schooling between 1870 and 1890. After the Civil War, educational reformers embraced the state's coercive powers over the family, and advocated compulsory attendance laws as essential to the self-preservation of "the State." By examining efforts of reformers and Republicans to expand state authority in schooling in the North and South, the chapter reveals the central role that ideas about paternal sovereignty played in the opposition of both immigrant Catholics in the North and white Protestants in the South. By the 1890s, when the introduction of English language

requirements sparked a furor over compulsory education laws in the mid-West, the Democratic Party adopted parental rights as part of its national platform as a catchphrase that spoke to the common interests of its disparate constituents.

The third chapter explores how health reformers capitalized on the state's powers over schooling to enforce public health campaigns at the turn of the twentieth century. Beginning in the 1890s, cities and states made vaccination a condition of entry to schools, and by the early twentieth century states began to mandate medical examinations in schools. School medical schemes precipitated new conflicts between parents and the state over the governance of the child, especially in the Southwest and West. In anti-vaccination campaigns, mothers marshalled their moral authority and fathers invoked their rights as tax-paying citizens to assert the sovereignty of the home. In the 1910s, ideas about paternal sovereignty figured prominently in the campaign of the National League for Medical Freedom that fought against the establishment of a federal Bureau of Health.

The rise and fall of the movement for federal regulation of child labor between 1904 and 1924 is explored in the fourth chapter. In the first two decades of the twentieth century, the National Child Labor Committee built bi-partisan support for federal child labor legislation by arguing that the removal of children from the industrial work force would save white children from the debilitating effects of premature labor and restore the rightful role of the white male breadwinner. After the Supreme Court struck down two federal child labor laws, Congress proposed a constitutional amendment to grant the federal government powers over child labor in 1924. In that year, Sentinels of the Republic succeeded in turning public opinion against the Amendment in Massachusetts by mounting an anti-ratification campaign that argued that the Amendment threatened the sovereignty of the family and the states alike.

The fifth and final chapter narrates the controversy over the Oregon School Law that aimed to make attendance at public schools compulsory for all students. The proposal was put on the ballot for the state election via a citizen's initiative in 1922. In the midst of a resurgent tide of nativist nationalism, opponents of the bill, especially Oregonian Catholics were fearful of inflaming religion tensions, and chose to couch their campaign against the bill in the language of parental rights rather than religious freedom. After the measure passed at the polls, a prominent Catholic lawyer, and *laissez-faire* constitutionalist, William Dameron Guthrie took that argument to the Supreme Court, making the case that the Fourteenth Amendment should not only protect the fundamental economic rights of men, but their fundamental civil rights as fathers. The decision of the Supreme Court in *Pierce v. Society of Sisters* (1925) gave constitutional protection to the principle of paternal sovereignty as a fundamental liberty.

Finally, the epilogue traces how William Dameron Guthrie joined forces with the Sentinels of the Republic to quash revived efforts to ratify the federal Child Labor Amendment in the 1930s. Establishing the "National Committee for the Protection of the Child, Family, School and Church," Guthrie and the Sentinels mobilized the same arguments about paternal sovereignty that had underpinned decades of anti-statist campaigns. The epilogue reveals the interconnections among the networks of anti-statists that grew out of the Sentinels' campaigns in the 1920s and 1930s and formed the nucleus of anti-New Deal lobby groups in the 1930s. Exploring their broader campaigns against "state paternalism," this dissertation concludes that ideas about paternal sovereignty lay at the heart of an emerging anti-statist movement that stood opposed to the liberal state.

Chapter One

"Domestic Despotisms:" Paternal Sovereignty Under Siege, 1840-1900

Introduction

"The State, now as never before, takes cognizance and bestows favor upon the child," argued Florence Kelley in her senior college thesis written in 1882. Based on two and a half years of research at the Library of Congress, surveying one-hundred years of Anglo-American laws, treatises and social legislation, Kelley concluded that the "extremely favored position of the child" was a distinct nineteenth-century development, resulting from the "ever-increasing recognition of the child's welfare as a direct object of legislation, apart from family relation." In contrast to the eighteenth century, in which William Blackstone's *Commentaries on The Law* revealed the father's "absolute ownership" of the child, the breakthrough of the nineteenth century was the "emergence" of the child from "its former position in which it existed... almost solely within the family, governed wholly in and through the family." By the late nineteenth century, custody laws, child labor regulations and compulsory school laws acted directly upon the child. It was the mark of progress, in Kelley's view, that legislatures were "guarding all children without reference to the family, diminishing paternal power, and making the child more and more nearly the ward of the State."[1]

Florence Kelley would go on to become a leading national reformer during the Progressive Era. Between 1889 and 1932, she campaigned for women's suffrage, instigated labor regulations and played a founding role in the National Consumers' League, the National Association for the Advancement of Colored People and the National Child Labor Committee. As a factory inspector, legal advocate, and political operative, Florence Kelley was at the frontline of a generation of reformers who carved out a larger role for the state in protecting the rights of the oppressed. Of all her causes,

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[1] Florence Kelley, "On Some Legal Changes to the Status of the Child Since Blackstone," *The International Review* (August 1882), 83, 93-95.

however, it was her interest in the rights of children that served as an entry point for her vision of a new type of statecraft and sustained her activism for over half a century. Her senior thesis, entitled "On Some Changes in the Legal Status of the Child Since Blackstone," revealed her formative ideas about the relationship between the child, the family, and the emancipatory potential of an interventionist liberal state.[2]

In this chapter, we step into the intellectual and political world in which Florence Kelley came of age and found her calling as a reformer. When the twenty-three-year-old Kelley penned her senior college thesis in the early 1880s, she was but one of many academics, reformers, thinkers and religious leaders confronting the question of what the relationship between the patriarchal family and the state had been, what it now was, and what it ought be. From the mid-nineteenth century onward, the spread of industrial capitalism dramatically reshaped economic relations and social life, while the demands of abolitionists and women's rights advocates challenged central precepts about citizenship and rights.[3] In the 1860s, the Civil War precipitated a new role for the federal government in American life.[4] All of these dramatic transformations changed, challenged and reconstituted the structure and role of the white male-headed family as an institution and the role of the state played in civil life as well.[5] Against this backdrop, and

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[2] Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830-1900* (New Haven: Yale University Press, 1997) provides an excellent biography of Kelley's early life. On Kelley's life after 1900, see Dorothy Rose Blumberg, *Florence Kelley* (New York: A&M Kelley, 1966) and Kathryn Kish Sklar, Preface to *Notes of Sixty Years: The Autobiography of Florence Kelley,* ed., Kathyrn Kish Sklar (Chicago: Charles H. Kerr Publishing Company, 1986), 1-18.

[3] For example, see Mary Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* (Cambridge: Cambridge University Press, 1981) for an account how religious revivals and the market revolution changed white middle-class family life, and for a synthesis of the broader changes to family life, see Steven Mintz and Susan Kellog, *Domestic Revolutions: A Social History of Family Life* (New York: The Free Press, 1988) that describes the rise of the "democratic family" in this period. On women's rights, abolitionism and the family, see note eleven below.

[4] On the Civil War and the changing role of the state, see Drew Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Alfred and Knopf, 2008); Susan J. Pearson, "A New Birth of Regulation: The State of the State after the Civil War," *The Journal of the Civil War Era*, 5, no. 3, (September. 2015): 422-439.

[5] Of course, crucially, the Civil War changed the structure of Southern households with the emancipation of the enslaved Carol Shammas argues patriarchal household government disintegrated by the mid-nineteenth century, marked by the "increasing ability of wives, children and labor to exit legally from their relationship with the head and the placing of limitation on his control of their property and labor," and indeed that the "disintegration in the powers of the household head was much more central to the

influenced heavily by Darwin's theory of evolution, a generation of thinkers debated how the institutions of the family and the state had changed over time. It was a debate that drew in a broad range of actors, from proponents of *laissez-faire* philosophy to socialists, and everyone in between: women's rights activists, anthropologists, social reformers, politicians and theologians alike. Put in that context, we can see how and why Florence Kelley first approached the problem of children's rights through the prism of family-state relations.

This chapter traces the genealogy of central debate that would dominate the Progressive Era over who governed the child. Questions about the relationship between the state and the family preoccupied many nineteenth-century thinkers, from figures in the academy such as Herbert Spencer and Henry Maine, to radicals and reformers such as Frederick Engels and Florence Kelley. While the writings of these prominent nineteenth-century thinkers are generally approached from the lens of political economy: Henry Maine is synonymous with liberal contract theory, Herbert Spencer with *laissez-faire* economics, Florence Kelley and Frederick Engels with labor reform and critiques of capitalism respectively, this chapter takes a new vantage point on their writings to reveal that they were also centrally concerned with the question of family-state relations. [6] By

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definition of a modern United States in the middle of the nineteenth century than industrialization or urbanization." Carole Shammas, *A History of Household Government in America* (Charlottesville: University of Virginia Press, 2002), xiv.

[6] On Henry Maine, see Alan Diamond, ed., *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge: Cambridge University Press, 1999); on Florence Kelley, and her formative friendship with Frederick Engels that approaches Kelley from the perspective of labor history and women's activism, see Sklar, *Florence Kelley and the Nation's Work*. Finally, with respect to Herbert Spencer, I would suggest that one measure of how closely a historical figure is associated with a certain position is the volume of historical scholarship produced to challenge or complicate that association. Spencer became almost notorious for being a social Darwinist after Richard Hofstader painted Spencer as an "ultra-conservative" in his 1944 *Social Darwinism in American Thought, 1860-1915* (Philadelphia: University of Pennsylvania, 1945), writing that Spencer's "biological apology for *laissez-faire"* inspired *laissez-faire* capitalists from Andrew Carnegie to William Graham Sumner. Numerous historians have written to challenge that representation of Spencer, emphasizing that Spencer was not an unrepentant Social Darwinist, even as gilded-aged industrialists might have drawn on his writings to justify unfettered capitalism and economic competition. See David Weinstein, "Herbert Spencer," *The Stanford Encyclopaedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta, ed., viewed November 28, 2017 at https://plato.stanford.edu/archives/spr2017/entries/spencer/ from which the Hofstader quotes are drawn and Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880-1920* (Chicago: University of Chicago Press, 1981), 20-22. Taking those correctives on board, in this

recovering the debate over the family and the state that reverberated so widely in the late nineteenth century, the chapter reveals how much was at stake in the debates over the governance of the child in the late-nineteenth and early-twentieth centuries, and why those battles were so politically and emotionally charged.[7] It argues that the investigations into how the individual, the family and the state fit together, however, were not merely academic inquiries, but formed a crucial part of the ongoing process of re-rationalizing and reconstituting the authority of the family and the state.

These nineteenth-century debates created a legible and robust political discourse about what role the male-headed family ought to play within the modern state.[8] In particular, the academic inquiries into the origins of the family and the state in the late nineteenth century produced a set of usable pasts that would continually surface over the next fifty years, deployed as ammunition by state builders and anti-statists alike to argue

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chapter I treat Spencer as a radical individualist, while noting the influence of his writings on the development of *laissez-faire* philosophy, and particularly *laissez-faire* constitutionalism in the United States.

[7] Amy Dru Stanley approaches the relationship between these two fields from the opposite direction, exploring how the "metaphor of contract" shaped understandings of marriage. See Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Era of Slave Emancipation* (Cambridge: Cambridge University Press, 1998). Ann Taylor Allen has shown the importance of these debates to the transatlantic women's rights movements in "Feminism, social science, and the Meanings of Modernity: The Debate on the Origin of the Family in Europe and the United States, 1860-1914," *The American Historical Review* 104, no. 4 (1999): 1085-1113. Carole Shammas also notes the proliferation of these academic debates that reflected, if in exaggerated forms, the changes in household government that her work describes in *A History of Household Government,* chapter one. In this chapter, I focus more narrowly and in greater depth on how these debates affected the governance of children, and I place more emphasis on resurgence of a conservative backlash at the end the nineteenth century.

[8] The political discourse about the family and the state discussed in this chapter, of course, floated far above the reality of family life. While there was a kernel of truth in each, both narratives were based more in caricature than in fact. Based on the existing literature, we know a great deal about the changing facets and demographics of family life in the nineteenth century. We also know how the law both evolved to reflect the changing gender dynamics within family and also operated to chasten the pace of change. We also know how the law both evolved to reflect the changing gender dynamics within family and also operated to chasten the pace of change. This chapter instead illuminates the importance of changing ideas about the family to changing understandings of state power. On the changing nature of family life in the nineteenth century, see, among others: Stephanie Coontz, *The Social Origins of Private Life: The History of the American Families, 1600-1900* (London: Verso, 1988); Mintz and Kellog, *Domestic Revolutions,* Shammas, *A History of Household Government*; Ryan, *Cradle of the Middle Class*; John Demos, *Past, Present and Personal*: *The Family and Life Course in American History* (New York: Oxford University Press, 1986); Philip Greven*, Four Generations: Population, Land, and Family in Colonial Andover, Massachusetts* (Ithaca: Cornell University Press, 1970). On family law, for an account that emphasizes the transformations in family law in the nineteenth century, see Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 1985), and for accounts that emphasize the continuities that persisted, see Linda K. Kerber, *No Constitutional Right To Be Ladies: Women and the Obligations of Citizenship* (New York: Hill & Wang, 1998); Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York: Cambridge University Press, 2010).

for or against the supremacy of the state over the family. Anti-statists would draw on narratives about the sovereign rights of the patriarch that had deep roots in the in laws, politics and religious beliefs of the Anglo-American world. The discourse about paternal sovereignty posited that the family was the first form of government, and thus had a claim to sovereign authority that preceded state power. The father ruled supreme, entrusted with the responsibility and right to govern his children. In this narrative, the family was not only a form of government-unto-itself, but also the foundational unit around which society and the state were ordered.

By the second half of the nineteenth century, powerful counter-narratives emerged that challenged orthodox interpretations that the patriarchal family was the first form of government, critiquing in particular, as Florence Kelley's essay did, the dangers of the absolute powers of the patriarch. In its most prominent form, this new narrative argued the patriarchal family was the first form of government, but crucially, that the patriarchal family was a form of despotism antithetical to the principles of the modern state, which was organized around the individual. The individualist narrative plotted a path to progress in which individuals were emancipated from family government and formed a direct relationship with the state, and was popularized by the legal historian Henry Maine's best-selling account, *Ancient Law*.[9] A more radical iteration of the individualist narrative, promulgated by the socialist leader Frederick Engels, posited that the patriarchal family had never been the germ seed of government and predicted that the socialist revolution would bring the male headship in the family to an end.[10] In the late 1880s, Florence Kelley befriended Engels and become partial to his own theory of family-state relations. As socialism came to fill out her political philosophy, she began to understand the problem of children's rights through the prism of Marxian political

[9] Henry Maine, *Ancient Law* (London: J.M Dent & Sons, 1960). The first edition was published in 1861.
[10] Frederick Engels, *The Origins of the Family, Private Property and the State*, trans. Ernest Untermann (Chicago: Charles H. Kerr & Company, 1902).

economy. Yet, the association between Florence Kelley, socialism, and the fall of family government, forged in this era would ultimately cast a long shadow over her career until the very end of her life in the 1932.

Indeed, well into the twentieth century, these two counterpoising arguments about the family and the state would continually surface in political disputes over the governance of the child, demarking the battle lines. The discourse on the family and the state laid out in this chapter was the lingua franca of an ongoing debate about children, parents and the state that would play out over the next half century. In those debates, policy-makers, reformers, lawyers and anti-statist activists all drew on, reinterpreted and embellished the arguments and usable pasts discussed here. At the outset, in the mid-nineteenth century, the ideological battle lines were fluid. Indeed, the widespread consensus that children had individual rights, but distinct rights claims, paved the way for the state to claim a broad grant of power over children. By the late nineteenth century, however, as it became evident that social reformers would use children's rights to expand the state's power, ideological camps began to harden. Herbert Spencer, for example, who in the mid-nineteenth century was a strident advocate for children's full equality, by the end of the century, came to tout paternal sovereignty as a decisive limit on the state's power. In the end, the chapter explains not only why Florence Kelley would return to the cause of children's rights to enact her broader labor politics in the 1890s, but also why anti-statists would continually adopt political rhetoric about the sovereignty of the family to arrest the expansion of state power.

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Florence Kelley and the Fate of Blackstone's Empire of the Father

When Florence Kelley wrote her senior college thesis in the early 1880s, her work formed one part of a far-reaching and growing critique of excessive paternal power. In the mid-nineteenth century, the transatlantic movements for women's rights and the

abolition of slavery gave rise to a searing critique of male mastery in the family and pushed for a more expansive definition of the "individual" who deserved full political rights and legal equality.[11] Florence Kelley's family was deeply involved in the abolitionist and women's rights movements. In her childhood, then, she had a front-row seat to the social reform movements and political conflicts that defined the era. Her own career as a reformer that took flight in the 1890s exemplified the character, commitments and concerns of the next political generation, the Progressive Era, where reformers would increasingly look to the state to remedy the inequalities produced by industrial capitalism. By turning to Florence Kelley's early life, we can see how the movement for children's rights that would form a central tenet of Progressivism emerged out of the debates that played out during the nineteenth century over male mastery, the family, and the state. Her essay further serves as an entry-point into the dialectic relationship that formed in the late nineteenth century between the individualist and paternal sovereignty narratives.

Florence Kelley grew up immersed in the world of law, politics and social justice. Born in 1859 to William D. Kelley and Caroline Bartram in Philadelphia, she was the third of the couple's eight children, but one of only three who survived to adulthood. During the 1850s, Kelley, a prominent judge in Philadelphia, had broken with the Democratic Party over the issue of slavery and helped found the Republican Party. In 1860, Kelley was elected as a Republican to the United States Congress. He served for nearly thirty years until his death in 1890. The congressman, a committed abolitionist, firm believer in education, and lifelong supporter of women's suffrage, steered his

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[11] Blanche Hershe, *The Slavery of Sex: Feminist-Abolitionists in America* (Urbana: University of Illinois Press, 1978); Jean Yellin, *Women and Sisters: Antislavery Feminists in American Culture* (New Haven: Yale University Press, 1990); Kristin Hoganson, "Garrisonian Abolitionists and the Rhetoric of Gender, 1850-1860," *American Quarterly* 45, no. 4 (1993): 558-95; Nancy Isenberg, *Sex and Citizenship in Antebellum America* (Chapel Hill: University of North Carolina Press, 1998); Michael Pierson, *Free Hearts, Free Homes: Gender and American Antislavery Politics* (Chapel Hill: University of North Carolina Press, 2003); Chris Dixon, *Perfecting the Family: Antislavery Marriages in Nineteenth Century America* (Amherst: University of Massachusetts Press, 1997); Stanley, *From Bondage to Contract*. On specifically how women's rights activists and abolitionists used ideas about childhood as a negative reference point to argue for the full and equal rights of all adults, see Corinne Fields, *The Struggle for Equal Adulthood: Gender, Race, Age and the Fight for Citizenship in Antebellum America* (Chapel Hill: University of North Carolina Press, 2014).

daughters' early intellectual development. In a childhood spotted by illness, the precocious Florence Kelley received little formal schooling, but famously made her way through her father's sizable personal library. She started aged ten on the top shelf with the works of natural science, reading Galileo Galilei and Isaac Newtown. Over the next six years, she worked her way down to the philosophers Edmund Burke and Herbert Spencer housed on the bottom shelf.[12] By the time she entered Cornell University in 1876, the year the first class of women graduated from that institution, the sixteen-year-old Florence Kelley was well versed in all the great works of the male canon.[13]

In her childhood, Kelley was also introduced her to the radical possibilities of women's activism. Kelley spent frequent periods of convalescence in her childhood at the home of her maternal great-aunt, Sarah Pugh, the co-founder and president of the Philadelphia Female Anti-Slavery Society. Leaders of the women's rights movement and Garrisonian abolitionism, such as Lucretia Mott and Elizabeth Cady Stanton, were friends of the family. Through her aunt, Kelley was became familiar with the distinct world of women's reform culture that operated largely outside the male realm of formal politics. It would be a tradition that Kelley would carry forth in her own reform career, where the female-dominated world of settlement houses in Chicago and New York provided a nourishing and intellectually fertile base for her reform efforts at the turn of the century. In her senior thesis, it was evident that Florence Kelley was working through how the strong antebellum reform traditions that shaped her youth might be built upon to meet the challenges of her generation. Women's reform efforts on behalf of women

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[12] Kelley describes this self-education in her autobiography, noting that she was "never willingly absent" from her father's study from aged ten onwards, Florence Kelley, *Notes of Sixty Years: The Autobiography of Florence Kelley,* ed., Kathyrn Kish Sklar (Chicago: Charles H. Kerr Publishing Company, 1986), 34-36; Florence Kelley, "My Philadelphia," *The Survey,* 57, no.1 (October, 1926): 52-53.

[13] The details on Florence Kelley's childhood are drawn from Sklar, *Florence Kelley and the Nation's Work,* chapters one and two.

and children, she rightly appraised, would lay the path for women to play a larger role in the state.[14]

Kelley came to the cause of children's rights because of the suffering she witnessed in her youth. As she would later reflect, her interest in children's health had deep roots in her own childhood, where infant mortality and childhood illness had been a constant source of grief for her family.[15] There was one particular experience, however, that remained in her mind and captured her conscience as a reformer. In 1871, when the family was vacationing near the Allegheny mountain range in Pennsylvania, her father arranged a special midnight excursion for the eleven-year old to witness the wonder of the newly invented Bessemer steel process that allowed for the mass production of steel. While her father marveled at the might of industrial production, the human costs of industrialization much closer to the ground captured Florence Kelley's attention. She was struck by "the presence and activity of boys smaller than myself… carrying heavy pails of water and tin dippers from which the men drank eagerly" at two o'clock in the morning.[16] In the 1870s, as Kelley reflected, Pennsylvania had no limits on either the ages or hours that children could work.[17] After a subsequent visit to a glass factory on that same trip, Kelley was unable to forget the young boys laboring long into the night, nicknamed the "dogs," who outnumbered adult workers.[18] She was also astonished at the "utter unimportance of children compared with the products in the mind of the people whom I was among," referring to her father, who was an avid supporter of industrial

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[14] Sklar's interpretation of Kelley's essay heavily emphasizes this aspect of her essay in viewing children's rights as a vehicle for women's involvement in the state. Sklar also notes that Kelley's belief that law could be a "force eroding patriarchy" set her apart intellectually from other women's rights activists in the mid-nineteenth century such as Elizabeth Cady Stanton who held a more adversarial stance towards the state, Sklar, *Florence Kelley and the Nation's Work,* 61-65.
[15] Kelley, "My Philadelphia," 11, 50-52.
[16] Kelley, *Notes of Sixty Years*, 42 – 46; Kelley, "My Philadelphia," 56. See also Sklar, *Florence Kelley and the Nation's Work,* 45-46.
[17] Kelley, "My Philadelphia," 55.
[18] Kelley, "My Philadelphia," 56.

development.[19] Observing that her father was "completely preoccupied with technical and financial development of the great American industries," Kelley realized at a young age that the "conservation of the human element," namely protecting children, "was to remain a charge on the oncoming generation."[20] Kelley would take a leading role in the efforts of her generation to meet that charge.

The plight of child laborers punctuated Florence Kelley's entire career. Child labor laws not only served as a point of entry for Kelley into the world of activism in the 1880s, but she would spend the final years of her life, until her death in 1932, fighting for the ratification of the federal Child Labor Amendment. Another constant in that fifty-year span was Kelley's commitment to marrying theory with activism. In 1890, for instance, she would lecture middle-class reformers on the "need for theoretical preparation for philanthropic work" to truly meet the needs of the working class.[21] Furthermore, her exhaustive reports on conditions in industry and legislative proposals in the 189s, as the first female Chief Factory Inspector for the state of Illinois, drew on the same research skills she had honed as an undergraduate.[22] Her unceasing thirst for further education, in fact, led directly to her conversion to socialism. After graduating from Cornell in 1882, she was refused admission to graduate school at the University of Pennsylvania "on account of her gender." She went to Europe instead, where she was inspired by the world of European socialism she encountered as a student at Zurich University between 1883 and 1885.[23] She befriended Frederick Engels, the German

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[19] Kelley, "My Philadelphia,"56. Her father was nicknamed "Pig Iron" Kelley because his ardent support of the development of the steel industry in Philadelphia led him to be one of the most prominent supporters of protective tariffs for American industry.
[20] Kelley, "My Philadelphia," 56.
[21] Florence Kelley, "The need of theoretical preparation for philanthropic work, Part I," *The Christian Union,* 34 no. 22 (1887): 12, Florence Kelley, "The need of theoretical preparation for philanthropic work, Part II," *The Christian Union,* 35, no. 23 (1887): 12.
[22] Sklar notes, in reference to this report, that Kelley was always a "scholar-activist," *Florence Kelley and the Nation's Work,* 250.
[23] On Kelley's rejection from the University of Pennsylvania and subsequent conversion to European socialism, see Florence Kelley, "When Co-Education Was Young," *The Survey,* 57 no.1 (Feb. 1, 1927): 557-

socialist and compatriot of Karl Marx, and by the time Kelley returned to the United States in 1886, she had become his American translator. With Engels as a mentor, she began her career as a reformer in Chicago in the 1890s by working on the very issues she explored in her Cornell thesis, child labor and compulsory education laws.[24]

Florence Kelley penned her thesis, then, at a pivotal moment in her life in the early 1880s when she was forming her own set of politics. The thesis, of course, reflected the deep influence her father and aunt had upon her interests and worldview. To make sense of the legal status of the child, Kelley turned to the tools of her father's trades: government reports, legal treatises, court cases and statutory provisions. Her compassion for neglected and exploited children channeled the appeals to conscience that animated her aunt's anti-slavery efforts, similarly revealing children's suffering to make their rights claims legible.[25] But the essay also represented a baton change between generations. Across his career, William D. Kelley's thinking had taken multiple twists and turns before he finally settled on the need for a strong state to balance the interests of labor and capital, and to uphold the rights of the oppressed, especially African Americans. Florence Kelley started from that conclusion; she looked to the state as the solution to the problems afflicting children, arguing in her thesis that the "strong arm of the law proved itself tender and merciful" in recognizing and upholding the inherent rights of the child. In the essay, as she would in her activism, Kelley projected the sympathy and concern of antebellum reformers for the self-sovereignty of the oppressed onto the state, viewing law as the instrument for social reform.[26]

562; Florence Kelley, "My Novitiate," *The Survey*, 58, no.1 (April, 1927):31-35; Sklar, *Florence Kelley and the Nation's Work,* 66-119.

[24] On Kelley's ongoing communications with Engel, and work in Chicago, see Sklar, *Florence Kelley and the Nation's Work,* 120-280.

[25] Elizabeth B. Clark, "'The Sacred Rights of the Weak': Pain, Sympathy, and the Culture of Individual Rights in Antebellum America," *The Journal of American History* 82, no. 2 (1995): 463-493.

[26] In *Governing the Hearth,* Michael Grossberg describes Kelley's essay as foreshadowing the shift towards Progressivism in celebrating an interventionist state, but notes that Kelley's essay evinced the "incompatibles objectives" of reformers in the late nineteenth century who were trying to "preserve republican individualism… while creating a more cooperative community and active state," 297-298. Susan

The essay also reflected the intellectual currents and concerns of the age, namely the reconcilability, or irreconcilability, of individualism with the institution of the family. In her essay, which she published in the *International Review* shortly after her graduation, Florence Kelley donned the hat of historian to account for what was driving the changing legal status of the child. First, "steam" had given the child the "novel role of industrial being." The problems of the exploitation of children in industrial labor, which had so moved her in 1871, she suggested was similarly moving legislators to take action to guard children's rights. Second, the extension of white male suffrage in the 1830s had "forced the State in self-preservation" to compel the education of children as future citizens would one day wield the ballot.[27] But the crux of her argument was that those two forces alone were insufficient to account for the change.

The third, and overarching force, she identified was the growing respect and recognition of "individuality in every form." With the state as the steward of these advancements, it was the "liberal spirit" of the age that was now reaching all former household dependents that had led to the legal elevation of the child. The "same impulse" had also "altered the status of women, made legal provision for the dependent and defective classes, ameliorated the condition of the Indian, and lifted the Negro bodily out of unrepresented condition."[28] The transformation of the status of the child, therefore, necessarily "struck a blow at the legal family" because the law now made "individuality superior to the unity of the family."[29] Florence Kelley, as we shall see, joined a diverse array of thinkers who advanced a more expansive sense of individualism,

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Pearson's recent work on the protection of animals and children in the late nineteenth century, and particularly her conception of "sentimental liberalism" as a force that fused "the language of the heart with the power of the law" as both a bridge between antebellum reform culture and Progressivism, and a process that merged "older status based views of … dependence" with "a newer language of rights" to create the rights-bearing dependent as a subject of liberal reform has been incredibly useful for me in conceiving of the role that children played in state formation, and I think helps to situate Kelley's thoughts on the subject at this time, reconciling some of the tensions Grossberg raises. *Rights of the Defenseless: Protecting Animals and Children in Gilded Age America* (Chicago: University of Chicago Press, 2011), 8-12.

[27] Kelley, "On Some Legal Changes," 95.

[28] Kelley, "On Some Legal Changes," 96.

[29] Kelley, "On Some Legal Changes," 96.

and came to view the patriarchal family as inimical to liberal individualism. Before delving into those ideas, however, it is necessary to consider the tradition to which Florence Kelley was responding.

In her essay, the twenty-three year-old Kelley took aim at William Blackstone, the doyen of Anglo-American common law tradition. Not only did Kelley seek to prove that the status of the child had been "transformed" since Blackstone published his *Commentaries on the Law* in the mid-to-late eighteenth century, but she offered a thorough critique of the attitudes towards paternal power and the proprietary conception of fatherhood that undergirded his writings on the subject. Blackstone was a towering figure in legal circles, casting a long shadow over jurisprudence in the United States. An Oxonian jurist, Blackstone's writings gave legal expression to the Enlightenment ideas about natural rights and liberty. His work exerted enormous influence on republican political thought in the Revolutionary Era and Early Republic, shaping the founding documents from the Declaration of Independence to the U.S. constitution.[30] His legacy, however, primarily lived on through the four volumes of his *Commentaries of the Law of England,* widely regarded as the most methodical summary of the common law. The *Commentaries* continued to inform the basis of the common law in the United States after the American Revolution, with much of it directly adapted in James Kent's *Commentaries on American Law* (1842).[31]

Blackstone's writings on the parent-child relationship, which he dubbed "the empire of the father," were contained in his third volume on the law of the persons. In that volume, he grouped the relationship of parent/child together with the relationships

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[30] Blackstone was the second most quoted European thinker in the United States press in the 1780s and 1790s. See Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth Century American Political Thought," *American Political Science Review,* 78 (1984): 189-197; Holly Brewer, "The Transformation of Domestic Law" in *Cambridge History of Law in America,* vol. 1, *Early America (1580-1815)* ed. Christopher Tomlins and Michael Grossberg (New York: Cambridge University Press, 2008), 288-323, in which she notes that Blackstone was the most cited writer in American newspapers in the 1790s and that his work became the "template and point of departure for all the major American common law writers of the early nineteenth century," 312.

[31] James Kent, *Commentaries on American Law,* vol. II, (Boston: Little Brown and Company, 1860).

of husband/wife, master/servant and guardian/ward, with each subject constituting a pillar of the powers and the responsibilities of the head of the household. Blackstone described the relationship of parent and child as one found in nature and contractual in form. The parent had three duties towards legitimate children: "their maintenance, their protection and their education." In return, the father was entitled to the "control, custody and labor" of his children.[32] Parental rights were exclusively paternal rights. Mothers, Blackstone noted in an aside, were entitled to "no legal powers, only reverence and respect."[33]

Writing in the mid-eighteenth century, Blackstone acknowledged that the roots of the paternal power he described lay in ancient Roman law in the principle of *patria potestas*. Under Roman law, the father, or *pater familias,* had absolute power to rule over their kin, including the power to kill or sell their children. But Blackstone wrote that the powers of the father that he described were "much more moderate." A father could still discipline his child, but only for "the benefit of his education."[34] The key difference, for Blackstone, was that whereas the powers of Roman fathers had been life long, the "empire of the father" in modern times gave way to the "empire of reason" when children came of age at twenty-one years.[35] Moreover, that power was no longer vested in the oldest living patriarch, or a master or lord, but was the right of every father.

While Blackstone viewed his "empire of the father" as a more moderate incarnation of its Roman predecessor, writing one hundred years on, Kelley saw little distance between the two. The *Commentaries*, in her view, emphasized "only the absolute ownership of the father." The father "owned his legitimate child," and the child was his

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[32] William C. Sprague, ed., *Abridgement of Blackstone's Commentaries* (Chicago: Callahan and Company, 1915), 80-68. Blackstone noted that the power the father held over his child was conferred "partly to enable the parent to more effectively perform his duty" and "partly as recompense for his care and trouble."
[33] Sprague, *Abridgement of Blackstone's Commentaries,* 83.
[34] Sprague, *Abridgement of Blackstone's Commentaries,* 82.
[35] On the importance of reason and consent to Blackstone's thinking, see Holly Brewer, *By Birth or Consent: Children, Law and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005), especially 260-261 and Holly Brewer, "The Transformation of Domestic Law," 288-323.

"chattel to be kept or given according to the whim." Indeed, she charged that under the *Commentaries,* there was no hint that "the common law regarded the child as an individual, with a distinct legal status."[36] Her essay criticized the entirely one-sided legal relationship between the parent and child under the common law, likening paternal powers to those of the slave owner. If Blackstone's "empire of the father" represented the position of the common law on the rights of the child, then the remedy lay in legislative enactments that acted directly on the child, chipping away at the "empire of the father."

Even at the time of writing, Blackstone's "empire of the father" was more of his own creation than an accurate reflection of the common law of his time. As historian Holly Brewer has illustrated, Blackstone's entry on the subject made scant reference to seventeenth-and-eighteenth century court decisions, instead citing older Roman civil law and the writings of natural law philosophers. In making the capacity to reason the marker of independent adulthood, Blackstone in fact extended the rule of fathers by lengthening the period of a child's minority from fourteen to twenty-one years. In a sense, then, Blackstone refortified patriarchal control in the late eighteenth and early nineteenth century, as his entry on the subject became as an authoritative source for common law decisions that affirmed the father's control over children's schooling and wages, and vested fathers with custody rights to the exclusion of mothers.[37]

Throughout the nineteenth century, as Florence Kelley's essay captured, a range of statutory provisions chipped away at paternal rights over children. In a slow judicial evolution, the role of the courts would shift from upholding paternal rights to enforcing paternal duties. Mothers, as well, gradually gained custody rights over their children, and

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[36] Kelley, "On Some Legal Changes," 84-85.

[37] Brewer, *By Birth or Consent,* 260-264. Brewer argues that in the eighteenth century, patriarchal control was a much looser concept in the American colonies, with wives, children and servants having much more leeway, and that there was a tightening of paternal control in the early nineteenth century. See also R.W.K. Hinton who argues that while patriarchal authority appeared to be at odds with the egalitarian spirit of the Early Republic, in fact fathers could not exercise full control over their family while they were subject to the king and gained greater control over their families after the Revolution in "Husbands, Fathers, Conquerors," *Political Studies* 15, no. 3 (October 1967): 291-300.

in certain circumstances older children came to be vested with rights to their own wages.[38] Nonetheless, Blackstone's "empire of the father" was a powerful fiction that still pervaded the common law despite the growing gap between the letter of the law and how families actually functioned in an increasingly industrial and urban world, and the changes within the law itself. As a nineteenth century legal scholar commented, there was a "proverbial conservatism of the law." The fact that judges were bound by the decisions and rationales of previous courts explained the "remarkable longevity of common law principles" despite the pace of change in other facets of life. [39]

Indeed, it was perhaps because of the changing character of family life and the waning of patriarchal control that some judges became particularly invested in upholding a realm of paternal power. In the case of *Commonwealth vs. Armstrong* (1842), the presiding judge Ellis Lewis seemed to be at pains to uphold the paternal right to control one's child even when the facts of the case clearly belied the idea that such control existed.[40] The case arose after the seventeen-year-old daughter of Mr. Armstrong, who had been raised Presbyterian, sought out the local Baptist minister, Reverend Hall, expressing her desire to convert. Initially, Mr. Armstrong had stopped the baptism by threating to kill the Baptist minister. Nevertheless, his daughter persisted. After the baptism, Mr. Armstrong

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[38] The best work on maternal custody rights remains Grossberg, *Governing the Hearth.* In one respect, the rise to the "tender years" doctrine still reified paternal control because it only reversed the presumption of custody while the child was of "tender years" and gave father's presumptive custody rights once the child was old enough to work. Moreover, as Michael Grossberg has righty pointed out "declining paternal rights were not automatically supplanted by maternal ones. On the contrary, the law reduced the rights of parenthood generally," in "Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy In Nineteenth Century America," *Feminist Studies,* 9, no.2 (1983): 247. On children gaining the "implied assent" to control their own wages and make their own contracts, see James D. Schmidt, *Industrial Violence and the Legal Origins of Child Labor* (Cambridge: Cambridge University Press, 2010), 131-134.

[39] The legal scholar who made this comment was Christopher Tiedeman, whose writings we shall return to at the end of the chapter. Tiedeman was explaining why men could still assert rights over his wife's property, noting that it was a "wrong" that could "only be remedied by statutory changes." Christopher Tiedeman, *A Treatise on the Limitations Of Police Power in the United States: Considered From Both A Civil And Criminal Standpoint* (St Louis: The F. H. Thomas Law Book Co, 1886), 549. The plethora of precedent in the common law also gave judges significant leeway, which was there were both decision as early as the 1840s that limited paternal rights and still see decisions in the late nineteenth century that upheld paternal authority.

[40] *Commonwealth v. Armstrong,* 1 Pa. L.J. 3 (1842). For more background on the case see Sean A. Scott, "Conscientious Children and Authoritative Fathers: Two Clashes of Religious Liberty and Parental Rights in 1840s Pennsylvania" *Journal of Church and State*, 57 no. 3 (September 2015): 469-468.

continued to threaten Reverend Hall who took out a restraining order against him. In the resulting court case, Lewis, who would go on to become the Chief Justice of the Supreme Court of Pennsylvania, found Armstrong guilty of attempting to take the law into his own hands and ordered him to pay a $500 surety to keep the peace.

The judge, however, ordered that Reverend Hall pay the court costs because he had usurped the rightful authority of a father over his child. In his judgment, Ellis Lewis found that Hall had provoked Armstrong's violent outbursts and "excited feelings" with this "first wrongful act." "The patriarchal government was established by the Most High, and with the necessary modifications, it exists at present day," he pronounced.[41] Lewis pointed to ten Bible versus as evidence that God ordained a father's right to govern his children and cited the writings of William Blackstone and James Kent as evidence that common law doctrine accorded with these biblical principles. With the exception of the power of the courts to intervene in the rare instance when a child was physically endangered, Lewis declared that the law had "assigned no limits to the authority of the parent."[42] James Kent, the leading authority on American common law, sent Lewis a note about the case, praising his "reasoning and conclusion" and informing him he would use the decision in his next edition of his *Commentaries of the Law* as the correct explanation of paternal authority in the United States.[43]

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[41] *Commonwealth v. Armstrong,* 1 Pa. L.J. 3 (1842) at 394-396.
[42] *Commonwealth v. Armstrong,* 1 Pa. L.J. 3 (1842 at 395.
[43] The note was published alongside the decision in the *Pennsylvania Law Journal* and suggested that Lewis had mailed his decision to Kent to bring Kent's attention to it. Letter from James Kent to Ellis Lewis, October 5, 1842 in ed. John Clark, *Pennsylvania Law Journal Reports, vol. 1* (Philadelphia: John Campbell & Son, 1872), 398. The common-law maxim "a man's home is his castle" was another, closely related fiction that would continually surface to shore up the boundaries of paternal sovereignty. In 1885, for instance in *In Re Jacobs,* 98 N.Y. 98 (1886), a decision that would form the basis of the Supreme Court's decision in *Lochner v. New York,* the New York Supreme Court invoked the fiction of "a man's home is his castle" to strike down protective labor laws that sought to end sweatshop work in tenements. As Eileen Boris puts it, the decision "sought to save the cigarmaker from the paternalism of the state" by "affirming his paternalism within the family," finding that the law violated his right to contract, and implicitly, to contract the labor of his family. Eileen Boris, "A Man's Dwelling House Is His Castle: Tenement House Cigarmaking and the Judicial Imperative," in *Work Engendered: Toward a New History of American Labor,* ed. Ava Baron (Ithaca: Cornell University Press, 1991), 115.

The law was as much a cultural expression of the attitudes of a certain class towards paternal power as it was constitutive of that power. Blackstone was far from the only prominent thinker to endow paternal power with a sense of sovereignty in dubbing it the "empire of the father." As the decision of Ellis Lewis suggests, ideas about paternal sovereignty and family government rested on a broad bed of Christian theology. The idea that the male-headed family government was a divinely ordained institution was a font that would find expression in multiple realms of public life from legal treatises and political debates to religious sermons and advice manuals.

As one example, a similar narrative about near-absolute paternal sovereignty surfaced in the writings of Heman Humphrey. Humphrey, a Congregationalist minister and the first president of Amherst College, was active and influential in mid-century educational reform circles.[44] In 1840, he echoed Blackstone in describing every family as "a little state or empire within itself." In his view, family government operated in a similar way to other forms of government: the father was the "earthly legislator" and the family was bound together by its own logics and rules, including the endearing affections of its members. Family government, however, differed in one important respect. While nations could change their form of government as needed, in family government there was "but one model, for all times and all places... It is just the same now, as it was in the beginning, and it is impossible to alter it." [45] For men like Humphrey, the supposedly timeless character of the sovereign family was a steady anchor in times of upheaval.

Humphrey posited that family government as the foundational unit of society and the state. Since the colonial era, as historians such as John Demos have long documented, the family formed "a little commonwealth," in which the patriarch took

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[44] On Humphrey, see Carl Kaestle, *Pillars of the Republic: Common School and American Society, 1780-1860* (New York: Hill and Wang), chapter two; Mary Ryan, *The Empire of the Mother: American Writing About Domesticity, 1830-1860* (New York: Routledge, 1982), 22-24; Stephanie Coontz, *The Social Origins of Private Life: The History of the American Families, 1600-1900* (London: Verso, 1988), chapter five.
[45] Heman Humphrey, *Domestic Education* (Amherst: J. S. C. & Adams Publishers, 1840), 16-17.

responsibility for the health, welfare and education of his family on behalf of, and in support of, the state.[46] By the mid-nineteenth century, however, there was a perceptible and significant shift in how conservatives described the function of the family as its own form of government. As society and the state increasingly assumed responsibility for the health, welfare and education of its members, especially children, conservatives like Humphrey would position the sovereign family as a bulwark against state power.[47] Family government was still vitally important to the state, but instead of the patriarch supporting the state, Humphrey insisted that the social order rested on the clear delineation of jurisdictional boundaries between the family and the state. Society and the state had to defer to the powers of the patriarch and respect the sovereignty of his rule.

The patriarch, Humphrey asserted, was only answerable to God. "You might think that your neighbor's family is badly managed, you may see and know the education of his children is greatly neglected" and that he had "not a single patriarchal qualification," but, Humphrey counseled, little could be done. Even if his children would be better off under your control, Humphrey sternly advised, "[y]ou have no right… to enter his house, to order him to stand aside, and assume the reins of government yourself." Like Ellis Lewis, Humpherey asserted that the power of the state to intervene children's lives was strictly limited to circumstances of extreme abuse. Even in cases of "great delinquency," it was imperative that the boundary between the state and the family be respected. Humphrey thought it was "impossible for any government in the world to take upon itself parental authority and discharge parental duties." If it were possible, "such an innovation would soon derange and destroy the whole social system."[48] The

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[46] John Demos, *A Little Commonwealth: Family Life in Plymouth Colony*, (Oxford: Oxford University Press, 1970).
[47] On this point, see also Stephanie Coontz, *The Social Origins of Private Life: The History of the American Families, 1600-1900* (London: Verso, 1988), 161-162.
[48] Humphrey, *Domestic Education,* 16-17.

consequence of the state trespassing into the home posed a much greater danger to social order than the collective failings of deficient patriarchs.

Ideas about the sovereignty of family government were still widespread in the mid-nineteenth century. The growing cultural exaltation of motherhood among the middle-class in nineteenth century, in fact bolstered ideas about paternal sovereignty by emphasizing the separateness of the home. For while the ideology of separate spheres increased the authority of mothers within the home and led writers to direct domestic advice manuals towards women, the ideology nonetheless rested on and reinscribed traditional gender hierarchies in marriage.[49] Writers of domestic advice manuals also continually referred to the family as a government, empire, or state. Catharine Beecher, for example, one of the foremost advocates of women's separate sphere, referred to the domestic world as "the family-state."[50] It was more than an analogy. If there was any ambiguity about that point, Horace Bushnell, the prominent Congregationalist, minister clarified that by "family government," he literally meant government. Family government relied on the use of "authority, maintains laws and rules, by a binding and loosing power" over the child.[51] As the nineteenth century progressed, in white middle-class culture, advice manuals on family government and the lectures of religious ministers would grant that mother and father both had a role to play in governing the child, and that mothers would be the primary care-giver. In the end, though there could be only one head of the family government for, as one minister put it in 1855, "a two-headed body was not a greater monster in nature, than a two-headed government in society."[52]

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[49] Ryan, *Empire of the Mother.*

[50] Catharine Beecher and Harriet Beecher Stowe, *The American Woman's Home, or, Principles of Domestic Science* (New York: J.B. Ford & Company, 1869), 19.

[51] Horace Bushnell, *Christian Nurture* (New York: Charles Scribner, 1861), 315.

[52] Cortlandt Van Rensselaer, *Home, the School and the Church, Or, the Presbyterian Education Repository* (Board of Education of the Presbyterian Church, 1855), 8. Van Rensselaer added: "it is true that the wife may often be more capable of ruling than the husband, just as the private citizen may often be more capable of ruling than the civil magistrate but to refuse obedience for this reason, in either case, would be an absurdity."

From the 1840s onwards, the growing conflict in jurisdiction between the family and the state would lead to an increasingly strong assertions of paternal sovereignty, as Heman Humphrey's defensive tirade revealed. Ideas about paternal sovereignty continually surfaced well into the twentieth century as the role of the state in governing the child's life expanded. The primary respect in which the narrative about paternal sovereignty would change was that its imagined boundaries expanded to encompass poor and working-class fathers. Even though Blackstone "idealized and strengthened" paternal control in his *Commentaries,* he nonetheless he did not think the "empire of the father" extended to poor fathers, approving of poor laws that removed children from their parents on the basis the children would receive a better education than their fathers could provide.[53] In the mid-nineteenth century, it was an implicit, unquestioned assumption that paternal sovereignty was the privilege of the white middle-class or those fit for "self-government."[54] But by the 1920s, anti-statists opposing the Child Labor Amendment would argue that denying working-class men their property rights over the labor of children would strip them of the last marker of independent manhood. Before the Supreme Court, lawyers would argue that a European immigrant had the "same rights to his family" as the "most cultured" native-born man.[55] If anything, the assertion of absolute paternal sovereignty became more forceful in the twentieth century than it

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[53] Sprague, *Abridgement of Blackstone's Commentaries,* 82-83. On this point, see Brewer, *By Birth or Consent,* 260-261.

[54] It was for that reason that in the famous case of *Ex Parte Crouse*, 4 Wharton 9 (Pa., 1838) heard by the Pennsylvania Supreme Court four years before *Commonwealth v. Armstrong* the court held the state was within its rights to abridge a poor father's paternal rights by committing his daughter to the care of the state. This case is discussed in the next chapter. John Adams argued that poor men should not receive equal political rights and treated as dependents like women and children, see Field, *The Struggle for Equal Adulthood,* 27-29. On the cultural policing of manhood in the Early Republic, and the anxiety about whether all men were fit for self-government, see Mark E. Kann, *A Republic of Men: The American Founders, Gendered Language, and Patriarchal Politics* (New York: New York University Press, 1998).

[55] These two examples are explored in chapter four and five respectively. By the 1870s, arguments are already surfacing, for instance in the case *People v. Turner* that immigrant and working-class fathers deserve the same rights over their children as other men. The more dominant assumption that poor and immigrant parents were not fit for self-government was a driving force behind the introduction of compulsory education laws that compelled parents to fulfill their duties. The quote comes from the oral arguments of Arthur Mullen in *Meyer v. State of Nebraska,* 262 U.S. 390 (1923) as quoted in Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle over Compulsory Public Education* (Ann Arbor: University of Michigan Press, 2009), 120.

had been in the nineteenth. The political discourse of paternal sovereignty became more defensive precisely because critiques of paternal power became more common and more pronounced in the late nineteenth century, and the enlargement of the state steadily eroded the sovereign realm of the father.

In the second half of the nineteenth century, powerful counter-narratives about the relationship between the family and the state emerged. Critiques of an authoritarian conception of family relations of course already existed. But in historical accounts, the belief that patriarchal family was the first form of government was hegemonic.[56] "Up until the beginning of the sixties," Frederick Engels commented in 1884, " a history of the family cannot be spoken of." Until that point, he complained, the history of the family was understood entirely through the Bible. "The patriarchal form of the family, described more exhaustively by Moses than by anybody else" was not only considered as the "most ancient" family form, "but was also identical with the family of our times." In short, "no historical development of the family was even recognized."[57] Inspired by Darwin's theory of evolution, the revelation that the forms of the family and the forms of the state evolved over time led to a flurry of works between the 1860s and 1880s that investigated the origins of the family and the state in tandem.[58]

Collectively, these works challenged the idea that family government had any role to play in the modern state and emphasized that the individual was the political unit of the state. As evidenced in Kelley's essay, in its most popular form, the individualist narrative plotted a path to progress in which each family member was emancipated from family government and formed a direct relationship with the state. Like the discourse

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[56] As Ann Taylor Allen notes with reference to feminist critiques of male mastery, what changed in the late nineteenth century was the creation of historical and anthropological evidence that women's rights activists could harness to buttress their arguments. Allen, "Feminism, Social Science, and the Meanings of Modernity," 1088-1089.

[57] Engels, *The Origins of the Family,* 16-17.

[58] Engels believed that the discovery that the patriarchal family was not the original family form has the "same signification for primeval history that Darwin's theory of evolution had for biology and Marx's theory of surplus value had for political economy," Engels, *The Origins of the Family*, 13.

about paternal sovereignty, the individualist narrative found expression across multiple registers, particularly in the philosophical writings of Herbert Spencer and the historical inquiries of Henry Maine. A second more radical narrative questioned whether the patriarchal family had in fact been the first form of government. While the second narrative did not penetrate the mainstay of public thought as much, socialists like Frederick Engels and a range of women's rights activists such as Elizabeth Cady Stanton nonetheless seized upon it to challenge the basis of male rule in the family and the state. Such political uses of these academic inquiries foreshadowed the political cleavages that would become increasingly pronounced by the late nineteenth century in debates over the governance of children's lives, where the child's unique status as an individual dependent on the state and family for its rights precipitated on-going conflicts over the proper relationship between the male-headed family and the state.

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"Domestic Despotism" and the Individualist Narrative

The most prominent source of the individualist narrative was Henry Maine's *Ancient Law,* first published in 1861. Maine was a British barrister and conservative professor of civil law at Cambridge University, who spent much of his career contributing to the development of law in British India. The significance of Maine's work in the United States lay not in who he was (politically, he was far from a radical), but rather in the rapacious appetite for *Ancient Law* in the United States. *Ancient Law* was consistently reprinted over the next few decades to meet demand, as Maine's biographer commented it was "the only legal-best seller of that or perhaps any other century."[59]

[59] R.C.J. Cocks *Sir Henry Maine: A Study in Victorian Jurisprudence* (New York: Cambridge University Press, 1988). Carol Shammas quotes a letter from a Harvard student written about how he spent New Years Eve in 1864 that captured the excitement with which *Ancient Law* was received: "Thursday evening I began reading Henry Sumner Maine's *Ancient Law* and read it all New Year's, finishing it at exactly midnight. No novel that I ever read enchained me more… I have passed through an era and entered upon a new Epoch of my life!" The letter writer, John Fiske, would go on to be one of many that would popularize Maine's thesis that gave him such "intellectual ecstasy" as a popular historian who lectured on *Ancient Society* in the late nineteenth century, arguing that one of the great works that fundamentally changed how one

Published the year after Darwin's *On The Origins of the Species,* Maine's work offered a master narrative of how societies evolved from ancient societies to modern states. Today, Maine's thesis is best remembered for his formulation that "the movement of the progressive societies has hitherto been a movement from Status to Contract," but Maine located that shift within a larger historical argument about the changing relationship between the individual, the family and the state. The contrast between ancient and modern societies, he concluded, "maybe most forcibly expressed by saying that the unit of the ancient society was the Family, of modern society the Individual."[60]

Ancient Law argued that the defining feature of ancient societies was that they were structured around patriarchal family government, best exemplified by Roman law. Modern states, by contrast, were organized around the individual whose relationship to the state was no longer mediated through family government. The path to progress, therefore, was marked by the emancipation of individuals from the "domestic despotism" of family government to a direct relationship with the state. Maine acknowledged that the "Patriarchal Theory," the idea that the patriarchal family was the first form of government, had long been generally accepted. Its "chief lineaments" were outlined in the Old Testament, and eighteenth- and nineteenth-century political philosophers. Most notably Robert Filmer and John Locke had extensively debated the relationship between paternal power and political power. What Maine claimed to offer in *Ancient Law* was the empirical proof of the "Patriarchal Theory" based on his study of the laws of Indo-European ancient societies, particularly Roman law.[61]

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understood the origins of modern society. The letter was originally quoted in George Feaver, *From Status to Contract: A Biography of Sir Henry Maine* (London, 1969), 44 as cited in Shammas, *Household Government,* 1.

[60] Maine, *Ancient Law*, 76-68.

[61] Maine, *Ancient Law,* 80. Maine's direct evidence, in fact, was quite scant. He had uncovered "hints" of the practice in Homeric literature, and acknowledged in Greek law the powers of the father were limited to children's minority. Furthermore, he also acknowledged that even in Roman Law, *patria potestas* did not extend to public contexts in which sons could rule over their fathers. Adam Kuper, "The Rise and Fall of Maine's patriarchal society" in *The Victorian Achievement of Sir Henry Maine*, 103.

Maine argued that all ancient societies were organized around the autocratic power of the patriarch. The earliest systems of law all revealed the "life long authority of the Father… over the persons and property of his descendants, an authority which we may conveniently call by its later Roman name of *Patria Potestas.'*[62] *Patria potestas* ("the powers of the father") referred to the autocratic powers of the patriarch, the *pater familias,* who was "absolutely supreme in his household."[63] The rule of *pater familias* applied equally to his children, including his adult children, as well as his slaves. It was an unqualified power, extending to the power to kill or sell his children or slaves. *Patria potestas* was the central organizing principle of earliest societies, bringing together women, children, adopted kin, slaves and servants under the singular rule of the patriarch. Maine insisted that the patriarchal family unit was so fundamental to the ordering of earliest societies that the "primitive ideas of mankind were unequal to comprehending any basis of the connection inter se of individuals, apart from the relations of family."[64] It required the suspension of any assumptions based on modern jurisprudence to understand the law and structure of ancient societies. In ancient societies, the laws of society acted upon the family as whole, and did not distinguish the acts of individuals even in criminal law, which punished the family collectively. There was no individual ownership of property.

The second part of Maine's argument was, therefore, to prove that modern states were organized around the individual. The transition from ancient societies to modern states had started with the emancipation of adult sons from the "domestic despotism" of *patria potestas.* The demise of patriarchal government began as adult sons came to develop a direct relationship with the state, developing the right to fight and vote side by side with their father, and through democratic elections, conceivably rule over their father. The thesis resonated with Blackstone's analysis of the modifications of Roman law under

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[62] Maine, *Ancient Law,* 72-73.
[63] Maine, *Ancient Law,* 80, 72-73.
[64] Maine, *Ancient Law,* 76-78.

his "empire of the father." For both men the key signifier that the autocratic aspects of Roman law had fallen was the emancipation of the adult son who in Blackstone's rendering graduated from the "empire of father" to the "empire of reason." The focus on the (white) adult son in both works reflected the dominant racialized and gendered assumptions about who was the "individual" that constituted the political unit of modern states in Anglo-American political thought.[65]

Maine also recognized, however, that the progress from a family-based polity to an individual-based polity had been uneven, and maintained that it nonetheless was the inexorable path to progress. Maine acknowledged that within modern jurisprudence, even within more "advanced civilizations," all forms of status were "derived from, and to some extent are still colored by the powers and privileges anciently residing in the Family."[66] Writing on the eve of the American Civil War, he noted with regret that the United States constituted a significant exception to his thesis that the status of slave had disappeared and been replaced by the contractual relations of servants.[67] But Maine believed the next stage of progress would involve the emancipation of all adult household dependents. Indeed, like many of his generation who advanced liberal contract theory, Maine embraced a more expansive conception of the "individual," at least the abstract. He argued that the "perpetual tutelage of women" had ceased to exist. While it was true that a woman stood in legal subordination to her husband, her subordination was not a remnant of *patria potestas* under which she stood in subordination to her father. It resulted from the mark that canon law had left on modern jurisprudence.[68] Maine regretted the subjugation of women as a wives, which he commented belonged to a "peculiarly to an imperfect civilization," but nonetheless

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[65] As Corinne Field points out, the focus on the status of white adult sons as an index of paternal power was a premise that underpinned liberal writings since Locke. *The Struggle for Equal Adulthood,* 14-15.
[66] Maine, *Ancient Law,* 100.
[67] Maine, *Ancient Law,* 96-97.
[68] Maine, *Ancient Law,* 92.

pointed out that women acted as free individuals from the point that they came of age until marriage.[69]

The popularity of *Ancient Law* in the nineteenth-century suggests that Maine's individualist thesis was a dominant narrative about progress, and one that relegated patriarchal family government to a by-gone era. Prominent philosophers, legal scholars and reformers, in a wide variety of contexts, all reproduced Maine's thesis. All freshmen students studying political science at college in the 1890s, for instance, were introduced to Maine's "Patriarchal Theory" through Woodrow Wilson's textbook *The State,* which was the standard textbook for all colleges. In that work, the future president sought to explain the origins of the United States government and adopted Maine's thesis wholesale to do so. [70] "The original State was a Family," Wilson explained, which had operated under the "omnipotent jurisdiction" of the father. The family-state was a form of "despotism" that left almost no room for individuality.[71] Of course, as we shall see, Maine was one of many thinkers to plot the path of progress from "domestic despotism" to modern individualism. Indeed, *Ancient Law* was popular because it resonated strongly with other contemporary intellectual currents and social movements, including liberal contract theory and the critiques of patriarchy that found expression in the abolitionist and women's rights movements as well as the anti-polygamy movement.[72]

Against that intellectual and political milieu, *Ancient Law* catapulted Roman law and particularly the concept *patria potestas* into the popular discourse in the late nineteenth century as the symbol of undeveloped, backward societies. The powers of the Roman

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[69] Maine, *Ancient Law,* 91-92, 99.

[70] Woodrow Wilson, *The State; Elements of Historical and Practical Politics. A sketch of institutional history and administrations.* (Boston: Heath, 1894). In his introduction, Wilson noted" "In preparing it I labored under the disadvantage of having had no predecessors. So far as I have been able to ascertain, no textbook of like scope and purpose has hitherto been attempted, " xxxiv. Specifically, in that volume, Wilson discounted the evidence that the earliest societies had been matrilineal, arguing it held no implications for the development of the state in the United States because the evidence came from "what we may call the outlying races – the non-Aryan races," 5.

[71] Wilson, *The State,* 3-4.

[72] Stanley, *From Bondage to Contract*; Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002).

father, the idea of absolute paternal sovereignty, was cast as the antithesis of progress. The idea that the father "owned" his children was particularly repugnant to liberals in the late-nineteenth century; it was a concept that too closely resembled the powers that the slave owner had, until recently, held over his slaves. Maine's account about the absolute sovereignty of the Roman patriarch in *Ancient Law* was a key source for a pervasive narrative about paternal sovereignty that would continually surface in conflicts over the governance of children's lives during the Progressive Era – one that equated paternal sovereignty with despotism. From the 1860s onwards, when parents, politicians and anti-statists claimed that the state had no right to regulate the labor, health or education of children because such regulations invaded the parental domain, supporters of state intervention were quick to liken such arguments to a defense of *patria potestas*. It required a slight twist on Maine's politically moderate narrative. Maine explicitly singled children out as the lone exception to his theory. In Maine's account, the child was the lone dependent to remain within the bounds of family government in the modern state because children did not posses the faculty to reason, the "first essential engagement by Contract."[73]

Yet, as Florence Kelley's essay demonstrated, it did not take a large leap to extend the individualist narrative to children. Written twenty years after Maine's *Ancient Law* was first published, the broad outlines of Maine's argument appeared in Kelley's essay. The problem with the common law, Kelley identified, was that children were "governed wholly by, and through the family."[74] In Blackstone's time, the common law, much as it had in Roman times, emphasized "only the absolute ownership of the father." In Kelley's telling, the path of progress turned on the increasing recognition of the child's distinct status as an "individual possessed of legal status independent of his family

[73] Maine, *Ancient Law,* 99-100. On the use of Lockean reasoning to exclude children from rights claims, see Brewer, *By Birth or Consent* and Field, *The Struggle for Equal Adulthood.*
[74] Kelley, *On Some Legal Changes,* 96.

ties." [75] Kelley acknowledged in her essay that compulsory schooling, child labor laws, custody laws were not always explicitly framed as a vindication of children's inherent rights but nonetheless they operated to that effect.

Nor was Florence Kelley the only prominent thinker to include children within the individualist narrative. In his 1851 work *Social Statistics,* Herbert Spencer, the influential nineteenth-century British positivist philosopher, argued that the recognition of individual rights of children was an essential element of a free society.[76] Like his contemporaries, Spencer was influenced by evolutionary biology, relying on it to develop scientific laws, or what he called a "synthetic philosophy" about the development of society and in particular his liberal political philosophy. Spencer, whose prolific writings saturated nineteenth century periodicals in the United States, was a foremost proponent of radical individualism and limited government, most famed for his theory of the "survival of the fittest."[77] Spencer viewed government as inimical to individual freedom. And while Spencer's thinking would evolve on certain subjects, his case for limited government was a life's work.[78]

That life's work began with his first publication, *The Proper Sphere of Government,* in 1843, that argued the sole role of government was to uphold natural rights and that any legislation that went beyond that purpose created more injury than good. It culminated in his polemical *The Man versus the State* (1884) in which he inveighed against the transformation of classical liberalism into a new form of liberalism that favored state

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[75] Kelley, *On Some Legal Changes,* 96-97.
[76] Herbert Spencer, *Social Statistics: Or The Conditions Essential to Human Happiness, specified and the first of them developed* (London: John Chapman, 1851).
[77] For a recent overview of all of Spencer's work and their reception in the United States, see Joel F. Yoder, "Hebert Spencer and His American Audience" (PhD diss., Loyola University Chicago, 2015). For an overview of Spencer's reception in the United States, see William Hofstader, *Social Darwinism in American Thought 1860-1915* (Philadelphia: University of Pennsylvania, 1945), 18-37 though Hoftsader's reductive reading of Spencer as a social Darwinist has been since criticized, see above note six.
[78] For Spencer's changing views on land nationalization, universal suffrage and religion, see Weinstein, "Hebert Spencer." My account of Spencer in this chapter likewise emphasizes the changing aspects of Spencer's thought, and highlights some more radical aspects to his thinking that complicate the picture of Spencer as an ultra-conservative, but nonetheless I draw attention to how his views on children in particular became more conservative over time.

intervention. In that work, Spencer noted this new conception of liberalism had become popular and warned that it would be the harbinger of despotism worse than the feudalism and slavery from which classical liberalism had emancipated society.[79] By the late nineteenth century, Spencer was an intellectual figurehead for American proponents of *laissez-faire* capitalism, a feted guest of academics such as William James Graham Sumner and Gilded-aged industrialists alike.[80]

By the 1890s, Florence Kelley was a committed socialist, spearheading efforts for the state to intervene in industry in Illinois. And as her earliest writings evidenced, she had always viewed the state as a potentially emancipatory agent and essential vehicle for upholding and protecting the rights of individuals. By the late nineteenth century, then, Spencer and Kelley occupied two poles on the political spectrum, and it seemed discordant that their writings ever shared any common intellectual tenets. But by looking at Herbert Spencer's early writings on children's rights, which were influential in the United States, we can first see how pervasive the individualist narrative was in the mid-nineteenth century.[81] And in particular, by tracing Spencer's about-face on the rights of children, we can see how the question of children's rights would become a litmus test for how far the individualist narrative would stretch, prompting, in Spencer's case, a vehement defense of paternal sovereignty as a bulwark against state power. The movement for children's rights became a driving force behind the reformulation of liberalism and the expanding boundaries of state power in the long Progressive Era, as

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[79] Spencer reprinted the published articles that formed *The Proper Sphere of Government* in *The Man versus The State with Six Essays on Government, Society and Freedom* (New York: D. Appleton and Company, 1892).
[80] On Spencer's popularity among the Gilded-Aged elite, see Sven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850-1896* (Cambridge: Cambridge University Press, 2001), 212-213.
[81] As the final section of the chapter shows, Spencer's writings on the child were influential on how the *laissez-faire* constitutionalist Christopher Tiedeman approached the question of parental rights, children's rights and state power in the late nineteenth century. Spencer's radical celebration of the rights of the child were also disseminated in the United States in new manuals on child-rearing, such as Bertha Meyer, *Aid to Family Government,* trans. M.L Holbrook (New York: M. L. Holbrook & Co., 1879). Meyer (who also went by her husbands' name Ronge) was a German born activist on behalf of children and women's education, who began the kindergarten movement in Europe. She founded the first three kindergartens in London in 1851, with her sister Margarethe. Her sister later married Carl Schurz, moved to the United States and founded the first kindergarten in Wisconsin in 1856.

presaged in Kelley's essay and evidenced by her career.[82] Ideas about paternal sovereignty that seemed so outmoded by the mid-nineteenth century found new resonance and new life well into the twentieth century because children were so central to the expansion of state power. Paternal sovereignty came to form part of a conservative, reactionary pushback against Progressivism and a central tenet of *laissez-faire* ideology.

In *Social Statistics,* first published in 1851, Spencer took aim at the concept of family government and made strident statements in support of the equal rights of women and children. Published a decade before Maine's *Ancient Law,* Spencer's work was a philosophical treatise in which he promulgated his vision of an ideal society that ordered around the "law of equal freedom." The law of equal freedom, which constituted the basis of natural law in Spencer's thought, meant every individual could "claim the fullest liberty to exercise his faculties."[83] Nearly two decades before Harriet and John Stuart Mill published "The Subjection of Women," Spencer came out in favor of women's full and equal rights, writing that the law of equal freedom "knew no difference of sex."[84] For his time, his writings on children's rights were even more radical. He rejected the dominant Lockean conception that the capacity to reason formed the basis of individual rights. "A true rule has no exceptions," Spencer stated, claiming that the child "has claims to freedom – rights as we call them, co-extensive with those of

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[82] Pearson, *The Rights of the Defenseless.*

[83] Spencer, *Social Statistics,* 155.

[84] Spencer, *Social Statistics,* 187. Spencer anticipated Harriet and John Stuart Mill on rights of women by twenty years and went far beyond the Mills' argument in his claims about the rights of the child. On the radicalism for Spencer's writings on women's rights for the time see Mark Francis, *Herbert Spencer and the Invention of Modern Life* (Cornell: Cornell University Press, 2007), 69-70 and Ernest Barker, "The Scientific School: Hebert Spencer And After Spencer," *Herbert Spencer: Critical Assessments,* ed. John Offer (London: Routledge, 2000), 13. I disagree with Francis's contention that the inconsistency in Spencer's writings on women mean that his "feminist politics beyond to his biography, not his political theory," 69. As I argue below, Spencer's conservative turn on women's rights and particularly children's rights ought to be regarded as an important factor in the development of his political philosophy and in particular his criticism of the statist tendencies of modern liberalism.

the adult." All individuals, regardless of sex and age, had the natural right to exercise their freedom to the fullest of their capacities. "[85]

For Spencer, the universality of the law of equal freedom was the inexorable path of social evolution as society moved beyond all forms of coercive government in both the family and the state to emancipate all individuals. In plotting the path to progress, Spencer's abstract theory accorded broadly with Maine' empirically grounded thesis in *Ancient Law* – both emphasized the imperative for individuals to be liberated from family government. Indeed, anticipating the same term that Maine would adopt in *Ancient Law*, Spencer called for an end to "domestic despotism."[86] For Spencer, the freedom of women and children measured how emancipated a society was at large. He criticized his fellow countrymen for their ability to recognize the problems of domestic despotism in "less civilized" nations, but their inability to recognize the same seedbed of despotism at home. In his rejection of coercive governmental power, Spencer singled out "despotism in the family" as a source of "despotism in the state."[87] The tolerance of the patriarch's rule over his wife and children was a blind spot in the development of liberal individualism.

Spencer countenanced that the universality of the law of equal freedom included extending political rights to women and children. "We cannot avoid this conclusion, if we would," he ventured. "Either we must reject the law altogether, or we must include under it both sexes and all ages."[88] He acknowledged that it was "plausible" to argue against this position because children had underdeveloped faculties. (At this time, Spencer outright rejected that women had lesser mental faculties than men.)[89] If rights

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[85] Spencer, *Social Statistics,* 155, 187. On how Spencer's own upbringing influenced his critique of power imbalances within the family, see Francis, *Herbert Spencer*, 71.
[86] Spencer, *Social Statistics,* 184. Maine used same the term to describe Roman law. Maine, *Ancient Law,* 81.
[87] Spencer, *Social Statistics,* 187, 161-63.
[88] Spencer, *Social Statistics,* 187.
[89] In *Social Statistics,* Spencer rebuked his critics who opposed the extension of the law of equal freedom on the grounds that it would mean that the "political privileges exercised by men must thereby be ceded to women." To this he answered, "of course they must, and why not?" Spencer, *Social Statistics,* 169.

were dependent on faculties, it was arguable that the rights of children could not be "co-extensive with the rights of adults." But Spencer felt it was "a curious compound of truism and absurdity" to suggest that because an individual had fewer faculties, he had no right to exercise the faculties he did have.[90] Children held the same rights as adults, and therefore it followed that children ought to be endowed with the same political power as adults. Spencer admitted that such a declaration exposed his whole theory of the law of equal freedom to mockery.[91] Yet, he maintained that the absurdities of the political enfranchisement of children exposed the problems with the institution of government, rather than the law of equal freedom. If the moral law were universally obeyed, Spencer argued, there would be no need for government. If there were no need for government, then there would be no need to enfranchise children. In a perfect Spencerian society, all individuals, men, women and children alike would be fully emancipated and free from all forms of coercive government.

Spencer's writings on the equal rights of the child were a compelling example of his radical individualism, and importantly, a position he would later come to revile. At the other end of the spectrum, socialists such as Frederick Engels also found merit in the individualist narrative. Frederick Engels began working on the relationship between the patriarchal family and state power in the early 1880s, shortly after Florence Kelley did. Both would publish their respective theses a few years before they met, but their conclusions shared much in common. Engels began working on the subject after he found the notes Karl Marx had written on Lewis Morgan's *Ancient Societies*.[92] In notes written shortly before his death in 1883, Marx had begun to incorporate Morgan's groundbreaking history on the evolution of the family and the state into his and Engels'

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[90] Spencer, *Social Statistics,* 169.
[91] Spencer, *Social Statistics,* 191. It was "easy to imagine" the "smiles" of those who opposed the law of equal freedom as the "mediate[d] upon the absurdities" of his position on the equal political rights of children.
[92] Lewis H. Morgan, *Ancient Society* (Chicago: Charles Herr and Company, 1910).

thesis on the development of class, private property, and the state. Completing that task, Engels viewed his 1884 work, *The Origin of the Family, Private Property and the State* as "executing a bequest" to his late friend and ideological partner.[93]

Engels' efforts to popularize Lewis Morgan's history in *Ancient Society* cemented the association between radical politics with those who supported the fall of family government. Morgan's work was one of a body of path breaking anthropological, ethnological and legal inquiries published in the 1860s and 1870s that challenged Maine's "patriarchal theory," arguing instead that the earliest family forms were in fact matrilineal. Morgan, however, took his argument further than his colleagues across the Atlantic such as Johan Jakob Bachofen, John McLennan and E.B. Tylor. This group of European scholars all found evidence that the earliest societies were organized along matrilineal lines of descent, but suggested that the patriarchal family emerged later as a more advanced stage of civilization and the germ seed of modern government.[94] Morgan went further upending the patriarchal theory by claiming that the patriarchal had never formed the basis of government, even if it did mark a later stage of familial development.

Morgan tracked the evolution of both familial forms and governmental organization through his study of the kinship systems and customs of the Iroquois. He mapped the evolution of the "growth of the idea of government" into two "general plans": "society" (societas) and the "state" (civitas). In early times, "society" was indeed structured by one's relationship to a common ancestor based on a concept he dubbed the gentes (kinship). The gentes, however, constituted a very different germ of government than the familial bonds of *patria potestas*. The gentes dated back to the archaic

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[93] Engels, *The Origins of the Family*, 25.

[94] Johann Jakob Bachofen, *Myth, Religion and Mother-Right: The Select Writings of J.J. Bachofen,* trans. Ralph Manheim (Princeton: Princeton University Press, 1967), 69. On the discovery of the mother-right, see Kuper, "The Rise and Fall of Maine's patriarchal society," 105-107 and Allen, "Feminism, Social Science, and the Meanings of Modernity," 1089-1099.

period when family forms were exclusively matrifocal, antedating the monogamous patriarchal family structure. The "state," according to Morgan, emerged in the times of the Ancient Greeks and Romans and was founded upon territory and property. Thus, he agreed with Henry Maine that the origins of the modern state lay in Ancient Greek and Roman times when the patriarchal family was constructed under *patria potestas,* but he urged that the two developments were unrelated.[95] It was the individual who formed the political unit in Ancient Roman times.

The Origins of the Family, by Engel's own admission, was a recapitulation of Morgan's *Ancient Societies* encased in a political commentary. For the Marxist critique of the capitalist state, the discovery of the mother-right age was revelatory for two main reasons. It belied the apparent timelessness of the subjugation of the female sex. Moreover, it revealed the widespread existence of communal household structures and collective ownership of property before the emergence of an individualized family and the privatization of property. In Engels' interpretation, changes in the modes of production, namely the domestication of animals and the development of agriculture, spurred the accumulation of wealth and alienable property. These developments created the economic impetus for the shift to paternal lines of descent. Engels revisited his conception of the origins of class conflict, arguing the "first class antagonism" in history coincided with the "development of the antagonism of man and wife in monogamy, and the first class oppression with that of the female by the male sex."[96] The Roman family was the "ideal type" of the patriarchal family and took form to privatize property,

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[95] The patriarchal family had never been part of the gentes because the husband and wife belong to different gentes. Morgan, *Ancient Societies,* 47-48. Indeed, Morgan acknowledged it was an "important question" because many "able and acute investigators" of his generations and generations' prior from the historians George Grote and Connop Thirlwall to his contemporary, and rival, Henry Maine had taken the same position in arguing the patriarchal family was the "integer" that structured Ancient Greek and Roman societies. He further understood his conclusion that the patriarchal family had no role in the origins of the state would have present day implications. "The family," he maintained, was "not the unit of the political system" and this was "equally true with respect to the modern family and political system." *Ancient Societies,* 233-234.

[96] Engels, *The Origins of the Family*, 79.

secured in laws of primogeniture.[97] The bourgeois family, which grew out of the patriarchal family, was the nexus between private property and the state.

The socialist revolution, therefore, would undermine the foundations of the bourgeois family and improve the status of women and children alike. Engels harnessed the idea that the family and state adapted to fit the changing needs of society over time to make predictions about the changes that were forthcoming. "We are now approaching a social revolution, in which the old economic foundations of monogamy will disappear," Engels predicted.[98] When the means of production were transformed into collective property, the supremacy of men in marriage would fall because male headship rested on men's economic superiority. Moreover, Engels argued the fall of the male-headed family would precipitate a shift in the governance of children's lives for the better. It would transfer responsibility for the child from private family to the public at large. When society moved beyond the bourgeois family form, the care and education of children, Engels trumpeted, would become a "public matter" in which "society cares equally well for all children," legitimate and illegitimate children alike.[99] Like Kelley, Engels posited that the fall of the patriarchal family as an organizing unit would ameliorate the position of children, making the rights of all children a matter of public concern.

The political implications of the debate of the relationship between the individual, the family and the state were laid bare in Engels' work. At the time of publication, Engels believed his argument was too dangerous to the capitalist order to

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[97] Engels, *The Origins of the Family*, 70-71. The emergence of slavery "by the side of monogamy" Engels argued, where "young and beautiful female slaves" belonged "without any restriction to their master" from the "very beginning gives to monogamy the specific character of being monogamy for women only, but not for men. And this character remains to this day," 76. Engels contended, and the fact that "family" derived from the Roman word "familia" meaning the "aggregate number of slaves belonging to one man" was instructive – slavery and serfdom were inherent in the modern family that coalesced to privatize property.

[98] Engels, *The Origins of the Family,* 81-82.

[99] Engels, *The Origins of the Family,* 82.

enjoy a wide audience.[100] The discovery of the mother-right, more broadly, was contained to the academy, compared to the wide, popular consumption of Henry Maine's "patriarchal theory." Indeed, when Florence Kelley offered to translate *The Origins of the Family* into English in the early 1890s, Engels declined her offer, writing, "it will take some time yet before the *mass* of the American working people will begin to *read* socialist literature." As evidence, he pointed out that at suffragist meetings in the United States, Americans were still busy discussing Maine's *Ancient Law,* proof apparent they were not ready for socialist theory.[101]

Still, a wide range of women's rights activists seized upon Morgan's work to offer a critique of male rule in the family and the state. Suffragist Elizabeth Cady Stanton offered her own reading of Morgan's *Ancient Society* before the 1891 assembly of the National Women's Conference in Washington D.C. She used Morgan's findings as evidence that the patriarchal family was not and never had been the political unit of the state. The individual was always the political unit of the state, she lectured, and the discovery of the mother-right revealed that women's subjection was not timeless, but rather there had been a time when women ruled supreme. Scholars who argued that the patriarchal family was the germ seed of government did so for the same reasons as modern opponents of women's suffrage: "They cling to the idea of 'the family unit' because that is based on the absolute power of the father over the property, children and civil and political right of wives."[102]

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[100] In 1902, Engels' translator, Ernest Untermann claimed that the findings of Marx, Morgan, Bachofen and Darwin had "never reached the great mass of humanity" because they were "dangerous to the existing (capitalist) order." "The names of these men are practically unknown… their books are either out of print, or they are not translated into English. Only a few of them are accessible to a few individuals of on the dusty shelves of some public libraries. Ernest Untermann, preface, *The Origins of the Family*, 5.

[101] Frederick Engels to Mrs. Florence Kelley Wischnewetzky, Eastbourne, August 13, 1886 [emphasis in original] in Karl Marx and Frederick Engels, *Letters to Americans, 1848-1895: A Selection* (New York: International Publishers, 1969), Frederick Engels to Mrs. Florence Kelley Wischnewetzky Eastbourne, August 4, 1886, International Institute for Social History Archives, Amsterdam as cited in Skar, *Florence Kelley and the Nation's Work,* 120.

[102] Elizabeth Cady Stanton, "The Matriarchate or The Mother-Age," read by Susan B. Anthony on February 25, 1891, in ed. Rachel Foster Avery, *Transactions of the National Council of Women of the United States:*

The next generation of women's rights activists, such as Jane Addams, used the discovery of the mother-right to reimagine a more maternal and benevolent state. Addams, who would welcome Florence Kelley into her Hull House Settlement in Chicago in 1891, where the two would form a close and productive bond, invited the readers of her weekly column in *Ladies Home Journal* to imagine "the result upon society if the matriarchal period held its own." Such a state, she suggested, would look markedly different. In contrast to the present state where men dominated in government, its chief function would entail the "nurture and education of children and the protection of the weak, sick and aged."[103]

Some women's rights activists would also offer feminists critiques of Henry Maine's individualist thesis. Scottish novelist and feminist Mona Caird, for example, argued the shift from status to contract was a "lopsided development" that was "rendered half-futile" because only men were allowed to become fully independent individuals. [104] The modern family still bore the strong imprint of its patriarchal predecessor.[105] "We are living under a slowly-disintegrating patriarchal system and find it difficult to realize any other," she maintained. American feminist and sociologist Charlotte Perkins Gilman agreed, arguing that the modern family was still "man-made despotism" that hindered the individualism of men, women and children alike.[106] While women's rights activists grasped the radical political implications of the conclusion that the patriarchal family had no place in the modern state, they also believed that society at large would be slow to accept the full implications of such a discovery. Cairn cautioned

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assembled in Washington, D.C., February 22 to 25, 1891 (Philadelphia: J.P. Lincott [National Council of Women of the United States], 1891), 219-220.

[103] Jane Addams, "Miss Addams," *Ladies' Home Journal*, 30, June 1913, 21. As Kelley described it, when she showed up unannounced at Hull House with her children, "Addams welcomed as if we had been invited." Kelley, "When Co-Education Was Young," 34. On the partnership between Kelley and Addams, see Sklar, *Florence Kelley and the Nation's Work,* chapter eight.

[104] Mona Caird,"The Emancipation of the Family: Part II" *The North American Review* 151, no. 404 (1890): 27.

[105] Mona Caird,"The Emancipation of the Family: Part I" *The North American Review* 150, no. 403 (1890): 692-705, Caird,"The Emancipation of the Family: Part II": 22-37.

[106] Charlotte Perkins Gilman, *The Man-Made World: or, Our Androcentric Culture* (New York: Charlton, 1911).

that the resistance would be fierce; the defense of family government, she wrote, was the "last citadel of the less intelligent kind of conservatism, and it has been defended with the ferocity and jealously with which one instinctively fights for a last hope."[107]

With respect to children's rights, Florence Kelley had anticipated the same type of push back. "So marked is the emphasis now laid by the law on the individuality of the child," she wrote in 1882, that one writer had already "complained that the child's present position as the 'favorite of the law' is attained largely at the expense of the family…"[108] Her essay, however, reflected the optimism of her youth, overstating the progress that had been made already towards realizing children's rights and underestimating how vehement the backlash would be. Reflecting on her essay in the 1920s, Kelley admitted that she never could have anticipated that the 1920 census would show that one million children between ages six and ten were still laboring. "Nor could America's bitterest critic," she wrote, "have foretold the cynical opposition which, to this day, frustrated every effort to establish for wage-earning children the equal protection of the law throughout the Republic."[109] In her view, the battles for women's rights and children's rights were intimately linked. If women had been politically enfranchised earlier, their power as voters would have vastly expedited the progress towards the realization of children's rights.[110]

The battles for women's rights and children's rights, as Kelley's career attested, dominated in the late nineteenth and early twentieth century. But with respect to children's rights, in the late nineteenth century, the widespread acceptance of the idea that children had rights that the state was bound to respect first paved the path for a quiet revolution in the law that defined and upheld children's rights. The mounting

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[107] Caird,"The Emancipation of the Family: Part II," 33. On women's rights activists' engagement with and participation in the debates over the mother-right, see Allen, "Feminism, Social Science, and the Meanings of Modernity,"1085-1113.
[108] Kelley, "On Some Legal Changes," 97.
[109] Kelley, *Notes of Sixty Years,* 64.
[110] Kelley, *Notes of Sixty Years,* 64.

judicial consensus rested on the premise that children had rights, but that the rights of children were distinct from the rights of adults. Before the Supreme Court decision in *Muller v. Oregon* in 1908, for example, courts would go back and forth on whether women and men had the same "right to contract," The view that women had the same right to contract as men invalidated protective labor legislation for women, but the view that women's rights were different on account of their childrearing capacities and obligations meant that protective labor legislation for women was constitutional as the Supreme Court ultimately held in *Muller*. By contrast, courts universally upheld state laws that protected child laborers in recognition of the unique rights of children.[111]

By the twentieth century, the fact that legislators could enact broad laws about children, and the growing middle-class consensus that children had a right to be protected, led many Progressive reformers to focus many of their campaigns on children.[112] State enactments that upheld the rights of the child, in turn, expanded the powers of the state. The combination of these two facts would produce fierce political resistance, a resistance that would only grow in size and strength as reformers increased their legislative ambitions. While there was broad support for children's rights in principle, the efforts to enforce child labor laws and compulsory school laws would test the public's tolerance for the state taking a grant of power away from families. As we shall see in the final section through the conservative turn of Herbert Spencer, the symbiotic relationship between the enlargement of children's rights and the expansion of

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[111] Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* (Ann Arbor: University of Michigan Press, 2001), 87-89, Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (Oxford: Oxford University Press, 2001), 29-34. Florence Kelley understood this challenge first hand with respect to women's protective labor laws. After completing a law degree at Northwestern in 1895 (for which she used her undergraduate thesis on Blackstone and studies in Zurich as credit), she defended the labor laws that she had helped devise before the Illinois Supreme Court. The Court struck down the provisions protecting women, but left the child labor regulations standing. Later, she would help craft the successful defense of Oregon's protective legislation for women in the case of *Muller v. Oregon,* 208 U.S. 412 (1908). On the Illinois case, see Sklar, *Florence Kelley and the Nation's Work,* 256-264.

[112] Viviana A. Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* (Princeton: Princeton University Press, 1994).

state power breathed new life into old arguments about paternal sovereignty which came to form a key, but under recognized component of *laissez-faire* ideology.

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The "rightful" claims of children and the makings of the modern liberal state

In 1891, Florence Kelley found refuge at the Hull House settlement in Chicago, Illinois, from where she would launch her career as a reformer. Having left her abusive husband, Kelley arrived with her three children in tow, with little money but a lot of ambition. Her understanding of the sources of the problems afflicting children had expanded after her European sojourn; it was the "capitalist system of production" that had created the problem of child labor she explained her 1889 essay *Our Toiling Children.*[113] But as Kelley set out to enact her socialist vision in the United States, she nonetheless returned to the state legislative reforms she had studied as an undergraduate. "I am working on the subject of Child Labor (and Compulsory Education)," she explained to Engels in March 1889.[114] Her vision of what would constitute children's rights was expansive and uncompromising. At this time, many reformers supported child labor legislation that, for instance, set limits on the hours of child workers, prohibited them from working at night, or introduced minimum age requirements ranging from eight to fourteen. In 1890, Kelley announced in a symposium published in *Arena Magazine* that her goal was legislation that would prohibit the employment of all children under eighteen. To achieve this goal, she envisioned that the state would greatly expand the provision of public schooling, employ a suite of truant officers and factory inspectors, and offer free clothing and schoolbooks to indigent children.[115]

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[113] Florence Kelley Wischnewetzky, *Our Toiling Children* (Chicago: Women's Temperance Publication Association, 1889), 35.
[114] Florence Kelley Wischnewetzky to Frederick Engels, 110 7 E. 76th St, New York City, March 29, 1888, International Institute for Social History Archives, Amsterdam as cited in Sklar, *Florence Kelley and the Nation's Work,* 141.
[115] Florence Kelley Wischnewetzky, "White Child Slavery," *The Arena,* 1, no.5 (April 1890), 595-596.

Florence Kelley was the type of reformer, and her legislative proposal the type of scheme that Herbert Spencer had in mind when he singled out the United States as a country that had had established more "liberties for the young" than was "either just or politic." He complained "political ethics now in fashion," injected what he called "the ethics of the family" to "vitiate the ethics of the State," as evidenced by the raft of protective child labor laws and compulsory education laws enacted in the late nineteenth century.[116] Women, he charged, were particularly responsible for this new, dangerous form of liberalism because they "led by their feelings" and maternal instinct to believe the "ethic of the family" had a role to play in the state. By the 1890s, Hebert Spencer was railing against this transformation in liberalism, which had led to an increasingly interventionist state on both sides of the Atlantic. In his mind, the growing number of legislative enactments on behalf of children was the greatest example of the way liberal ideas were being perverted to aggrandize state power and comprised one of the greatest threats to individual rights. His observation led him to reverse his radical pronouncements in favor of children's rights. Perhaps the only point on which he could now agree with his ideological opponents was that children's rights were fundamentally different to the rights of adults. He proposed an entirely new lexicon to distinguish between the "rights of adults" and the "rightful claims of children."[117] Kelley and wide range of Progressive reformers would agree; children's rights were different to adults -- because children's rightful claims were rightful claims on the State.

In the United States, it was the work of one of Herbert Spencer's disciples, Christopher Tiedeman, which was a key legal source for the expansive grant of power that the state held over children. Tiedeman, a self-described *laissez-faire* constitutionalist

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[116] Herbert Spencer, *Justice: Being Part IV of the Principles of Ethics* (New York: D. Appleton & Company, 1892), 195-196. Spencer wrote: "The idea of paternal government ought to have died with fall of the Roman Empire," but that the "ancient social idea, like ancient religious idea, survives, or continually re-appears, under conditions utterly unlike those to which it was appropriate."
[117] Spencer, *Justice,* 168.

who led a conservative backlash against the rising tide of liberal state interventions in the late nineteenth century, in fact drew on the writings of Spencer and Maine to arrive at his position on children's rights. Tiedeman shared Spencer's ideological antipathy to government. In particular, he was concerned by what he perceived to be a growing abuse of the police powers of the states – the power reserved to the states under the constitution to pass regulations necessary for the health, safety, morals and general welfare of the population. Tiedeman's *A Treatise on the Limitations of Police Powers in the United States,* published in 1886, sought to correct that tendency by demarking strict constitutional limits on the exercise of police powers.[118] In that volume, the right of the state to protect children's rights constituted a rare exception to his otherwise hostile attitudes towards "paternal" state laws.

The respect for constitutional limits, Tiedeman felt, would rid state legislatures of their "tyrannical" tendencies and save the United States from the threat of socialism. In the late nineteenth century, there had been "so many unjustifiable limitations imposed upon private rights, sumptuary laws, and laws for the correction of personal vice," Tiedeman wrote, that the "entire modern world looks upon with distrust any exercise of police power" no matter how justifiable it was.[119] The present state of government had led the "conservative classes to stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any experienced by man." [120] Since the American Revolution, he argued, Americans had jealously guarded a tradition of limited governance while the memory of the tyranny of monarchy loomed large. "But the political pendulum is again swinging in the opposition direction…. Government interference is proclaimed and demanded everywhere as a sufficient panacea for every

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[118] Tiedeman, *A Treatise on the Limits of Police Powers*. Tiedeman was one of two leading *laissez-faire* constitutionalist in this pushback, the other was Thomas Cooley who authored the *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, 2nd ed. (Boston: Little, Brown & Co., 1871).
[119] Tiedeman, *A Treatise on the Limits of Police Powers,* 9.
[120] Tiedeman, *A Treatise on the Limits of Police Powers,* vi.

social evil which threatens the prosperity of society." Indeed, "Socialism, Communism and Anarchism" were "rampant," as "The State" was "called upon to protect the weak against the shrewdness of the stronger," particularly in labor relations.[121] In the face of this perceived onslaught, Tiedeman spearheaded a vehement defense of private property rights. He rejected usury laws, prohibitions on gambling and drugs and protective tariffs as unconstitutional exercises of police powers. He regarded all laws regulating the hours and wages of adult workers as unconstitutional encroachment of men's fundamental rights and was most famed for his formulation of the "liberty to contract."[122]

Yet, within the realm of domestic relations, Tiedeman appeared sympathetic towards paternal state action to check the abuses of power of the head of the household. Like Spencer, Tiedeman's reverence for individual rights as the cornerstone of liberty led him to hold liberal attitudes to the rights of women, children and African Americans. Acknowledging that neither women nor African Americans were equal under the existing legal order, Tiedeman nonetheless viewed anti-miscegenation laws as unconstitutional and rejected any laws that subjected a wife to her husband's command or gave him control over her property rights.[123] Men no longer held rights over their women and children because patriarchal family belonged to a by-gone era. "In the words of Hebert Spencer," he quoted, "to the same extent that triumph of might over right is seen in a nation's political institutions, it is seen its domestic ones. Despotism in the State is

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[121] Tiedeman, *A Treatise on the Limits of Police Powers,* vi-vii. Tiedeman's perception that there had been an exponential growth in the use of the police powers in the late nineteenth century that displaced a tradition of limited governance did not accord with the historical record, but was part of powerful narrative that suggested that United States had enjoyed limited government until the Progressive Era. William J. Novak, "The Myth of the 'Weak' American State," *The American Historical Review* 113, no. 3 (2008): 752-772; William J. Novak, *The People's Welfare* (Chapel Hill: The University of North Carolina Press, 1996).

[122] David N. Mayer, "The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism," *Missouri Law Review* 55 (1990): 89–90.

[123] On the issue of slavery, Tiedeman that despite the "fundamental and constitutional guaranties of personal liberty" that marked the founding of the Republic, "the astounding anomaly of slavery of an entire race in more than one-third of the States of the American Union, during three-fourths of a century of national existence, gave the lie to their own constitutional declarations that "all men are endowed by their Creator with certain inalienable rights…" After the passage of the Thirteenth Amendment, Tiedeman reported, "happily, this contradiction is now a thing of the past." Tiedeman. *A Treatise on the Limits of Police Powers,* 536*,* 544-555.

necessarily associated with despotism in the family."[124] To vest men with rights over the property or wages of their dependents was to allow a seedbed for state despotism to fester.

Tiedeman argued that children had their own inherent rights and liberties. Adopting Maine's historical narrative, Tiedeman regarded the father's "autocratic" and "absolute" power as a product of a historic age when the family was the political institution of the state that could no longer be justified. Tiedeman recited the history of the ancient societies in which the family was the "primal social and political organization," noting that the extensive powers of Roman fathers extended to the power to sell or kill his children.[125] This history was important for Tiedeman because it revealed that the father's control over his children was not based on his "natural capacity of a sire" but rather derived from the political function of the family. "When, therefore, the family ceases to be a subdivision of the body politic, and becomes a domestic relation instead of a political institution," Tiedeman reasoned, "we expect to find, and we do find as fact, that this absolute control of the children is taken away."[126] Children, "like the father," in modern states, "become members of the body politic, and acquire political and civil rights, independently of the father." The abolition of family government as a political unit endowed the child "whatever his age may be" with the "same claim to liberty" as an adult. [127] Here, Tiedeman's thinking reflected Spencer's ruminations on the child and the law of equal freedom.

Tiedeman, however, took that conclusion one step further. The emancipation of the child from the dominion of the family resulted in the "supreme control" being

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[124] Tiedeman, *A Treatise on the Limits of Police Powers,* 544-545 quoting Spencer, *Social Statistics*, 179.
[125] Tiedeman, *A Treatise on the Limits of Police Powers,* 552.
[126] Tiedeman, *A Treatise on the Limits of Police Powers,* 552.
[127] "To recognize in the father any absolute right to control of his child, would be to deny that "all men are born free and equal," Tiedeman, *A Treatise on the Limits of Police Powers,* 552.

"transferred to the State."[128] Men were still entrusted with the control over children during their minority, but because children were born free and equal and were "entitled to the equal protection of the law" and "enjoyment of equal liberty" Tiedeman declared: "the authority to control the child is not the natural right of the parents; it emanates from the State, and is an exercise of police power."[129] It was a statement that would be widely cited by courts in the Progressive Era. The state delegated its power police to parents, and if parents were derelict in fulfilling these duties, the state held the supreme power to step in. As evidence of this established point of law, Tiedeman cited cases where courts had upheld the state's powers to override parental consent in conscripting minors, intervening in custody disputes, and binding out poor children. Importantly, he singled out child labor laws as the sole legitimate protective labor law.[130] "There never has been, and never can be, any question as to their constitutionality," he asserted.[131] As he would put it in a later treatise: "Minors are wards of the nation, and even the control of them by parent is subject to the unlimited supervisory control of the state."[132]

The judicial consensus that states held expansive powers over children was critical to state-building efforts in the long Progressive Era. State courts that universally upheld the constitutionality of child labor laws continually cited Tiedeman's writings.[133] The Supreme Court of Oregon in 1906, for instance, turned to Tiedeman's treatise in upholding the constitutionality of the state's child labor law. The decision in *State v.*

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128 Tiedeman, *A Treatise on the Limits of Police Powers,* 552.
129 Tiedeman, *A Treatise on the Limits of Police Powers,* 554.
130 Tiedeman also suggested that animals "must be recognized as subjects of legal rights," suggesting that laws against cruelty to animals shouldn't be classified as police offenses "against public morality" but a criminal violation of the "rights of the animal themselves." "Any why should they not be so recognized?" Is it not self-conceit for man to claim that he alone, of all God's creatures, is the possessor of inalienable rights?" Tiedeman posed in *A Treatise on the Limitations of Police Powers,* 513 as quoted in Mark Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005), FN 7, 249.
131 On this point, he noted that the status of protective legislation for women was different, noting that as women were granted property rights, and potentially the right to vote, there was no legal basis to deny women the right to contract as some state supreme courts were beginning to recognize. See also Mayer, "The Jurisprudence of Christopher G. Tiedeman," 142-143.
132 Christopher Tiedeman, *A Treatise on State and Federal Control of Persons and Property in the United States* (St Louis, 1900), 355.
133 On this point, see Schmidt, *Industrial Violence and the Legal Origins of Child Labor,* 158.

Shorey held that minors were "wards of the states and subject to the states control. As to them the state stands in the position of *parens patriae* and may exercise unlimited supervision and control…"[134] The judicial emphasis laid on the unlimited supervisory powers of the state at the turn of the century represented the profound shift that had occurred since courts had emphasized the virtually unlimited powers of the father, such as Ellis Lewis's declaration in *Commonwealth v. Armstrong* in 1842 that the law "assigned no limits to the authority of the parent."

The consensus about the "principle of supreme state control" in the governance of children's lives was cemented in 1904 when Ernst Freund published *The Police Power, Public Policy and Constitutional Rights.* Freund's treatise supplanted Tiedeman's as the leading authority on police powers and signaled a paradigmatic shift in judicial thought and popular understandings of the police power. [135]He offered broad and expansive definition of the police powers, particularly in rejecting the doctrine of the "liberty of contract" and approving of all protective labor legislation.[136] The power of the state to supervise the exercise of parental rights, then, was a rare point of convergence between the two works. "There is no parental authority independent of the supreme power of the state," Freund wrote.[137]

Twenty years on, Tiedeman's position on parental rights would be reversed within the tradition of *laissez-faire* constitutionalism itself. Tiedeman concluded that parents had no rights that the constitution was bound to respect. By the 1920s, *laissez-*

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134 *State v. Shorey* 86. P. 881 (Oregon 1906) at 882.
135 Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (New York: Callaghan, 1904), 260.
136 Freund, *The Police Power*, 260. Freund viewed all protective labor legislation as a "clear and indisputed title of public power" because it was "enacted in the interested of health and safety" and "to promote decency and comfort."
137 Freund, *The Police Power,* 260. "Our constitutions are silent upon family rights and relations," he opened. Unlike Tiedeman, Freund was not concerned with delving into the history of the family to discover the character of parental rights in order to distinguish parental rights from natural rights. Because he regarded the police power as a necessarily a justified incursion of personal rights and liberties, it was immaterial whether parental rights were natural rights. For police powers that intervened in the parent child relationship to be struck down, Freund continued, "we should have to regard the parental power not only as a natural right but as a natural right above the power of the state to declare its legislative restraint to be unconstitutional."

faire constitutionalist William Dameron Guthrie would break ground in the case of *Pierce v. Society of Sisters* before the United States Supreme Court by arguing the reverse – that parent's rights over children constituted fundamental liberty protected by the Fourteenth Amendment. Guthrie, like Tiedeman, spent his career attempting to strike down state laws he viewed as an unconstitutional interference with private property rights. He would expand upon the substantive due process clause of the Fourteenth Amendment that was the basis of the "liberty to contract" to argue that the natural rights of parents were superior to the states' police powers and deserved protection by the federal constitution. How and why radical individualists would shift from viewing paternal sovereignty as antithetical to the principles of liberal individualism to arguing that it was a fundamental liberty that the states could not abridge was presaged by Herbert Spencer's conservative turn on the subject.

Spencer would no doubt have abhorred the fact that his writings on the rights of children were being used, particularly by a sympathetic ideologue, to expand the state's powers over children and the paternal role of the state. For Herbert Spencer, after forty years of debates and legislative enactments that granted more rights to women and children separate from the family unit, the extension of equal rights that underlay his once utopian view of the law of equal freedom was becoming a lived dystopia. In 1890, in the fourth volume on his *Principles of Ethics* on *Justice,* Spencer walked back his previously radically liberal views on the rights of women and children. In that work, he developed a new framework in which he posited that there had to be a "radical opposition between the ethics of the Family and the ethics of the State" to justify limits on the rights of the child.[138] While Spencer began to qualify his once strident support for women's full and equal rights, particularly within marriage, his about-face on children's rights was stark.

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[138] Spencer, *Justice,* 175-176.

No longer were the rights of children "co-extensive with the rights of adults," as he had argued in *Social Statistics*. Spencer instead proposed distinguishing between the "rights of adults" and the "rightful claims of children" because children were unable to "carry on the activities" associated with rights that he had one deemed an immaterial consideration.[139] To his horror, the fact that children were unable to enact their own rights had been used to amplify the state's paternal role. Spencer opposed all legislation that in his view treated adults like children. All state initiatives that provided support for the welfare, health, education or religious needs of the population, he believed, rested "on the assumption that men are not fitted to take care of themselves."[140] By working against the principle of the "survival of the fittest," all paternal legislation violated natural law and threatened the quality of the race by promoting dependency on the state. But children, he conceded, could not be expected meet all of their needs and wants by themselves, and thus Spencer came to advocate that all of children's needs ought to be met solely and exclusively by their parents, and never by the state.

The defense of parental rights against the paternal state sat at the heart of the conservative turn in Spencer's thinking. To this end, Maine's patriarchal theory was instrumental in Spencer's evolving beliefs about the family. Spencer honed in on Maine's contention that the shift from a family-based government to an individual-based government marked the birth of the modern state. In ancient times, the "despotic powers of the father" under "paternal government" was best adapted to the needs of the time. The state, subject to its own evolutionary path, once had a need of paternal government that no longer existed, and indeed now that the state was organized around the individual, paternal government had no place within the state. Each citizen must be left alone by the state to his own means and capacities as the laws of evolution dictated that the survival of the fittest was the most efficient and just means to distribute

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[139] Spencer, *Justice,* 168.
[140] Spencer, *The Man versus The State,* 247-248.

resources and wealth.[141] To fit children within that schema, Spencer argued there were two conflicting requirements of all species. "During a certain period," Spencer explained, each member of society needed to "receive benefits in proportion to its incapacity" but after that period, "it must receive benefits in proportion to its capacity."

To reconcile these two "antagonistic" principles, Spencer developed a new theory that distinguished the regime of governance of the family from that of the state. Spencer argued there needed to be a "cardinal distinction between the ethics of the Family and the ethics of the State."[142] Spencer concluded that "unqualified generosity must remain the principle of the family."[143] But such an ethic would be ruinous to the state. The family and the state had diametric governing needs, which meant paternalism was necessary within the family and had no place whatsoever in the governance of the state. "And here we come in sight of a truth on which politicians and philanthropists would do well to ponder," Spencer announced. "The salvation of every society, as of every species, depends on the maintenance of an absolute opposition between the regime of the family and the regime of the state."[144] In creating this distinction, Spencer resurrected the concept of family government as having its own "sphere," a "regime" to be that was ruled by a fundamentally different "ethic" to that of the state, insisting never shall the twain meet. And in that fashion, Spencer, perhaps the foremost ideologue for *laissez-faire* capitalism, reappraised Locke's distinction between paternal and political power, endowing it with an evolutionary function that befitted *fin-de-siècle* thought.

By the late nineteenth century, clear ideological camps began to emerge between Progressives who would champion the rights of the child as a means to assert the

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[141] Spencer, *Justice,* 215-216. Fatherhood "habitually implies ownership of the means by which children and dependents are supported; and something like such ownership continued under the patriarchal form of rule."
[142] Spencer, *Principles of Sociology,* 720.
[143] Spencer, *Principles of Sociology,* 719-720. Spencer's writings on the ethic of the family resonated strongly with the themes of bourgeois domestic advice manuals that similarly argued a woman's proper sphere was in the home. As Catharine Beecher put it, "the discipline of the family state is one of daily self-devotion of the stronger and wiser to elevate and support the weaker members." *American Woman's Home,* 18.
[144] Spencer, *Principles of Sociology,* 719.

supremacy of the state and anti-statists who would rely on ideas about paternal sovereignty to argue against the expansion of state power. While Tiedeman believed there were no constitutional limits on the exercise of the state's police powers over children, he immediately raised doubts about the political wisdom of laws that ignored or disturbed the "natural bond between parent and child." He singled out compulsory schooling laws as a prime example. When state governments moved beyond providing free schools, exhibiting a "desire to force every child to partake of the State bounty against its will and the wishes of its parents," such an exercise of police power he felt, albeit constitutional, would "meet with a determined opposition from a large part of the population." Such laws would, he predicted, "surely prove dead letter."[145]

Paternal sovereignty was a line touted not only by classical liberals but also by traditional conservatives. The controversy over the governance of children's lives played out far beyond the borders of the United States. In 1891, Pope Leo XIII took a strong and forthright position on the question in the papal encyclical *Rerum Novarum*. Viewing socialism as a growing threat in Europe, and in response to the sectarian schooling wars that predominated in the nineteenth century United States and elsewhere, the Pope offered a criticism of liberalism and socialism alike.[146] The contention that "civil government should at its option intrude into and exercise control over the family and the household is a great and pernicious error." Affirming the Church's commitment to the family as a sovereign unit, antecedent and autonomous to civil government, the encyclical placed particular emphasis on the rights of the father over the child. "Paternal authority can neither be abolished nor absorbed by the state," the encyclical pronounced," for the child "belongs to the father." The child was a "continuation of the father's personality" that did not hold a place in civil society "in its own right," only as a

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[145] Tiedeman, *A Treatise on the Limitations Of Police Power in the United States*, 559-560.
[146] On this question in France, see Judith Surkis, *Sexing the Citizen: Morality and Masculinity in France, 1870–1920* (Ithaca: Cornell University Press, 2006), chapter one.

member of the family.[147]

On the other side of the divide, a public conception of the child became axiomatic of Progressive Era thinking. By the turn of century, a chorus of reformers, maternalists, sociologists and Progressive-minded lawyers had joined Kelley and Engels in celebrating the child as an individual with rights that society at large was responsible to uphold. Lawyer Frank Fessenden in 1899 summarized: "Acts of legislation and judgments of courts abound in evidence of the zealous care which the public exercised over children. These children belong to the public no less than to their parents."[148] And in 1906, surveying developments in public education, sociologist Ellwood Cubberly boasted that "each year the child belongs more to the state and less to the parent."[149] The sentimental view of the child, in particular, as an innocent individual deserving of the state's protection helped to build a broad-based consensus in support of child-centric legislative initiatives that expanded the purview of the state. By the Progressive Era, as Kelley put it, the "legal paternal right of protecting one's chattel" had become "the universal right of the child to be protected."[150] Florence Kelley, and a host of other maternalist reformers, viewed policy questions concerning children as a not only an entry point for women to exert a greater role in the state, but for the state itself to exert a greater role in civic and economic life.

By the late nineteenth century, the rights of the child became a prominent cause around which Progressives could mobilize broad-based coalitions to call for an enlargement of state power. While Florence Kelley herself viewed state protections for all workers as politically necessary, she would still turn to children and women as an

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147 *Two Basic Social Encyclicals* (Washington, DC: The Catholic University of America Press, 1943), 15-17. "Behold, therefore, the family, a very small society indeed, but a true one, older than any polity! For that reason it must have certain rights and duties of its own entirely independent of the state."
148 Frank Fessenden, "Nullity of Marriage," *Harvard Law Review*, 13 (1899), 110 as quoted in Grossberg, *Governing the Hearth,* 219.
149 Ellwood Cubberly, *Changing Conceptions of Education* (Boston: Houghton Mifflin Company, 1909), 63.
150 Kelley, "On Some Legal Changes," 90.

opening wedge for protective state action. As she explained to the German socialists in 1895, she had found it was easier to achieve legislative gains in the United States by "appealing of the masses for the welfare of helpless working women and children" than it was to find support for measures that protected "the lives, bodies and health of men."[151] Indeed, the cause of child labor allowed reformers like Kelley to build cross-class coalitions in support of state action, without necessarily requiring them to buy in to a broader critique of capitalism. Instead, many middle-class reformers would limit their critique to the excess of paternal power as Kelley once had. For instance, Jane Croly, the head of the General Federation of Women's Clubs, explained the causes of the problem of child labor in 1890 as the "remnants of the primitive idea" that men "owned" their children that "still lingered in the minds of brutal and ignorant individuals" and therefore legislative intervention was required to "dispel this idea."[152]

The reverse, however, also held true: conservatives and anti-statists would similarly find that the sovereignty of the male-headed family was a cause around which they could mobilize broad-based coalitions to arrest the expansion of state power. Over the next forty years, anti-statists would make a lot out of the friendship between Kelley and Engels, seeking to undercut her reform efforts by casting them as a socialist plot. Anti-statists, of course, abhorred Kelley and Engel's view on the role the state should play in economic life. But they would continually emphasize Kelley and Engel's apparent antipathy to the male-headed family and their desire to make the child the ward of the state because they too found that it was easier to turn public opinion against regulatory legislation by arguing that it threatened the autonomous family. And as we shall see, it was for that very reason that anti-vaccinationists would invoke ideas about paternal

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151 Florence Kelley, "Die weibliche Frabrikinspektion," (Women factory inspectors), *Archiv fur Soziale Gesetzgebung und Statistik* 11 (1897): 142 as cited and translated in Sklar, *Florence Kelley and the Nation's Work,* 258.

152 Jennie June, "White Child Slavery," *The Arena,* 1 no. 5, (April 1890), 600. (Jennie June was Jane Croly's pen name).

sovereignty to make their claims for medical freedom, and religious minorities would couch their claims to religious freedom in the language of parental rights as well in the early twentieth century.

Conclusion

The question of what role an illiberal institution like the family should play in the liberal state dominated public debates in the late nineteenth century. Florence Kelley was one of many who came to question certain shibboleths about the role the patriarchal family should play within the governance of the state, and who began to imagine what a state would look like that treated every family member, including children, as distinct individuals with rights and interests separate from the family unit. In the mid-nineteenth century, the individualist argument was espoused by many classical liberals but by the end of the century, it was evident that the recognition of the rights of the child, as a rights-bearing dependent, demanded a transformation in liberalism itself – towards an increasingly interventionist state that guarded the rights of the children.[153] By acknowledging the ways that the liberal state rested on the recognition of the rights of the children, and in particular, an assertion of the supremacy of the state over parental rights, we can see that the emerging opposition to a liberal state rested not only on property rights, but on ideas about paternal sovereignty as well. Over the Progressive Era then, as a great array reformers came to mobilize the rights of the child to enlarge the purview of the state, a growing number of anti-statists would join Herbert Spencer in mobilizing the concept of paternal sovereignty to arrest the expansion of state power.

The debates over the what role the male-headed family ought to play in modern state, therefore, had only just begun by the late nineteenth century. The narratives that emerged in the nineteenth century, about the supremacy of the individual over the family

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[153] Gary Gerstle, *The Protean Character of American Liberalism,* 99, no.4. (October 1994): 1043-1073; and especially Pearson, *The Rights of the Defenseless,* on "sentimental liberalism." Tracing the evolution of ideas about the child as rights-bearing individual adds to the existing explanations about the distinct treatment of children in the Progressive Era, most famously captured in Zelizer, *Pricing the Priceless Child.*

in the modern state and the sovereign rights of fathers would continue to provide fodder for those debates well into the twentieth century. As we shall see in the next chapter, when a policy proposal surfaced such as the introduction of compulsory attendance laws, players on both sides would rush to logical extremes about what such a proposal would portend for the future of the family and the state. Indeed, the exaggerated nature of those narratives that, for instance, likened any assertion of parental rights to the brutal powers of Roman patriarchs help to capture exactly how much was at stake in the debates over the governance of children's lives. The reason for this was that the political disputes over children went to the very heart of a debate about what the modern state itself should be, and what role white self-governing men would play within in it.

Chapter Two

"The Once Paternal Duty of Education Transferred Bodily to the State:" The Spread of Compulsory Schooling, 1867-1892

Introduction

"If the nation has itself a right to 'life,' it must have the right to save its life by timely precautions against multiplying and magnifying ignorance," wrote Francis Ellingwood Abbot in 1878. Abbot, a theologian from Massachusetts, belonged to a class of educational reformers who zealously advocated the adoption of compulsory education laws after the Civil War as a means to safeguard the nation. "Ignorance on the part of the citizens," as he put it, "is death to the State." Between 1867 and 1885, twenty states in the Northeast, Midwest and West adopted compulsory school attendance laws but the laws did not pass without significant political pushback. "Compulsory education offends the American ear," Abbot explained, because "it suggests the idea of compelling parents to relinquish a power they are justly entitled to." Compulsory education laws, he argued, enforced the rights of children that society had only just begun to recognize existed, rather than abridge any right that parents rightly held. Indeed, at the heart of the opposition to compulsory education laws, he contended, lay the Ancient Roman idea, *patria potestas,* that "a father's right over his child was absolute, even including the power of life and death." In a modern state, a father ought to have no such rights. It was the state's right and duty to compel education because the "parent who so abuses his authority over his child is neither more nor less than a criminal; and he ought to be 'compelled' to cease his crime."[1]

This chapter enters the debates over public schooling that played out over the nineteenth century in the United States in the 1870s when political disputes over schooling dominated at every level of government. From the 1830s to the 1860s, common school reformers had set about building statewide systems of free, tax-funded

[1] Francis E. Abbot, *Compulsory Education* (Boston: Index Association, 1878), 12-14.

public schools in every state outside of the slaveholding South.[2] Certain sectors of the community resisted each and every aspect of that project on the grounds, from teacher licensing to the introduction of school taxes, on the ground that the grounds that it invaded the parental domain by transferring responsibility for education from the family to the state. The decade after the Civil War, however, constituted an important period in which common school reformers came to embrace the state's coercive powers over parents. While the goal of the common school movement was to achieve universal attendance, antebellum educational reformers refused to entertain compulsory attendance laws because of their own beliefs in paternal sovereignty. The 1870s, then, represented a pivotal period when educational reformers came to embrace a view of the powers of the state over the family. Reformers, like Francis Ellingwood Abbot, came to argue that it was imperative that the state compel parents to send children to school for its own self-defense and over the next two decades almost every state north of the Mason-Dixon line introduced compulsory attendance laws. By the 1890s, states began to develop the bureaucratic and regulatory capacities to enforce attendance laws, extending the reach of the state by asserting the primacy of the state's claim over the child.

After the Civil War, debates over public school also took on national resonance as the Republican Party insisted that the South establish systems of public education as a key project of Reconstruction. At state conventions, African-American constitutional delegates led the charge in pushing for free systems of public education for all races to be included in newly drawn constitutions of former Confederate states. At the federal level, Congressional Republicans, who viewed public education as a vital instrument for preserving the fragile Union, sought to use the coercive powers of the federal government to insist on their implementation. Accordingly, the resistance of white

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[2] Carl Kaestle, *Pillars of the Republic: Common School and American Society, 1780-1860* (New York: Hill and Wang, 1983); David Nasaw, *Schooled to Order: A Social History of Public Schooling in the United States* (New York: Oxford University Press, 1979).

Southerners to public education formed a central component of the backlash to Reconstruction. Alarmed by the prospect that public schools would educate black children and involve racially mixed-schools, white Southerners rejected the entire concept of public education. To some, it seemed, the establishment of public schools was a threat to the order of the Old South, which had rested on elite white male mastery of the home. Looking at the vehement opposition of white Southerners to the establishment of public schools in the 1870s, then, provides a window into how ideas about paternal sovereignty underpinned the opposition to public education throughout the country.

The chapter emphasizes the defining role that ideas about paternal sovereignty played in debates over public education all across the United States from the 1870s to the 1890s. The battles over compulsory, state-run schooling in the nineteenth century bore the deep imprints of sectarian and sectional divides. Historians have correctly understood these conflicts as ethno-cultural, religious and racially driven battles. As a consequence, they have often told the stories of the development of public education in the North, where disputes between native-born Protestants and immigrant Catholics dominated, and South in which race was the defining factor, separately.[3] By contrast, this chapter tells those stories side by side to highlight the dominant role that debates over paternal rights played in contests over schooling. In doing so, the chapter reveals a gendered

[3] The literature on schooling is immense. For examples of works that either provide micro-studies or focus on sectarian issues in the North see Michael B. Katz, *The Irony of Early School Reform: Educational Innovation in Mid-Nineteenth Century Massachusetts* (New York: Teachers College Press, 1968); Diane Ravitch, *The Great School Wars: A History of the New York City Public Schools* (Baltimore: John Hopkins University Press, 2000); David B. Tyack, *The One Best System: A History of American Urban Education* (Cambridge: Harvard University Press, 1974); Ira Katznelson and Margaret Weir, *Schooling for All: Class, Race, and the Decline of the Democratic Ideal* (New York: Basic Books, 1985) and for works that focus particularly on African Americans and education in the South, see Heather Williams, *Self Taught: African-American Education in Slavery and Freedom* (Chapel Hill: University of North Carolina Press, 2005); David Tyack and Robert Lowe, "The Constitutional Moment: Reconstruction and Black Education in the South," American Journal of Education 94, no. 2 (February 1986): 236-256; James Anderson, *The Education of Blacks in the South, 1860-1935* (Chapel Hill: University of North Carolina Press, 1988).

dimension of the partisan dispute that has hitherto been hidden from view. [4]

While attendant to regional differences, and the particular racial and religious dynamics that shaped conflicts in different locales, this chapter nonetheless takes a view of the development of public schooling as whole to reveal the common ideological disagreements over the relationship between the family and the state that framed each conflict, and the common set of ideas about parental rights in each of those battles. Irrespective of their different motivations, compulsory education reformers all argued that the rights of the state and the child took precedence over the family. They also argued for new state powers to realize that view. The educational reformers who advocated compulsory attendance laws, and the Republicans who enacted them, extended the powers of the state by ardently laying claim to being the defender of the universal rights of the child, against the family.[5]

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[4] For an exceptional work that brings the sectarian and racial politics into a single frame, see Ward M. McAfee, *Religion, Race, and Reconstruction: The Public School in the Politics of the 1870s* (Albany: State University of New York Press, 1998). McAfee's work demonstrates the anti-Catholicism of Republicans in the North and their vision for expansive educational opportunities for blacks in the South were both part of an overall ideology of the Republican Party that viewed public schools as a the site to forge an American culture and safeguard citizenship. McAfee's work, in particular, illuminates how the anti-Catholic and pro-Black aspects of Republican education policy were intractably mixed in Congress in the 1870s. Like McAfee, this chapter emphasizes the critical role that debates over schooling played in politics in the 1870s, and I offer something of a complement to his portrait in illuminating the common ideology that animated Democratic opposition in the North and the South based on white male mastery of the home.

[5] This chapter focuses primarily on the introduction of compulsory attendance laws. The politics of compulsory attendance laws, relative to other topics in education history, has not attracted much attention from historians of education, with most dismissing compulsory attendance laws because they did not substantially increase attendance rate. For an early critique on the focus on effectiveness see Robert B. Everhart, "From Universalism to Usurpation: An Essay on the Antecedents to Compulsory School Attendance Legislation," Review of Educational Research 47, no. 3 (1977): 499-530. Numerous historians, especially recently, have engaged with the importance of compulsory education laws in assessing changing ideas about state power after the Civil War, and particularly the importance of compulsory attendance laws to reformers and state-builders as a symbolic statement of the state's powers over the family and children. See David B. Tyack, "Ways of Seeing: An Essay on the History of Compulsory Schooling," *Harvard Educational Review* 46, no. 3 (1976): 355-389; Steven Provasnik, "Compulsory Schooling, From Idea to Institution: A Case Study of the Development of Compulsory Attendance in Illinois, 1857-1907," (PhD diss., University of Chicago, 1999); Helen Schiller Schwartz, "Education, Individualism, and Society in Nineteenth-Century America" (PhD diss., University of California, Berkeley, 1986); Michael Callaghan Pisapia,"Public Education and the Role of Women in American Political Development, 1852-1979" (PhD diss. University of Wisconsin-Madison, 2010), especially chapter three; Tracy Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012); and Tracy Steffes, "Governing the Child: The State, the Family and the Compulsory School in the Early Twentieth Century," in *Boundaries of the State in US History,* eds. James T. Sparrow, William J. Novak and Stephen S. Sawyer (Chicago: University of Chicago Press, 2015). For a good overview of the historiography and critique of how the scholarship on education has neglected compulsory attendance laws, see Provasnik, "Compulsory Schooling," 3-16, and for a strong argument in favor of taking

What united opponents to public education was an investment in the sovereignty of the white, male-headed home.[6] Despite the differences between opponents, the chapter shows that in each circumstance, those who resisted the project of public education grounded their opposition in ideas about paternal sovereignty. It was no surprise then that in each state, and ultimately in national politics as well, the Democratic Party, as the party wedded to men's rights and local self-government, opposed the introduction of compulsory attendance laws and the spread of public education. The cause of parental rights spoke to the common interests of the Party's disparate, and often fragile, coalition of constituents including urban immigrants, especially Irish Catholic voters in the North, and white, predominantly rural Southerners.[7] By taking a macro-view of the debates over public schooling, the chapter reveals how gendered ideas about the family and the state were critical in shaping the partisan divisions on schooling.[8]

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compulsory education laws seriously for their symbolic value, see Pisapia, "Public Education," 87-96. With the exception of Steffes and Pisapia, however, this literature pays minimal attention to the role that gender played, or especially ideas about the family, in the debates over compulsory education.

[6] This insight has been entirely overlooked in the literature referenced above. Even Michael Callaghan Pisapia whose dissertation does much to reveal the gendered aspects of state building with reference to education by showing the role that women played overlooks the gendered aspects of opposition. Pisapia notes that that compulsory education laws was the most controversial topics in late nineteenth century and the partisan nature of the opposition, but writes "the significant disagreement in many state legislatures… was partisan in nature, though opposition also turned on the ethnic diversity and racial stratification within legislative districts" in "Public Education," 94.

[7] Here I disagree with Steven Provasnik who argues that the issue of compulsory education lost much of its partisan overtones after 1877. Provasnik,"Compulsory Schooling," 157-159.

[8] David Tyack was the first to argue that the partisanship was key to understanding why compulsory attendance laws were introduced in the 1870s in his article "Ways of Seeing," where he argued that historians had to account for the fact that the Republican Party was the driving force behind attendance laws across the nation. To explain this, Tyack argued that the Republican Party supported compulsory attendance laws because attracted "pietistic sects" (especially Baptists and Methodists) who espoused a "crusading moralism," 369-370. In this chapter, I do not discount the important role that ethnocultural politics played in shaping the partisan disputes as emphasized by Tyack, Pisapia and Provasnik, but rather argue that such an analysis overlooks the gendered aspects of the partisanship that transcended regional differences in North and South, in which, as we shall see, advocates of compulsory education strongly argued that the state should assume a paternal grant of power and Democrats relied on ideas about paternal sovereignty. In doing so, this chapter adds to the literature on the role of gender and the family in party politics in the late nineteenth century, particularly the Democratic party, by incorporating schooling and state politics into that story, see Rebecca Edwards, *Angels in the Machinery: Gender in American Party Politics from the Civil War to the Progressive Era* (New York: Oxford University Press, 1997); Rebecca Edwards "Domesticity versus *Manhood* Rights: Republicans, Democrats, and "Family Values" Politics, 1856-1896" *The Democratic Experiment: New Directions in American Political History,* ed. Meg Jacobs, William J. Novak, and Julian E. Zelizer (Princeton: Princeton University Press, 2003); Michael Pierson, *Free Hearts, Free Homes: Gender and American Antislavery Politics* (Chapel Hill: University of North Carolina Press, 2003), chapter four.

From Common Schools To Compulsory Schooling in the 1870s

The political popularity of compulsory school attendance laws soared in the 1870s. Before the Civil War, all states outside of the slaveholding South had developed statewide systems of tax-funded free schools. The spread of free public schools had significantly enlarged the role the state played in children's lives but attendance was voluntary, a fact that reflected the pervasive belief that parents had the exclusive right to decide whether and when their children were schooled. In 1852, Massachusetts, the birthplace of the common school movement, was the first state in the nation to adopt a compulsory attendance law and the lone state to do so before the Civil War. Vermont was the next state to pass a compulsory attendance law in 1867. Between 1871 and 1880, a further ten states in the Northeast, Midwest and West, from New Hampshire to Nevada, would do the same.[9] "Laws for compulsory attendance are quite the rage these days," complained an Indiana professor in 1881, who opposed the idea. "No well-regulated Legislature is perfectly happy unless it has one of more schemes of this kind between the first reading and the final passage."[10]

The drive for compulsory education in the 1870s reflected a set of anxieties that many native-born Protestant reformers held about the fragility of the state after the Civil War. In particular, the movement reflected a growing consensus among educational reformers that a certain class of parents, particularly immigrant men, could not be entrusted to meet their civic duties to their children, which served as evidence of their unfitness for self-government on which the Republic had once rested. The circumstances of postbellum life, therefore, required new instruments of state power. As many common school reformers saw it, the principle of voluntarism that underlay the common school movement had failed to bring about universal attendance. While that was certainly

[9] United States Bureau of Education, "Compulsory School Attendance," *Bulletin 1914,* no. 2 (Government Printing Office: Washington D.C., 1914), 10.
[10] Professor J.B. Roberts, "Compulsory Education" *The Indiana State Sentinel,* February 2, 1881, 2.

true, it was also the case that attendance rates for white children in the North were among the highest in the world at the time, around sixty-five to seventy percent in most states.[11] The attendance rates for black children were much lower, and their exclusion from public schools in the North gave little concern to most Northern reformers even as they registered their outrage at educational discrimination blacks faced in the South.[12] Compulsory attendance laws, though universal in construction, therefore targeted a small portion of the population -- the poor, predominantly immigrant communities in growing urban centers, especially Irish and German Catholics. While attendance laws would do little to increase attendance at schools, and did not address the economic factors that would pull more and more children into industrial labor in the late nineteenth century, they were nonetheless a strong symbolic expression of the state's power over parents and their children.[13] In fact, attendance laws crystallized a new conception of the state that emerged after the Civil War, one that rested on assertion of the supremacy of the state over traditional conceptions paternal rights.

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[11] Pisapia, "Public Education," 90. This was true of the entire Progressive Era, as Pisapia reports, between 1870 and 1910, ninety-one percent of American children aged five to fourteen years old were enrolled in school for part of the year. By comparison, sixty-two percent of British, sixty-six percent of Norwegian, seventy-four percent of German, and eighty-two percent of French children of the same age cohort were enrolled, see 16.

[12] For example, over 160, 000 black children in Illinois were excluded from its "free and open" school system altogether. See Robert McCaul, *The Black Struggle for Public Schooling in Nineteenth-Century Illinois* (Carbondale: Southern Illinois University, 1987). On the hypocrisy of Northern critiques of the exclusion of blacks, see McAfee, *Religion, Race and Reconstruction,* 100-110. Many abolitionists, black and white, were of course keen to secure equal educational opportunities for black children in the North. Charles Sumner who pushed for the federal government to mandate mixed-schooling in the 1870s also led the charge to desegregate schools in Massachusetts in 1850 in *Roberts v. Boston,* 59 Mass. 198 (1850).

[13] Martin Jay Eisenberg, "Compulsory Attendance Legislation in America, 1870-1915" (PhD diss., University of Pennsylvania, 1988) estimates that before World War I attendance rates accounted for at most a two to three percentage point rise in attendance. He also notes that attendance rates of sixty-five percent were a necessary threshold for attendance laws to pass in state legislatures and that Republican domination of legislatures was the most important factor in explaining why a state adopted compulsory education law. The ineffectiveness of compulsory education laws is explored in the third section of this chapter, but between 1870 and 1900, child labor rates in the United States would climb from one in eight children in 1870 to one in five in 1900, as is explored in the fourth chapter. In targeting parents as the problem, then, attendance laws did little to address the underlying factors that often led parents to put their children out to work. An early example of this was evident in Massachusetts, in 1876, despite child labor regulations have been in force for decades, sixty thousand children were reported to be working in Massachusetts instead of going to school. See Chaim Rosenberg, *Child Labor in America: A History* (Jefferson: McFarland & Company, Inc., 2013), 67-70.

The movement for compulsory schooling laws in the 1870s grew directly out of the antebellum common school movement.[14] Beginning in Massachusetts in the 1830s, under the stewardship of Horace Mann, the common school movement had sought to develop a universal system of free schools. Mann, a Whig politician and the first Secretary of the Massachusetts Board of Education, personified the character of common school reformers. A Massachusetts native, Mann rejected the strict Calvinism of his upbringing and came to embrace Unitarianism, pushing for public schools that were non-sectarian by including the Protestant Bible in the school curriculum but disavowing any specific denominational interpretations. Mann was also an advocate for temperance, abolitionism, institutions for the mentally ill, and women's rights but found his calling in the common school movement, stating that "other reforms are remedial; education is preventative."[15] In an era in which white male suffrage was expanding and an influx of immigrants was making the population more heterogeneous, Mann advocated universal common schools as a crucible to safeguard the republic and fashion the American citizen.[16] Like most antebellum reform movements, the common school movement was infused with the spirit of religious revival and a firmly held belief that moral suasion was the means to moral improvement. Unlike other antebellum reform

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[14] A brief note on terminology in this chapter: I place the emphasis on the development of schooling, rather than education, to capture the nineteenth century worldview which was that "schools" and "schooling" connoted institutions for education whereas "education" often had a broader meaning that included religious upbringing and child-rearing more broadly. Thus, historians often cite the Massachusetts Bay Colony as having the first "compulsory education law" in the world in 1642, but as Michael Katz pointed out the law intended to impose on parents the duty to rear their children properly, which in the Puritan view included teaching children to read for their religious upbringing. By contrast, when Massachusetts was the first state to introduce a compulsory attendance law in the United States in 1852, the purpose of the law was to compel parents to send their children to schools. With that distinction in mind, I use the terms "compulsory education" and "compulsory attendance laws" interchangeably as my actors did in the nineteenth century. Finally, while the terminology of "common schools" continued to be used after the Civil War, in this chapter, I use the term "public schools" at times to indicate that by the late nineteenth century common schools were did not charge parents fees, and were supported by tax-funds. Michael Katz, "The Concepts of Compulsory Education and Compulsory Schooling: A Philosophical Inquiry," (PhD diss., Stanford University, 1974).

[15] Horace Mann, "Reply to the 'Remarks' of Thirty-One Boston Schoolmasters on the Seventh Annual Report of the Secretary of the Massachusetts Board of Education," (Boston: WM. B. Fowle and Nahum Capen, 1844), 3.

[16] For more background on Mann, and more broadly on the goals and motivations of common school reformers, see Kaestle, *Pillars of the Republic,* especially 75-158.

movements, however, the common school movement from the outset sought to carve out a larger role for the state in taxing its citizens to provide free, non-sectarian education to all children.[17]

Between 1837 and 1849, in his tenure as the Secretary for Education, Mann withstood significant political opposition to develop a statewide system of common schools. Massachusetts had a strong tradition of education dating back to its Puritan roots as a colony, but in the early nineteenth century, schooling had devolved to be the exclusive jurisdiction of local townships augmented by private schools.[18] Slowly, but steadily, the common school movement centralized control over education under the purview of the state government. After the State Board of Education was established, the steps towards the centralization of state control over schooling included the compulsory licensing of teachers, the creation of superintendents, state laws that compelled townships to provide free schools and compulsory taxation for state funds. The provision of state funds to schools gave state governments the power to supervise and set conditions for schools, and, in the context of sectarian conflict over state resources, many states adopted a constitutional amendment specifying state funds could only be allocated to public schools. [19]

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[17] Owing to a deep pessimism about whether men could be saved through moral suasion alone, the question of compulsion also surfaced in other antebellum reform movements such as abolitionism, Sabbatarianism and temperance. Legal force, however, did not require the same investment of the state resources as common schooling did. On the question of legal force and the continuities, and discontinuities, between antebellum and postbellum reform movements, see Susan Pearson, *Rights of the Defenseless: Protecting Animals and Children in Gilded Age America* (Chicago: University of Chicago Press, 2011). On the common school movement as developing a state system of education, see Everhart, "From Universalism to Usurpation."

[18] After the Revolution, as one Progressive historian put it, "the reaction against ecclesiastical control [of schooling] went too far in the direction of individualism." The "farthest swing of the pendulum in this direction was reached in 1828, when the districts obtained exclusive control of the schools in all matters except in the item of examination of teachers." George H. Martin, A.M Supervisor Of Public Schools, Boston, Massachusetts, *The Evolution of the Massachusetts Public School System* (New York: D. Appleton and Company, 1894), vii-x. Ellwood Cubberly, *Public Education in the United States* (Boston: Houghton Mifflin Company, 1919) makes this point as well, 163.

[19] I cover the sectarian aspects of the conflict over state funds for education and the resulting "Blaine Amendments" in section two. For an in depth overview of how the sectarian conflict in New York drove the establishment of the public school system see Ravitch, *The Great School Wars,* and for a summary of the national patterns in the adoption of "Blaine Amendments" and anti-Catholic politics, see David T. Smith,

This model approximated the path taken by every state that established public school systems before the Civil War.[20] Between the 1830s and 1860s, state systems of public schooling replaced patchwork systems of private schools, local schools and charity schools, which had relied heavily on parental initiative. As Florence Kelley put it, during this period, "the once paternal duty of education was transferred bodily to the State."[21] In essence, the first stage of compulsion was to make it compulsory upon the state to meet its duty to the child – a principle that expressed the growing consensus that the education of children was primarily a collective responsibility to be met by the state, rather than a parental domain.

In Massachusetts, despite Mann's ambitions for a statewide system of free schools, he remained opposed to the idea of compulsory attendance laws until the end of his tenure. The degree to which common school reformers like Mann subscribed to the idea of paternal sovereignty was but one measure of the potency of paternal sovereignty in shaping the common school movement. For Mann, the universality of the common school movement was vital and throughout his tenure, the "evil" of non-attendance plagued him. Moreover, he held in contempt parents who failed to avail themselves of the free school system. He admonished fathers who refused to send their children to school as "willing to convert the holy relation of parent and child into the unholy one of

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Religious Persecution and the Political Order in the United States (New York: Cambridge University Press, 2015), 162-164.

[20] As Ellwood Cubberly first pointed out, despite its dominance in histories of education, Massachusetts was in fact quite exceptional because its Puritan roots meant there were deeply entrenched cultural values that supported the idea of universal schooling. Most of the remaining former British colonies, particularly the mid-Atlantic and Southern states, inherited the British pauper model where education was not a state concern. By the 1820s, many of these states, like New York, filtered state funds through private charities and the establishment of common schooling systems involved disestablishing private charities to establish state-run free schools. See Cubberly, *Public Education in the United States,* 21-23. The second section of this chapter looks at Virginia, which was a primary example of a state with a pauper model, and it shows that establishing universal systems of state funded inheritance in those states was more difficult than in Massachusetts because much of the population strongly believed that it was the sole responsibility of fathers to education their children and it was not acceptable to tax one man to fund the education of another man's child. On Massachusetts as an exceptional case, and for a detailed overview of the regional variation in the development of public schools, see Pisapia, "Public Education."

[21] Florence Kelley, "On Some Legal Changes to the Status of the Child Since Blackstone," *The International Review* (August 1882), 95.

master and slave, and to sell his child into ransomless bondage."[22] Yet Mann's writings also exhibited great sympathy for fathers who feared that the expansion of schools threatened their authority. He treaded carefully when questions arose about how public schools would gel with the authority of the home. Mann was committed to the principle of voluntarism, not only because he believed moral suasion was the most effective means to affect change, but because he believed that state compulsion would violate the rights of men. By the late 1840s, however, despite the increasing provision of public education, rates of attendance had at schools not increased substantially.

Reluctantly, Mann began to accept that measures of compulsion might be necessary to realize his vision. First, he supported indirect measures, including a child labor law that required employers to send children to school. This "benignant and parental" law was justified, he reasoned, because factories were profiting off children that were not their own and could not "intrench themselves behind the sacredness of parental rights."[23] In 1847, after an investigative tour of Europe's systems of compulsory education, Mann became convinced that compulsory laws were necessary and could be justified on the grounds that the parent who failed to fulfill his duties forfeited his parental rights.[24] "Reason and argument have failed as yet to work as reform," he explained. "The disease is too chronic and deep seated to yield anything but more energetic treatment."[25] In other states, the principle of voluntarism similarly failed to yield universal attendance, and thus after the Civil War other states began to consider adopting compulsory measures.

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[22] Third Annual Report of the Secretary of the Board of Education," *The Common School Journal,* 2, no.8 (April, 1840), 118.
[23] Horace Mann,*Annual Report of the Board of Education* (Boston: WM. B. Folwe, Office of the Common School Journal, 1848), 118.
[24] *Eleventh Annual Report of the Board of Education*, 125-126.
[25] *Twelfth Annual Report of the Secretary of the Board of Education,* 23-24 as quoted in *Sixth Annual Report of the Bureau of Labor Statistics* (Boston: Wright & Potter, State Printers, 1875), 25. The General Court, the legislature of Massachusetts, adopted the first compulsory attendance law one year after Mann had moved on from his role as Secretary. Mann had recommended the state adopt an attendance law in his final report.

The key point of departure between the common school movement and the compulsory school movement, then, was the degree to which reformers came to embrace the state's coercive powers over parents and their children. The legal basis of the state's powers to compel attendance had deep roots in the antebellum period, particularly in the House of Refuge movement, a close cousin of common school movement.[26] Houses of Refuge were first established during the 1820s and 1830s in cities that attracted large numbers of immigrants: New York, Rochester, Baltimore, Philadelphia and Boston. In those cities, reformers and charity workers, many of whom were involved in the common school movement, built institutions to house "dependent, delinquent and neglected youth" based on the belief that children deserved separate treatment from adults, and could be redeemed from a life of crime through early interventions. Alderman and truant officers had a broad grant of power in committing youths to such institutions; children did not need to have committed a crime and neither the consent of the child nor parent was required.[27] The Supreme Court of Pennsylvania in the case of *Ex Parte Crouse* (1838) first affirmed the right of the state to commit children to the care of the state without parental consent and established the supremacy of the state's powers over parental rights.[28] The case arose when Mr. Crouse filed a writ of *habeas corpus* to challenge the detention of his daughter, Mary Ann Crouse, who had been committed to the Philadelphia House of Refuge by her mother but without his

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[26] In historical scholarship, the origins of the juvenile justice system have generally received separate treatment to works that deal with the origins of public education. On the connections between the two reform movements, see Steven Schlossman, *Love and the American Delinquent: The Theory and Practice of "Progressive" Juvenile Justice, 1825-1920* (Chicago: The University of Chicago Press, 1977), 1-32. Correspondingly, little attention has been given to the importance of *parens patriae* as a legal justification for public schools. On that relationship see Stephen Provasnik, "Judicial Activism and the Origins of Parental Choice: The Court's Role in the Institutionalization of Compulsory Education in the United States, 1891-1925," *History of Education Quarterly* 46, no. 3 (October 1, 2006): 311–47.

[27] For example, the Philadelphia House of Refuge, opened in 1828 and funded by the state legislature. It was intended apprehend children who were likely to or had already committed an offence, its stated aim was to "prevent vice" and rescue "those especially in their tender years" who might be tempted by crime. The original Act of 1828 provided local authorities with the power to apprehend youth for commitment, and an amendment in 1835 enabled parents to commit their own children. Board of Managers, Philadelphia House of Refuge, *Seventh Annual Report of The House of Refuge of Philadelphia* (Philadelphia: William Brown Printers, 1835), 4.

[28] *Ex Parte Crouse,* 4 Wharton 9 (Pa., 1838).

consent. Crouse contended his daughter had been illegally imprisoned without being charged with a crime. He also argued that her detention violated his natural rights as her father.[29] In dismissing his complaint, the decision penned by Chief Justice Gibson opened: "The House of Refuge is a school, not a prison."[30] Defining the institution as an educational institution, the court held Mary Ann Crouse's rights had not been abridged as her commitment was for her own protection.

In addressing the complaint that her detention violated Crouse's rights as a father, Gibson ruminated on the power of the state and the rights of the parents with respect to education broadly. At the time that the decision was handed down, the managers of the House of Refuge, who were also leaders in the common school movement, were ensconced in a fierce political battle to secure a taxation base to support the common schools. It is likely that Gibson was mindful of that broader context because his judgment focused so heavily on the question of the state's jurisdiction in education and strongly affirmed the state's broad rights.[31] Asking "may not the natural parents, when unequal to the task of education or unworthy of it be superseded by the *parens patriae,* or the common guardian of the community?" Gibson held that because the public had a "paramount interest in the virtue and knowledge of its members… the business of education belongs to it." Parental control was, therefore, "a natural, but inalienable right."[32] The decision incorporated the concept of *parens patriae,* which translates as "father of the nation" into American jurisprudence to affirm the supremacy

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[29] The briefs and submissions of each party do not survive for this case, but I have inferred that these were the arguments made based on the summary of the facts outlined in the judgment and the judgment itself. The summary of facts states that "Mr. W.L. Hirst for the petitioner referred to the sixth and ninth section of the Bill or Rights and cited the *Commonwealth v. Addicks*, 5 Binn. 520174; *Commonwealth v. Murray*, 4 Binn. 492, 494." *Ex Parte Crouse,* 4 Wharton 9 (Pa., 1838) at 9.

[30] *Ex Parte Crouse*, 4 Wharton 9 (Pa., 1838) at 10-11.

[31] Negley K.Teeters, "The Early Days of the Philadelphia House of Refuge," *Pennsylvania History: A Journal of Mid-Atlantic Studies* 27, no.2 (1960): 165-187, Sam Bass Warner, *The Private City: Philadelphia in Three Periods of Its Growth*, (Philadelphia: University of Pennsylvania Press, 1987), 72-112 and Schlossman, *Love and the American Delinquent,* 10-11.

[32] *Ex Parte Crouse*, 4 Wharton 9 (Pa., 1838) at 10-11.

of the state's paternal claim on children as against parental claims.[33] At the time, common school reformers celebrated the decision as a strong statement of the principle that the "business of education" belonged to society and the state. After the Civil War, compulsory education advocates would use the logic in the decision in *Ex Parte Crouse* to argue that the state's paramount claim over education and the child should be extended to affect all parents by requiring every parent to send their child to school under the threat of criminal sanction. The decision itself would serve as the legal basis for affirming the paramount power of the state over children and their parents in the establishment of reform schools, compulsory schooling laws and juvenile courts.[34]

After the Civil War, many educational reformers embraced the principle that the state's rights over the child were paramount to the parent's rights over the child.[35] Apart from this key point of difference, compulsory school advocates had much in common with their antebellum common school predecessors. They shared the vision of common

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[33] Originally in England, the doctrine of *parens patriae,* derived from the King's prerogatives, formed part of the Chancellor's Court jurisdiction and was relied upon to resolve custody disputes involving propertied children only. When it was incorporated into American law in this case, the doctrine used to uphold the power of the state, specifically the legislative branch, against a private citizen with respect to a poor law. In English law, a similar trajectory occurred slightly earlier where the House of Lords dropped the requirement the child be propertied for the *parens patriae* jurisdiction to be invoked in *Wellesley v. Wellesley* House of Lords, 2 Bligh N.S. 124 (1828). On this point and the development of *parens patriae* more broadly see Douglas Rendleman, "*Parens Patriae*: From Chancery to Juvenile Court" *South Carolina Law Review* 205 (1971): 205-259 and George B. Curtis, "The Checkered Career of *Parens Patriae*: The State as Parent or Tyrant?" *DePaul Law Review,* 25, no.4 (1976): 895- 915.

[34] For example: *Ex parte Ah Peen,* 51 Cal. 280 (1876); *Milwaukee Industrial School v. Supervisors of Milwaukee County,* 40 Wis. 328 (1876); *Prescott v. State*, 18 Ohio St. 184 (1869); *Cincinnati House of Refuge v. Ryan,* 37 Ohio 197 (1881); *Farnham v. Pierce*, 141 Mass. 203, 6 N.E. 830 (1886*)*; *People ex rel. Billotti v. New York Juvenile Asylum*, 68 N.Y.S. 279 (1901); *Kennedy v. Meara*, 127 Ga. 68 (1906); *People ex rel. Duryee v. Duryee,* 188 N.Y. 440 (1907). On the importance of the doctrine of *parens patriae* to the founding of the juvenile justice system, see Joseph A. Haniphy, "VI: Juvenile Courts" *Educational Review* 49 (January –May) 1915: 489-502; Anthony M. Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1977); David S. Tanenhaus, *Juvenile Justice in the Making* (New York: Oxford University Press, 2004) and particularly Schlossman, *Love and the American Delinquent*. For a contrast between maternalist rationales for juvenile courts and *parens patriae,* see Elizabeth Jane Clapp, *Mothers of All Children: Women Reformers and the Rise of Juvenile Courts in Progressive Era America* (University Park: Pennsylvania State Press, 1998), 143.

[35] Of course, a significant number of educational reformers did not support the idea compulsory attendance laws as well for the reasons detailed in this second section. For an in-depth analysis of the opposition of the Illinois State Teachers' Association to the principle of compulsory education in the late 1860s and early 1870s, see Provasnik, "Compulsory Schooling, from Idea to Institution." Provasnik notes that the Ohio State Teachers Association and the New York State Superintendent of Schools also opposed compulsory attendance laws in the late 1860s, 2. As Provasnik rightly suggests, the fact that many educators themselves were ideologically opposed compulsory education is an indication that the topic deserves a more in-depth and nuanced treatments than historical accounts that claim that it was only self-interested parents, or employers who opposed compulsory education laws.

school reformers for a universal system of secular free schools that would assimilate immigrants, increase literacy rates and train children to be self-governing citizens regardless of their background. Like common school reformers, they were predominantly native-born, middle-class white male Protestants and often had trained as ministers as was the case with Francis Ellingwood Abbot.[36] Abbot was born in Boston in 1836, and in the 1850s he attended Harvard University and Meadville Theological School. Abbot was at the radical end of anti-clerical Protestantism. He broke with the Unitarian Church in the 1860s and became an avid advocate of Darwinism, seeking to fasten religious beliefs to science over scripture. As an editor of *The Index* in the 1870s and founder of the National Liberal League, Abbot found much to appreciate in the secular mission of public schools, becoming a strong proponent of compulsory education laws and an outspoken critic of the Catholic Church's position on schooling.[37]

Some education reformers, of course, had been involved in the common school movement before the Civil War and there was a common conversion narrative that circulated about how Northern common school reformers had come to embrace the principle of compulsory attendance. Birdsey G. Northrop, the Secretary of the Connecticut State Board of Education, was a prime example. Northrop was born in Connecticut in 1817. In the 1840s, he graduated first from Yale University then Yale

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[36] In the South, in the 1860s and 1870s, black Republicans, were among the most vocal and ardent supporters of compulsory education laws. The motivations of black Republicans (and some white Republicans as well) were quite distinct in the South: they sought to secure compulsory attendance laws to ensure that public education systems were open to both black and white children equally. By contrast, in the North where attendance rates were already quite high, most Northern compulsory education advocate were native-born Protestants who secure the attendance of European immigrants (and often turned a blind eye to the exclusion of Northern blacks from public schools as discussed above). Moreover, compulsory schooling advocates in the South failed to secure attendance laws until the twentieth century. For these reasons, I focus on the motivations and ideas of white Northerners who sought to introduce compulsory attendance laws in states with established public school systems. On the drive for compulsory attendance in the South, see Williams, *Self Taught*, 180-193, Tyack and Lowe, "The Constitutional Moment," 236-256 and on the exclusion of black students from compulsory attendance laws in the twentieth century, see Anderson, *The Education of Black*s, 94-100.

37 For more on Abbot, see Sydney Ahlstrom and Robert Bruce Mullin, *The Scientific Theist: A Life of Francis Ellingwood Abbot* (Mason: Mercer University Press, 1987). Scholars who discuss Abbot tend to focus on his contributions to philosophy rather than his contributions to debates over compulsory education, for example: Creighton Peden, *The Philosopher of Free Religion: Francis Ellingwood Abbot, 1836-1900* (New York: Peter Lang Publishing, 1992).

Theological Seminary. After serving as a Congregational pastor in Saxonville, Massachusetts, Northrop worked for ten years for the Massachusetts State Board of Education. In 1867, Northrop was appointed as Secretary for the Connecticut State Board of Education and oversaw the development of the state's common school system over the next sixteen years, which by the 1880s had the most effective and centralized compulsory attendance laws in the country.[38]

Between 1871 and 1872, like many other educational reformers of the era, Northrop undertook a six-month investigational tour of Europe's education systems. In his 1873 report, "Education Abroad," he explained, "my former objections to compulsory education were fully removed by observations recently made in Europe."[39] Struck by the pride Prussians took in their universal, compulsory educational system, and apparently, the complete absence of "street Arabs" (neglected children) on their streets, Northrop declared he heard not even a "lisp of objection" to the law. Upon his return from Europe, Northrop became a national leader in the movement for compulsory schooling laws, the Horace Mann of his generation. Compulsory schooling, he avowed, was "the most important school question of modern times."[40] The compulsory schooling law he developed in Connecticut served as a model for other states, and as the inaugural

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[38] Yale University, *Obituary Record of Graduates of Yale University, 1898* (New Haven: The Tuttle, Morehouse & Taylor, Co: 1900), 518; John McGilvrey Maki, *A Yankee in Hokkaido: The Life of William Smith Clark* (Lanham: Lexington Books, 2002),127-128. Northrop was as involved in encouraging Japanese and Chinese students to pursue education in the United States and founded Arbor Day.

[39] Birdsey Grant Northrop, *Education Abroad and Other Papers* (New York: A.S.& Barnes Co., 1873), 75-78. Like Mann, Northrop was converted to the justness and necessity of compulsory schooling laws after touring the Europe to investigate their educational systems. This pattern of American educational reformers embracing ideas about compulsory education based on what they had witnessed in Europe was very common, dating back to the tour Calvin Ellis Stowe in 1836 on behalf of Ohio which led to the first prominent proposal that a state in the United States should introduce compulsory schooling laws, Calvin Ellis Stowe, *The Prussian System of public instruction, and its applicability to the United States* (Cincinnati: Truman and Smith, 1836), 61-62. This pattern reflects an earlier example of the ways American reformers turned to Europe for reform ideas that Daniel Rodger's has detailed was so fundamental to the shaping of reforms in the Progressive Era, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Belknap Press, 2000).

[40] Northrop, *Education Abroad,* 81. Northrop vacillated almost violently between claiming that there would be no need to enforce compulsory education, and a thunderous insistence he would be willing to.

president of the National Association of School Superintendents and later the American Institution of Instructors, he used his national platform to lecture on their wisdom.

Compulsory-schooling advocates defended the fact that attendance laws reconfigured the relationship between parent, child and state by enforcing paternal duties under criminal sanction. Since Blackstone, the common law had recognized that the parent had three duties towards his child: to support, to protect and to educate. Courts, however, had only intervened to uphold the father's rights over the child, his rights to control his child and to its custody and labor.[41] Compulsory attendance laws transformed a moral duty to educate one's child into a legal obligation. It was the state's right and role to enforce that obligation with the threat of a criminal sanction. For compulsory schooling advocates, attendance laws were a necessary innovation because a growing number of parents, especially immigrant parents, failed to recognize or uphold their duties to their children. Reformers traced the source of non-attendance to "parental indifference, intemperance, or other evil home influence" with often little introspection about the quality of schools, and even less regard for the economic circumstances that might prevent parents from sending their children to school even when they wanted to. They complained about the apparent swaths of immigrant children who, due to parental neglect, "vegetate in the streets like poisonous plants, and take lessons for the State prison in brothels, gaming houses, drinking shops."[42]Attendance laws, Northrop explained, would awaken the "dormant pride" and "sense of duty" that many immigrant parents failed to exhibit in their child rearing, and if the law failed to achieve that, parents would be prosecuted under the law until they obliged.[43]

Compulsory schooling advocates celebrated the creation of this new "crime." With the zeal of a convert, Birdsey Northrop authored a short pamphlet entitled "Why

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[41] On this point, see chapter one.
[42] F.S. "Forced Education," *The Massachusetts Teacher* 3, no.2. February 1850: 44.
[43] Northrop, *Education Abroad,* 80-81.

Not?" to rebut common objections leveled against compulsory attendance laws. The first line of objection Northrop addressed was that compulsory education laws created a new crime. "I reply, it ought to," Northrop declared: "to bring up children in ignorance *is* a crime and it should be treated as such."[44] Northrop argued that because illiteracy and ignorance were the sources of crime, it should be a crime for parents to raise their children in ignorance. In the 1870s, Societies for the Protection of Cruelty against Children were also emerging as philanthropic organizations that pushed for the state to intervene when parents physically neglected or abused their children. [45] It was the first circumstance in which courts had widely approved the power of the state to intervene in the parent-child relationship. Building on that movement, compulsory schooling advocates likened educational neglect to physical neglect. As Francis Ellingwood Abbot argued, parents had "no more right" to "starve" the minds of their children than they did their bodies. [46] Both ought to be regarded as crimes.

Compulsory education advocates further argued that compulsory attendance laws were a just and necessary justified limitation on the liberty of fathers. Northrop identified the second main objection to compulsory education as the fact that it interfered with the liberty of parents and replied: "again, it ought to."[47] Many reformers pointed out that society always placed limits on the liberty of individuals when the exercise of that liberty infringed on the rights of the others or ran contrary to the common good. The Pennsylvania Board of Charities reasoned in 1871 that if the state could restrain a man from "cruelly beating his horse or mule, shall it be considered an insufferable interference with his personal liberty to forbid him dwarfing the minds, debasing the

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[44] Northrop's pamphlet was widely circulated in the 1870s. The quotes here are drawn from Birdsey Northrop,"Why Not*?," The American Educational Monthly*, October 1872: 470.
[45] On the history of the establishment of Societies for the Protection of the Cruelty Against Children in this period and an analysis of how such organizations extended the police powers of the state into the home, see Pearson, *Defending the Defenseless.*
[46] Abbot, *Compulsory Education*, 14.
[47] Northrop, "Why Not*?,"* 471.

morals, stunting the bodies, and enfeebling the constitution of his children? Is the state more interested in the care of oxen than of men?"[48] In a landscape where the states regulated almost every aspect of public life, putting the common good above the rights of the individual, the supposed liberty of parents to *not* educate their children struck many reformers as a glaring omission.[49]

Some went further to argue that the idea parents possessed the liberty to not educate their children was inimical to American individualism and an importation of Old World despotisms. The movement for compulsory education, as with the common school movement before it, was driven in large part by the desire to assimilate the high number of immigrants entering the United States in the late nineteenth century. Nativist arguments in favor of compulsory schooling celebrated the supremacy of the state over the family as a distinctly American principle of government because Catholic immigrants, in particular, refused to patronize public schools in favor of their parochial schools. Compulsory schooling advocates would cast Catholic opposition to public schools and compulsory schooling as a remnant of despotic ideals from the Old World. Francis Ellingwood Abbot, for instance, did not shy away from arguing that the idea at the "bottom of the objection" to compulsory schooling was the Ancient Roman principle of *patria potestas*. In an article for a short-lived, hyper-nativist journal, *America: A Journal for Americans,* G.G. Miner explored this line of argument at length. He criticized the position of Catholics as vesting fathers with too much power. Adopting Henry Maine's narrative, he argued that in the United States the family was not the political unit, but the

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[48] *Compulsory Education – An Extract from the Report of the Board of Public Charities of the State of Pennsylvania for 1871* (Pennsylvania Board of Charities: Harrisburg, 1872?), 22.

[49] William J. Novak, *The People's Welfare* (Chapel Hill: The University of North Carolina Press, 1996). Novak covers five areas of public life, which he argues demonstrates the widespread acceptance in the antebellum period that the common good should trump individual interest: public safety, public economy, public spaces, public morality and public health. Education does not figure in those five subjects.

individual. It followed that the "rights secured by our constitution are for individuals and there are no such thing as parental rights under our laws."[50]

Children, compulsory schooling advocates argued, had a right to education, but advocates were also quick to point out that children's rights depended on state power for their realization. "The proposition that the child has a right to be educated which no parent has a right to infringe or violate, has probably never occurred to many people," Abbot wrote in 1878, but children were equally as entitled to rights as their parents, "none the less so because they neither know them nor know how to maintain them." Just as there was a women's rights movement, Abbot argued, there needed to be a children's rights movement and offered the movement for compulsory education as that crusade. [51] The state had a duty to compel attendance because the children were dependent on the state to realize their rights. The collective interest in the welfare in of children also gave the state supreme responsibility and powers for their upbringing. As Horace Mann's successor in Massachusetts explained: "the child belongs as much to the society as to the family, and for a much longer period." Therefore, he argued, the will of the parent had to "yield to the will of the State." The state was so important to society that the family, which was "only preparatory and ancillary" had to be subject to the authority of the state when it came to children.[52] Birdsey Northrop articulated the idea that children, in a sense, belonged to the state when he argued that the state had a moral duty to protect "its defenseless wards." [53]

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[50] G.G. Miner, "Rights of the State, Parent and Child," *America: A Journal for Americans,* 4, (May 29, 1890): 227-278. Miner did not equate the rights of children as equal to adult men, but rather identified three classes of rights that the American state was beholden to protect – first, "the rights of the State," second the rights of citizens and finally the rights of women and children. The right of the State to self-protection was paramount, and therefore the state had the right to compel attendance.

[51] For example, the compulsory schooling act in California was called– "An Act to Enforce the Educational Rights of the Child," Abbot, *Compulsory Education,* 12-13.

[52] Barnas Sears, *Objections to Public Schools Considered: Remarks At the Annual Meeting of the Trustees of the Peabody Education Fund,* New York, October 7, 1875 (Boston: The Press of John Wilson and Son, 1875), 15. "By Diving appointment, the authority of the civil government is superior to that of the parent."

[53] Northrop, *Education Abroad,* 84.

At its core, then, the arguments in favor of compulsory education were statist. Advocates of compulsory education embraced the statist ideas encapsulated in the policy in varying degrees. For example, Lawrence Gronlund, a prominent Danish-born American socialist celebrated compulsory education as a harbinger of the socialist state. In his 1884 work, *The Cooperative Commonwealth,* Gronlund argued that liberals were right to push for universal education, but not for the liberal reasons offered: that education prevented crime and was cheaper than building jails. "The fundamental and all-sufficient reason for giving all as good an education as possible is that the Socialist State is upon us," Gronlund argued, framing the conflict over compulsory education as one between the established order and the new order. The established order believed that the society was based on three divinely coordinate authorities: the Family, the Church and the State. In this view, "the Family is imperium in imperio – a dominion within the dominion; -- the parent the exclusive master within that dominion." The coming socialist commonwealth refused the authority of the church and family. As evidence of this trajectory, Gronlund argued that, as the state "aggrandized itself," the family diminished in importance by the same proportion. The fact that the individual was becoming independent of the family was "merely a preparatory step to the supremacy of the state." Compulsory education precipitated the socialist state by doing away with the authority of the church and the family, and establishing the supremacy of the state through its claim on the child. Gronlund took his conclusion further than educational reformers like Francis Ellingwood Abbot. Under the new order, he stated, children did "not belong to their parents; they belong to Society."[54]

By contrast, liberal reformers believed the grant of new powers to the state would serve as an instrument to restore the social order, and specifically the role of the

[54] Laurence Gronlund, *The Cooperative Commonwealth In Its Outlines: An Exposition of Modern Socialism* (Boston: Life and Shepard Publishers, 1884), 215-227.

male-headed family within it.[55] Reformers viewed compulsory attendance laws as a necessary instrument to realize the assimilative goals of the common school movement. Compulsory education laws could help the state reach a class of children whose parents refused to assimilate into American life. Children were viewed as being more redeemable than their parents. Indeed, the belief in the malleability of children was so strong that in some respects it transcended the prejudices that reformers generally held about poor and immigrant adults. The compulsory schooling movement was predicated on the belief that children of all backgrounds deserved the protection of the state, even while their parents were held in contempt for their circumstances.[56] A key goal of the assimilative mission was to ensure the next generation of men possessed the virtues of self-governing manhood that their fathers failed to exhibit. That is to say, unlike socialists like Gronlund who proposed abolishing any role the family might play as a form of governance in the state, reformers sought to use the public school to restore the self-governing capacities of the head of the family. In an address before the National Education Association in 1871 on "how far may the State provide for the education of children at public cost?" William T. Harris, who would later serve as the federal Commissioner of Education, reasoned: "a free, self-conscious, self-controlled manhood is to be produced only

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[55] In 1879, Birdsey Northrop responded to "common plea" that public education was "communistic in its principle and tendency," quoting an 1868 plea that warned "establish free schools and you encourage a demand for free food, free clothes, free shoes, and free homes." Northrop argued experience showed that public schools were in fact a safeguard against communism and socialism by instilling American values, and producing educated laborers that would improve American industry and prevent conflict between capital and labor by leveling class differences. Birdsey Grant Northrop, *Schools and Communism, National Schools, and Other Papers* (New Haven: Tuttle, Morehouse & Taylor Printers, 1879), 5-9.

[56] In reference to the establishment of charity schools in New York City in the early nineteenth century, Caestle notes that: "this attitude dominated the writings of social reformers throughout the nineteenth century," *Pillars of the Republic,* 32. As Kaestle highlights, compared to England where an extended debate transpired over whether to educate poor children, there was a widespread consensus in the United States about the importance of educating the poor and instead debate centered on the best means to do so. See also Schwartz, "Education, Individualism, and Society in Nineteenth-Century America," chapter two on construction of the straw man of the "unfit parent" as the basis for expanding the jurisdiction of schooling in the antebellum period.

through universal public education at public cost."[57] Harris put forward that the object of government in the United States was the self-governing citizen; therefore, compulsory education at public expense was necessary to ensure the perpetuity of the Republic. Compulsory attendance advocates argued that attendance laws were a logical next step that followed from school taxes: if the state had the right to tax the population at large for schooling, the state was bound to ensure that that schools served the public by compelling attendance.

At the same time, however, the movement for the state to use its compulsory powers over children and parents revealed the changing conceptions of the state after the Civil War as both a national institution and an independent entity. Common school reformers had long viewed their efforts as fulfilling their duty to the Republic to furnish the educated voters and men with the civic virtue necessary to maintain the experiment in self-government. After the Civil War, the Republican conception of common schooling to promote the common good transformed into compulsory schooling for the "self-defense" of the State.[58] The intention was still the same; as Northrop explained, "to give the ballot to the ignorant would be suicide to the nation." But in the post-bellum discourse, ideas about the "State" as cohesive, distinct entity congealed. Indeed, reformers spoke of the "rights" of "the State" more often than they spoke about the rights of the child.[59] "If the State has a right to exist," Francis Ellingwood Abbot reasoned, "it has the right to make sure of the conditions of its existence." The state was

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[57] William T. Harris, "How Far may the State Provide for the Education of her Children at Public Cost?" An essay read before the National Educational Association, St Louis, August 28, 1871 as quoted in Abbot, *Compulsory Education*, 1.

[58] Florence Kelley used the term for the "self-defense of the State" in her essay, "On Some Legal Changes," 96. On this point, see also Schwartz, "Education, Individualism, and Society in Nineteenth-Century America."

[59] Charles Burgess situates the drive for compulsory education among a broad range of compulsory projects that the Republican Party pursued in the 1870s that experimented with compulsion as a mechanism to enforce rights and uphold duties from prohibition, to compulsory voting, compulsory arbitration and child labor laws, noting that ideas about the Union transformed from an "ideological unity" into a "living organism, a personality with moral principle and will." "The Goddess, The School Book, and Compulsion," *Harvard Educational Review,* 46, no. 2 (May 1976): 199-216. It is perhaps noteworthy that compulsory education and child labor laws were the only projects that stuck.

not transcending its legitimate functions and invading the parental domain by adopting compulsory attendance laws, an editorial in *Scribner's Monthly* reasoned in 1876, because educational policies concerned the very "life and perpetuity of the State." It was therefore a question for "the state to decide – not of course from any humanitarian point of view but from its own point of view."[60]

The *Scribner's Monthly* editorial defending compulsory education laws captured the new ideas about the American state in a pronounced, almost exaggerated, form. Without reference to any particular state legislature, the editorial discussed compulsory education as a policy that affected the life of "the State," encompassing all of the federated states as one and the same, as synonymous with the interests of the "American State." Indeed, the editorial went so far as to personify "the state" as an independent, reasoning being. Expressing the surprise of the editorial board that various classes of the population were still questioning the legitimacy of the state's role in education, the editorial explained the question before the state, "to put the question into form, that question would read something like this:"

> Can I, the American State, afford to intrust heedless or mercenary parents, or any church organization, which either makes or does not make me subordinate to itself, or to any, the education of the children of the nation, when my own existence and best prosperity depend on the universality and liberality of that education?[61]

In the wake of the Civil War, many reformers came to view the public school as the most vital institution for the "self-preservation" of the state. As the *Scribner's Monthly* editorial explained, Americans had gone to war to found the nation in 1776, and had recently spent "incalculable blood" to maintain it in the Civil War. Despite the present disquiet over compulsory education laws, *Scribner's Monthly* concluded the policy would stand for

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[60] "The Common Schools," *Scribner's Monthly* 11, no. 5 (March 1876), 5, 738.
[61] "The Common Schools," *Scribner's Monthly*, 11, no. 5 (March 1876), 5, 738.

"there is no one American institution that the American people would sooner fight or die for" than the public school.[62]

Debates over public schooling came to dominate at every level of government because reformers came to see education as the *sine qua non* of the nation's success. At the federal level, in particular, the Republican Party believed that spreading systems of public education to the South, where virtually none existed, was critical to Reconstruction.[63] At the state level, advocates viewed compulsory education laws as a vital part of a national reconstruction project, often using the terms the nation, the State and the states interchangeably in making the case for compulsory attendance laws. Birdsey Northrop reflected on the role of the states in driving a national movement. It would be "premature" to introduce compulsory education laws in the South, he acknowledged, but urged Northern states to "take the lead" in establishing compulsory education. The states should be working in concert towards the goal of national unification. "In each State our plans should embrace more than our boundaries," he urged as the "interests of all American states are virtually one." Public education, he argued, had been the key instrument for national unification in many European nations, especially in Germany and Italy. The need was even greater in the United States to "fuse" the people through one system because the population was more diverse in "race and character."[64]

For Republicans and liberal reformers, the impulse behind state level compulsory education laws and federal efforts to compel public education in the South was the same: a necessary flexing of state power to force a recalcitrant class of parents and states to subscribe to the universal vision of common schooling. The voluntary system of allowing

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[62] The Common Schools," *Scribner's Monthly*, 11, no. 5 (March 1876), 5, 738.
[63] David B. Tyack, Thomas James, and Aaron Benavot, *Law and the Shaping of Public Education, 1785-1954* (Madison: University of Wisconsin Press, 1987), 44-45; Tyack and Lowe, "The Constitutional Moment," 236-256, McAfee, *Religion, Race and Reconstruction.*
[64] Northrop,"Why Not*?,"* 469.

states' to develop their own systems of schooling and allowing parents to decide whether to avail themselves of them had failed. The principle of voluntarism had let to great variance in the provision of public schooling and attendance rates: the 1870 census revealed that only eighteen percent of children attended school in Virginia, whereas seventy-seven percent of children did in Massachusetts.[65] Another article in *Scribner's Monthly,* published in 1878, conflated the question of compulsory attendance in the states with the federal governments' right to compel the provision of public education in the South. "What right has Paddy O'Flinn, just over from the bogs of Ireland, to bring up his family of ten in utter ignorance?" The state had the right to force him to educate his children because the public would end up footing the bill for at least "one or two" of his children when they grew up to be criminals or paupers. By the same token, the article asked, "How else than by a strong fostering hand of the government" would change occur in the South where "ignorance and prejudice are now so strong that school houses are being burned, school teachers being whipped and driven away, and all educational privileges gradually being broken up?"[66]

In Congress, Republicans representatives made multiple efforts to establish federal powers over education.[67] In the late 1860s, Radical Republicans made headway at the state and federal level. During Reconstruction, the federal Freeman's Bureau apportioned a significant amount of its budget toward educational initiatives for freed blacks in former Confederate states while it operated.[68] In 1867, Republicans were also

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[65] Territories and new states tended to reproduce the rates of attendance and systems of schooling from the states where most of their residents had migrated. States and territories in the Southwest had among the lowest rates of school attendance with Arizona recording nine percent attendance whereas states like Wisconsin and Illinois that modeled their schooling laws on Massachusetts had seventy-four and sixty-six percent rates of attendance respectively. The attendance data is drawn from Pisapia, "Public Education," 90.

[66] The Common Schools" *Scribner's Monthly* 11, no. 5 (March 1876): 5, 738. See also "Our educational outlook", *Scribner's Monthly,* 4, May 1872, 97-103 that made the case for a national education department on the grounds: "In accordance with our American idea, we have for nearly a century tried the voluntary method, both in regard to establishing schools and attendance upon them, and find it is not a success…"

[67] For a detailed history, see McAfee, *Religion, Race and Reconstruction,* chapter five.

[68] On the Freedmen Bureau and education, see McAfee, *Religion, Race and Reconstruction*, chapter four.

able to push through the establishment of a Federal Bureau for Education, though their vision for a full-fledged department fell short. While the Bureau's functions were only exhortatory, it nonetheless signaled the national importance attached to education the 1870s and the creation of federal Commissioner of Education would do much to increase the uniformity of education policies among the states.[69] In the 1870s, a potent mixture of white supremacist politics, resentment of Northern interference and a strong attachment to the autonomy of the patriarchal household fueled Democratic opposition to educational schemes as the power of Southern Democratic opposition grew in Congress. Proposals for federal education bills repeatedly failed because they either included provisions for racially integrated schooling ("mixed schooling") or raised fears of mixed schooling.[70]

In terms of the influence that the federal government exerted over education after the Civil War, the greatest victory came during Reconstruction through the negotiations over the state constitutions for the re-admission of former Confederate states into the Union.[71] At state constitutional conventions, black Republicans took the lead by insisting on the inclusion of universal public school systems in state constitutions. In 1870, Congress used the "Guarantee Clause" to insist the that three remaining states, Virginia, Texas and Mississippi, be required to establish "meaningful systems of public

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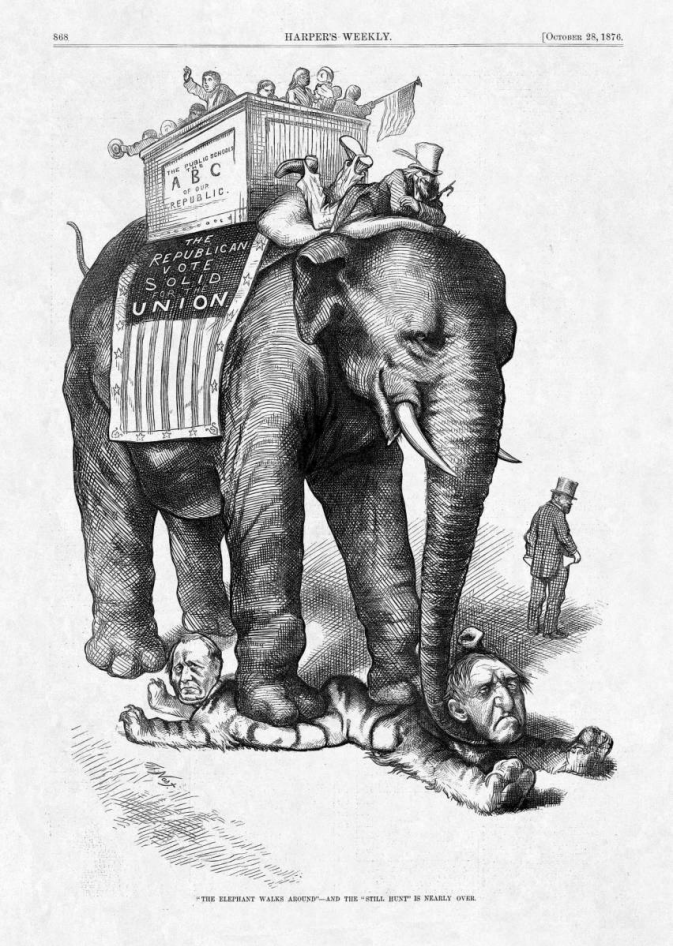
[69] In 1867, the United States Bureau of Education was established to "promote the cause of education throughout the country." The Bureau held few powers. Its functions were primarily limited to gathering statistics and diffusing information to aid the development of state common school systems. For more background, see Pisapia, "Public Education," chapter three who notes the opposition to the Bureau came primarily from Western and Northern Congressmen, especially these with large constituents of Irish and German immigrants, partly because Southern states were underrepresented in early Reconstruction Congresses, 78. See also Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge University Press, 2004), 237-239 and Darell Hevenor Smith, *The Bureau of Education: Its Histories, Activities and Organization* (Baltimore: Johns Hopkins University Press, 1923).
[70] See McAfee, *Religion, Race and Reconstruction*, chapters five, six and seven.
[71] The other important expansion of federal government power over education in this era was over higher education via the Morril Act passed in 1862, see Kersch, *Constructing Civil Liberties,* 240-242 and Tyack, James and Benavot, *Law and the Shaping of Public Education, 1785-1954*, 22.

education" as a condition of re-admission to the Union.[72] The same requirement was imposed on new territories seeking statehood thereafter.[73]



2.1: Cartoon from *Harper's Weekly,* October 26, 1876, 826 depicting the Republican Party trampling on the Democratic Party as a commentary on the result of the 1876 presidential election. On top of the elephant representing the Republican Party sit school children celebrating by waving American flags, and the side of their carriage reads: "The Public Schools – the ABC of our Republic."

Just as public schooling advocates viewed compulsion at the state and federal level as a common, two-prong strategy to secure the interests of the State, opponents of

[72] McAfee, *Religion, Race and Reconstruction*, 85-95. It was also stipulated that these states could not disenfranchise black citizens from voting on the grounds of illiteracy.

[73] Montana, North and South Dakota, and Washington were all required to have free, non-sectarian public schools under the enabling acts of 1889, as was New Mexico in 1912. See Kersch, *Constructing Civil Liberties,* 29-30; McAfee, *Religion, Race and Reconstruction,* 85-95. For a full account of the role of federal government in stoking the development public education, see Tyack, James and Benavot, *Law and the Shaping of Public Education, 1785-1954*, especially 27-36 on the admission of new territories after the Civil War and the increasingly strict stipulations on the use of land grants for public schooling.

public schooling viewed those policies as a two-prong attack on the very structure of the state, as an invasion of the rights of family government and state government alike. There were, of course, important regional differences: religious and racial dynamics framed the battles over education in different ways in different parts of the country. Outside of the South, white ethnic and minority religious groups, especially Catholics, opposed compulsory education laws in order to keep their children out of public schools. In the South, it was white Southern Protestants who opposed the establishment of public education systems to keep black children out of schools.

Nonetheless, the partisan lines were the same. Just as Republicans pushed for compulsory education laws at the state level, and to expand federal powers over education in Congress, the Democratic Party was the primary force behind the opposition at both levels. A common ideology bridged the opposition of Democrats in North and South: one that viewed compulsory education schemes, and the centralization of state power it entailed, as a threat to the decentralized structure of republican governance that vested authority in the white male-headed family and the state, respectively. Outside of the South, Democrats succeeded in voting down proposals for compulsory attendance laws in twelve states during the 1870s because they were perceived to violate parental rights.[74] The confluence in the 1870s of debates outside of the South about legitimacy of compulsory attendance laws with the debates in the South over the legitimacy of public education brings into view the role that paternal sovereignty played in the opposition to every stage of the expansion of public schooling.

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[74] Provasnik,"Compulsory Schooling, from Idea to Institution," chapter four. Provasnik notes that the proposal of compulsory education was also rejected at the state constitutional conventions of Michigan, Illinois and New York in 1867, see 130.

Paternal Sovereignty and the Opposition to Public Schooling in the 1870s

In 1870, a legal case arose in Chicago, Illinois that threatened to arrest the compulsory schooling movement in its infancy. The exceptional decision of the Supreme Court of Illinois in *People v. Turner* crystallized the connections between paternal sovereignty and conceptions of republican government and liberty that underpinned Democratic opposition.[75] Whereas Republicans viewed the grant of paternal power to the state over children as essential to the perpetuity of free government, opponents viewed the usurpation of paternal rights that it entailed as a fatal threat to free government, undermining the very principles of liberty on which it rested. Furthermore, the decision in *People v. Turner,* if only momentarily, overturned *Ex Parte Course* and challenged the principle of *parens patriae* as the justification for the state's compulsory powers over children and their parents. The facts of *O'Connell v. Turner* were similar to *Ex Parte Crouse.* Daniel O'Connell, a poor Irish Catholic boy of fourteen or fifteen years had been admitted to the Chicago Reform school on the vague charge of "misfortune" in September 1870 and his father, Michael O'Connell, filed a writ to free him.[76]

The case unfolded, however, in a new political and legal moment, and would test the bounds of how far the state's power ought to extend over children. The boy at the heart of the case, Daniel, shared his name with the Irish leader of the Catholic emancipation movement, known as Ireland's own "Great Emancipator" or "The Liberator" – a coincidence that would not have been lost on Chicago's large Irish Catholic immigrant community, who were angered that their children disproportionately made up over half of the boys at the Reform School. Indeed, when his father filed the

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[75] *The People v. Turner,* 55 Ill. 280 (1870).

[76] By the 1860s and 1870s, Houses of Refuge had fallen into ill repute among many scandals of over-crowding, abuse, and their jail-like conditions. Reform Schools were the post-war version of House of Refuge and while they were designed with the hope of being less crowded, more educational and less punitive, they ended up mired in many of the same controversies as their predecessors. By 1876, there were more than fifty Reform Schools or Houses of Refuge around the country. Platt, *The Child Savers,* 51-55; Robert Mennel, *Thorns and Thisles: Juvenile Delinquents in the United States 1825-1940* (Durham: The University of New Hampshire Press, 1973).

writ, it was the seventeenth petition filed against the Reform School by an Irish Catholic parent that year.[77] When the Supreme Court of Illinois decided to hear Michael O'Connell's petition, then, it represented the grievances of an entire community who felt targeted by the state's coercive powers in the establishment of public schools and reform schools. The attorney for the O'Connell family, William T. Butler, therefore sought to limit the power of the state over children by arguing that the new federal constitutional protections for the rights of citizenship encompassed in the recent Reconstruction Amendments extended to children, and protected the fundamental rights of fathers against state power.[78] The attorney for the Reform School, I.N. Stiles, was less loquacious and less ambitious in his defense. To prove the Reform School was a legitimate exercise of the state's *parens patriae,* he argued that he need "call the attention to the court of one decision only," *Ex Parte Crouse,* and he took the liberty of transcribing the judgment in full.[79]

In direct contrast to the Supreme Court of Pennsylvania in *Ex Parte Crouse* (1838), the Supreme Court of Illinois in *People v. Turner* held that the Chicago Reform

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[77] The case was also heard in Abraham Lincoln's home state as the full effects of the Reconstruction Amendments began to unfold. Days after the writ was filed, black men voted first the first time since the ratification of the Fifteenth Amendment. The judge who would deliver the unanimous decision, Anthony Thornton, a new appointment to the Court, had returned from representing the state a Democrat in the 39th Congress that adopted the Fourteenth Amendment in 1868. For more details on the background of the case, see David S. Tanenhaus, "Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age," *Law and History Review,* 23, no.2 (2005): 351-385. In his recounting of the case, however, Tanenhaus misidentifies Thornton as a Republican, the party responsible for adopting the Fourteenth Amendment. Thornton was in fact a Democrat.

[78] The Fourteenth Amendment, adopted in 1868 to protect the citizenship rights of freed slaves, gave individuals redress to argue that the states were abridging their rights as United States citizens. Butler argued that the Fourteenth Amendment had established that American liberty was the right of all persons, "not the exclusive right of those of a certain color," and for same reasons liberty was an inherent right, not the "exclusive right of persons over and above a certain age." The fact that Daniel had been detained without trial violated his due process rights, and the fact that he was forced to labor for six hours a day in the reform school he argued made him "victim of involuntary servitude," expressly prohibited by the Thirteenth Amendment adopted in 1865 that formally abolished slavery. Brief of the Relator, William T. Butler filed November 26, 1870, n.p. Case file 16742, Supreme Court Archives, Springfield, Illinois. [Hereafter: Butler Brief].

[79] Brief by I.N. Stiles, The City Attorney and Counsel for the Chicago Reform School, filed November 23, 1870, 1-4. Case file 16742, Supreme Court Archives, Springfield, Illinois. "The liberty which the framers of the constitution were do desirous of protecting… is that which this boy had never been deprived since he was never permitted to enjoy it," Stiles argued. If Daniel were released, he pointed out, he would be recommitted to his father's custody.

School was a prison, not a school. The Court ordered Daniel's release, holding that his detention abridged the liberty of both himself and his father. Anthony Thornton, a new appointment who had represented Illinois as Democrat in the 39th Congress that adopted the Fourteenth Amendment in 1868, delivered the unanimous decision of the Court. Thornton opined that the language of the Bill of Rights "was broad and comprehensive and declares a grand truth." Reflecting on the influence of a new constitutional conception of citizenship after the adoption of the Fourteenth Amendment, Thornton found that Daniel O'Connell's detention abridged his fundamental liberties as a citizen, noting the "disability of minors does not make slaves or criminals of them." He characterized Daniel's detention as a dangerous form of tyranny and oppression. "The principle of the absorption of the child in, and its complete subjection to the despotism of the State, is wholly inadmissible in the modern civilized world," Thornton declared. Thus, though it was a "grave responsibility to pronounce on acts of the legislative department," the court was impelled to do so in this case to uphold the liberty of father and son.[80]

Thornton viewed the autonomy of fathers as a fundamental liberty that ordered society, and accordingly held that the state's powers of *parens patriae* must be highly circumscribed by principles of constitutional and natural law. [81] The common law, he noted, entrusted the governance of children to fathers and made special allowances in deference to the fact. The state, as *parens patriae* should only intervene in cases of extreme physical abuse. The authority of the father was an "emanation from God, and every attempt to infringe upon it, except from dire necessity, should be resisted in all well governed states." Moreover, father's responsibility to his child was the most powerful

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[80] *The People v. Turner,* 55 Ill. 280 (1870) at 284-285.

[81] To establish the fundamental rights of fathers, William Butler had turned to the writings of the seventeenth century Republican theorist Algernon Sidney to argue there was "no idea more strenuously and persistently inculcated by this great thinker" than that "the right of the father is from nature incommunicable" and that " no man can therefore claim the right of a father over another except one that is so." The rights of fathers were not "delegated powers" but derived from nature. Butler Brief.

inducement for men to act as a productive and responsible citizen. "The violent abruption of this relation," he therefore warned, would "not only tend to whither these motives to action, but necessarily in time, alienate the father's natural affections."[82] The decision, in effect, closed down the Chicago Reform School, which could only thereafter accept convicted children. It was not rebuilt after it burnt down in the Great Fire of 1871.

If only for a brief moment, the decision was celebrated as spelling the end of the compulsory education movement. Justice Isaac Redfield, the former Chief Justice of the Supreme Court of Vermont, heralded it as such. Redfield was a distinguished jurist, and like Thornton, he was a life-long Democrat. He celebrated the decision as a "wonderful advance in liberty" in granting parents the rights over their children's education. "Unless we have greatly misconceived its scope and principles," he wrote in the *American Law Register,* the decision in *People v. Turner* "must be regarded as striking at the very root and life of one of the most favorite schemes or reform known to the present age… legislative moral reform and compulsory popular education." He claimed reformers were attempting to "erect an empire" of unprecedented proportions and the decision struck a "fatal blow at the very foundation of their entire superstructure." The constitution had succeeded in safeguarding the liberty of the people from legislative excess. He predicted the decision would bring a "speedy and inglorious termination" to the entire project of compulsory education.[83]

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[82] *The People v. Turner*, 55 Ill. 280 (1870) at 284.

[83] Isaac Redfield, "Note to Turner v. O'Connell," *American Law Register* 10 (1871), 372-375. The Illinois Superintendent for Public Instruction Newtown Bateman, also anticipated that the decision would give ammunition to "those who deny the competency of a legislature to meddle with the question of school attendance." But he argued the decision instead buttressed the authority of compulsory attendance laws because it established the inalienable rights of the child as a constitutional principle. The project of compulsory education secured the highest right, the "natural and inalienable right of every child" to an education, a "right independent of all human laws and regulations; higher than the constitution and law" that would be held "forever sacred," Ninth Biennial Report of the Superintendent of Public Instruction of Illinois 1871-1872, 224 as cited in Jeffrey Shulman, *The Constitutional Parent: Rights, Responsibilities, and the Enfranchisement of the Child* (New Haven: Yale University Press, 2014). 99-110.

Redfield had indeed greatly misconceived the scope and significance of the decision in *O'Connell v. Turner*. In the decades following, state courts around the country, including the Supreme Court of Illinois, denied petitions based of *Turner v. Illinois* and reverted back to *Ex Parte Crouse,* which became the law of the land.[84] In 1873, the U.S. Supreme Court gutted an expansive view of the Fourteenth Amendment in the *Slaughterhouse* cases, which held that the Amendment only protected a small number of federal rights of citizenship and effectively foreclosed civil rights cases like *People v. Turner* for the next fifty years. The Supreme Court did not recognize that civil rights fell under the Fourteenth Amendment until 1925 in the case of *Pierce v. Society of Sisters,* which held that parental rights constituted a fundamental liberty under the substantive due process clause.

Even so, the idea that paternal sovereignty was fundamental to liberty that pervaded both *People v. Turner* and *Pierce v. Society of Sisters* fell out of favor in judicial circles in the intervening years. Courts looked favorably upon the state's paternal role, as *parens patriae,* in governing the child, approving the constitutionality of compulsory schooling laws, child labor laws, vaccination requirements and establishment of the juvenile courts. Those reform movements championed the rights of the child, but as *People v. Turner* illuminates, rested on a conception of the child as having very distinct rights claims to adults. Children had rights claims on the state, whereas adults had rights claims against the state. In effect, it was children's lack of liberty that allowed the state to safeguard their individual rights as the state expanded its paternal functions and powers. From 1870 onwards, the cry of parental rights that so resonated with Democratic jurists like Thornton and Redfield held little muster in judicial circles.

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[84] The Supreme Court of Illinois adopted the reasoning of *Ex Parte Crouse* almost verbatim in reversing *The People v. Turner* in *Petition of Ferrier*, 103 Ill. 367 (1882). It was not until 1967 that the Supreme Court again recognized children as having due process rights in the case of *In Re Gault*. Tanenhaus, "Between Liberty and Dependency."

Instead, it became a rallying cry among Democratic politicians who sought to block the passage of compulsory schooling laws in the North, especially on behalf of their Catholic constituents. The controversy over the commitment of Irish Catholic youth to the Reform School in Chicago was a microcosm of a much larger dispute. Catholic opposition to compulsory schooling in the 1870s was the culmination of a long-running sectarian dispute over the state's role in education. Indeed, the sectarian schooling wars had dominated, and in many ways had in fact driven the development of the common school system before the Civil War. The waves of German Catholic and Irish Catholic migrations into the United States during the nineteenth century drove repeated and recurring conflicts between these immigrant groups and native-born Protestant populations over schooling. The Catholic Church required its parishioners to patronize parochial schools. Like numerous other churches in the nineteenth century, the Catholic Church opposed public schooling because it believed that religious instruction was a vital part of education. Moreover, it maintained that public schools were not in fact secular institutions because they used the King James Bible.[85]

The schooling wars had erupted over the issue of whether tax funds would be allocated to parochial schools or exclusively to public schools. In New York, a proposal that religious schools be eligible for state funds in 1840 triggered such a strong political firestorm that it became the driving force behind the establishment of a statewide system of free public schools, and a constitutional amendment in 1846 cemented that state funds could only be used for public schools.[86] This pattern repeated in states across the United States between the 1840s and 1880s where the adoption of constitutional amendments not only prohibited the use of state funds for religious schools but also

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[85] For a broad overview, see John McGreevy, *Catholicism and American Freedom* (New York: W.W. Norton & Company, 2003), 7-42; Smith, *Religious Persecution and the Political Order,* chapter seven; Steven Green, *The Bible, the School and the Constitution* (New York: Oxford University Press, 2012).

[86] On the schooling wars in New York see Ravitch, *The Great Schooling* Wars; Cubberly, *Public Education in the United States,* 177-180. On the school-funding question elsewhere, see Green, *The Bible, The School and the Constitution,* chapter two; McAfee, *Religion, Race, and Reconstruction,* chapters one to three.

cemented the state's obligations to provide free schools for all children. Free public schools became a central plank of the anti-Catholic political parties, the Native American Party in the 1840s and the Know Nothings in the 1850s as nativist sentiment soared. Between 1844 and 1872, eleven states resolved the controversy over state funds for religious schools with constitutional amendments in which dominant native-born Protestant populations prevailed in securing the exclusive use of state funds for non-sectarian schools. The constitutions of six states admitted to the Union in that same period also included a prohibition on the use of state funds for religious schools. [87]

In 1875, the issue filtered up to federal politics when the Republican President, Ulysses Grant, proposed a federal constitutional amendment that would mandate that states provide free public schools and prohibit the use of state funds for religious schools.[88] The resulting "Blaine Amendment," named for the Republican James Blaine who introduced the amendment in Congress, narrowly failed to secure required two-third majority in the federal Senate. Another nine states, however, adopted a state constitutional amendment to the same effect before the end of the decade.[89] By the early twentieth century, thirty-eight states had what came to be known as "Blaine Amendments" to their state constitutions.[90] The panic of 1873 and subsequent economic depression heightened the sectarian stakes of the schooling wars.[91] Many Catholic

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[87] Smith, *Religion Persecution and the American Political Order,* 162-164; Kersch, *Constructing Civil Liberties,* 241-242.

[88] President Grant, who had led the Union Army to victory in the Civil War and been an anti-Catholic Know-Nothing before the war, was the first President to champion public education. In 1875, he called for the establishment of public schools across the United States and stated "not one dollar appropriated to state public schools shall be supplied to the support of any sectarian school." Smith, *The Bureau of Education,* 241.

[89] The best account of federal controversy over the Blaine Amendment is McAfee, *Religion, Race and Reconstruction,* 203-219.

[90] Smith, *Religion Persecution and the American Political Order,* 162-164. Smith rightly notes that after Blaine made the proposal in Congress, state amendments came to be known as "Blaine Amendments," but the movement to constitutionally enshrine that public funds would only be used to secular public schools had been afoot for several decades by then.

[91] On the effect of the 1873 depression in inflaming the schooling wars, see McAfee, *Religion, Race and Reconstruction,* 121-123.

families could not afford parochial fees in addition to the taxes levied for public schools and resorted to sending their children to public schools against the wishes of the Church.

Throughout the schooling wars, Catholic opposition to the expansion of state schooling frequently invoked ideas about paternal sovereignty as perhaps best exemplified by Californian Democrat, Zachariah Montgomery. In the 1870s, Montgomery had put himself forward as an outspoken and prolific critic of what he called the "New England or anti-parental" system of education. By 1885, he became notorious for his position of public education nationally when he was nominated to serve as the assistant Attorney General. Montgomery was born in Kentucky in 1825 to a Catholic family that traced its roots to the Maryland colony. After gradating from St Mary's College in Kentucky, Montgomery traveled to California in 1849. In California, he worked as a lawyer and publisher, as well as serving in the state assembly from 1861-1862. Montgomery was a leader of the conservative wing of California's Democratic Party that avowed *laissez-faire* principles and strict adherence to federalism based on the constitution. (He was struck from the bar in California during the Civil War for refusing to pledge loyalty to the Union government). He was also a man of faith who believed firmly in the importance of religion in education and in natural law.[92] As religious conservative who lionized liberty, Montgomery's profile revealed how foundational ideas about paternal sovereignty were to conservative politics in the late nineteenth century.

Montgomery's stance on the schooling question married his religious beliefs and political principles. In 1855, the anti-Catholic Know Nothing Party had swept to power in California and within a year had outlawed the use of state funds for parochial schools and set about establishing a statewide system of public schools. Elected in 1861,

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[92] Scholarly treatments of Zachariah Montgomery are limited. This profile is drawn from John Josesph Shanahan, "Zachariah Montgomery: Agitator for State and Individual Rights" (M.A. Thesis, University of California, 1934). The name of Montgomery's publications included "The Occidental" and by "The Family Defender Magazine and Educational Review" as he began to focus on the school question more exclusively.

Montgomery entered the state assembly with a petition of fourteen thousand signatures demanding that the California School Law of 1855 be overhauled. Montgomery proposed a system of parent-run local schools where state funds would be distributed on a per capita basis, but there would be no state oversight of the schools or teachers. Introducing the bill, Montgomery argued that he supported the republican goal of universal education but that only his scheme remained true to republican principles of self-government because it respected the autonomy of the family. "There is a boundary beyond which government should not go; there is a circle within which it should not operate," he proclaimed. [93] During his time as an assemblyman, Montgomery knew he was fighting a losing battle but nonetheless attacked the expanding bureaucracy of state education, particularly the state licensing of teachers, the creation of district superintendents and school boards. [94] When California did introduce a compulsory attendance law in 1874, Montgomery condemned it as a "startling doctrine" that signaled children would soon fall "completely under the control of the State." [95]

In 1878, Montgomery published *The Poison Fountain,* a collection of writings and speeches on school policy, to push his anti-public schooling agenda. *The Poison Fountain,* he claimed, was written from a "parental and non-sectarian point of view" and offered a "platform of universally recognized principles" that people of all faiths could unite around to agitate for educational reform. Montgomery's central argument was that "the decline of parental authority, the downfall of family government, and the terrible growth of crime, pauperism, insanity and suicide" in the United States were all traceable "directly and un-mistakably to our anti-parental public school system."[96] Montgomery refuted the

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[93] Zachariah Montgomery, *The Poison Fountain or, Anti-Parental Education*: *Essays and Discussion son the School Question from a Parental and Non-Sectarian Standpoint* (San Francisco: Self-Published, 1878), 159.
[94] Defiantly, he told the legislature in 1861 that he would refuse the authority of any compulsory education law: "Gentleman, I tell the State, I tell the world, that for myself, no law exists, nor can there ever be a law enacted which can compel me to send my child into what I regard a school of vice or iniquity, merely because the law by a kind of legal fiction pronounces it good." Montgomery, *The Poison Fountain,* 184.
[95] Montgomery, *The Poison Fountain,* 74-75.
[96] Montgomery, *The Poison Fountain,* 1.

claim of reformers that public schooling prevented crime by producing copious statistics to suggest that crime spiked in regions that had introduced "anti-parental public schools" - just as Herbert Spencer did in *Social Statistics.*[97]

Poison Fountain outlined Montgomery's theory of government in which family government constituted the first station of self-government, the "first principle" of republican governance. Family government, he argued, was the original and oldest form of government in which parents were "legitimate law-givers" who held the right to set rules and regulations "without interference on the party of either city ordinances, State legislation, or federal enactments."[98] Family government held sovereign powers for the same reasons that sovereignty of the states was critical to federalism. The administration of government had to be as close to the source as possible. Labor laws, for example, had to be the exclusive purview of the states because Californian miners understood their conditions far better than manufacturers in Massachusetts or rice growers in South Carolina. Moreover, the sovereignty of the family within the structure of federalism was of the utmost importance because it was the source of society, and an unchanging form of government. The laws of family governed "not only boast a greater antiquity, but they claim a far higher authority, and stand upon an infinity more enduring basis…" than civil government. The "anti-parental" school system, therefore, not only threatened family government, but all government because it undermined parental authority, which "thereby logically and necessarily sanctions disobedience to all law."[99]

In 1885, President Grover Cleveland nominated Montgomery to serve as the Assistant Attorney-General. His well-known anti-public school position sparked national furor. The Attorney General, Augustus Garland, recommended Montgomery's

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[97] Montgomery, *The Poison Fountain,* 1-14.
[98] Montgomery, *The Poison Fountain,* 37-38. "Let this principle be denied, and the whole theory of self-government falls to the ground."
[99] Montgomery, *The Poison Fountain,* 39, 30.

nomination, the two had been friends since their school days at St Mary's College.[100] The nomination of Zachariah Montgomery was a lightening rod in the Senate that crystallized the deep partisan divisions between Republicans and Democrats on the question of public schooling that had formed since the Civil War. Republicans attempted to block his appointment on the grounds that he was an enemy of "America's bastion of liberty, the public school" and his nomination was derided in the Republican press.[101] The outcry, however, was not sufficient to block Montgomery's nomination and instead gave him a significant platform for his views. In his confirmation hearings, he refused to walk back his opposition to public schooling. Instead, he grandstanded. Montgomery published a new version of his book entitled *Poison Drops in the Federal Senate,* and distributed a copy to every senator and every member of the press corps.[102] After his tenure as assistant Attorney General, Montgomery toured the nation to lecture on his views about "Godless" public schools. The crusade against "anti-parental" public schools was cause that sustained Montgomery until the end of his life in 1900.

Zachariah Montgomery's campaign against public schooling made plain that ideas about parental rights were more than political chicanery, but rather constituted a core belief that lay behind the Catholic opposition. High-ranking members of the Catholic clergy and lay Catholics alike invoked the same ideas about paternal sovereignty. The Bishop of Rochester, Bernard John McQuaid, insisted, for instance, that "parental rights precede State rights" and urged all Americas to reject the "doctrine coming into vogue that the child belongs to the State." Edmund Francis Dunne, the Chief Justice of

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[100] Garland himself was not Catholic and had been a Whig and Know-Nothing in the 1850s.
[101] Senator Ingalls, the head of the judiciary committee, held up his appointment because he believed Montgomery's views on public education would compromise his ability to administer federal laws that fell within the purview of the Justice Department, including the Blair Bill presently before the House that proposed federal funds for common schools be apportioned on the basis of illiteracy rates. Allen Going, "The South and the Blair Education Bill." *The Mississippi Valley Historical Review*, 44, no. 2, (1957): 267–290. Shanahan, "Zachariah Montgomery," 127-134.
[102] Zachariah Montgomery, *Poison Drops in the Federal Senate,* 3rd ed. (Washington D.C.: Gibson Bros, Printers and Bookbinders, 1886).

the Arizona territory, proclaimed the "absolute control of our domestic affairs is a sacred right which we cannot yield to the State."[103]

Just as public schooling advocates would invoke the principle of *patria potestas* to critique contemporary Catholic arguments about paternal sovereignty, as an apparent time stamp on when such ideas about government were appropriate, Catholics and other opponents of public schooling would invoke a different usable past from ancient times, normally Sparta or Plato's Republic. Compulsory education, Bishop McQuaid charged, was the "dressing up of an old skeleton of Spartan paganism." Zachariah Montgomery lectured on how state control over education was inimical to the principles of the modern state. State controlled education, he charged, resembled the principle of ancient Sparta where children were reared and educated by the State, "according to the plans and purposes of the State, without regard to the wishes of parents" which he warned ultimately produced quiet citizens who would not hesitate "in obedience to the State's behests, to murder their own children whenever feebleness or deformity threatened to render them a charge upon the public."[104]

Supporters of public education, and especially nativist publications, would often remark on the uniformity of Catholic arguments about paternal sovereignty with suspicion. It seemed to offer proof of an insidious papal plot: a clever ruse parading in the language of liberal rights that masked, as one anti-Catholic critic put it, the fact that Catholic parents had no rights in education as they were slaves to a hierarchy "controlled by a foreign master, 3,000 miles away."[105] But, advocates of compulsory education were also keen to cast aspersions on the sincerity of Catholic arguments about parental rights

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[103] This coincidence was remarked upon by Miner, "Rights of the State, Parent and Child," 227-228 from which these quotes are drawn. For an exemplary overview of the Catholic position on paternal sovereignty and the schooling question, see "The Rights and Duties of Family and State In Regard to Education," *American Catholic Quarterly Review,* 9, no.33 (January 1884): 105- 130 that opens: "'The child belongs to the State before belonging to his parents,'" as a summary of position of advocates of compulsory education.
[104] Miner, "Rights of the State, Parent and Child," 227, Montgomery, *The Poison Fountain,* 127-128, and "The Rights and Duties of Family and State," 105-110.
[105] Miner, "Rights of the State, Parent and Child," 227.

because they understood paternal sovereignty was an idea that had a particular political appeal. Indeed, we can only understand the intensity with which compulsory schooling advocates argued for the supremacy of the state over the family in the 1870s within the context of how prevalent ideas about paternal sovereignty were in opposition arguments. In the Northeast, Midwest and West, native-born white Protestants painted the claim of parental rights as a defensive Catholic strategy, one that relied on "barbarous" ancient doctrines of absolute paternal power that were antithetical to liberal individualism and the rights of the liberal state.[106]

In the South, however, where battles over the establishment of public schooling exploded during the 1870s, the same lines about paternal sovereignty surfaced among many prominent white Southern Protestants who opposed public schooling. To be sure, the vanguard of the Old South was no friend of the liberal order of Yankee North. Nor was it surprising that the effort to educate freed blacks after the war provoked vehement opposition among white supremacists in a region whose legal and social order was premised on the subjugation of blacks, including prohibitions on the education of enslaved blacks. Furthermore, the anti-tax sentiment that plagued the establishment of public schools everywhere was particularly pronounced in the South in the context of the "debt crisis" faced by former confederate states. Finally, Southern religious conservatives assailed the secular nature of public education required by the separation of church and state.

While all of these factors shaped the conflict over schooling in the South, the idea that at the root of Southern opposition that bound them all together, and would ultimately give them national purchase, was that paternal sovereignty constituted the cornerstone of white men's liberty. Deeply engrained assumptions about the autonomy of the white patriarchal household in the South were asserted with vigor in the debates

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[106] A.D. Mayo, "The Parent and the State, "*Massachusetts Teacher* 26, no.5, May 1873: 149.

over the establishment of public schooling in the South, bringing to light the racialized assumptions that vested white men with sovereign rights over their homes. Moreover, the resistance of property-owning whites to paying for the education of the white property-less masses revealed the nexus between arguments about property rights and paternal rights that had consistently animated the resistance to public education in all regions during the nineteenth century. The debates in the South revealed that religious opposition to public schooling was also grounded in the language of liberal rights, specifically the right of fathers to control the religious upbringing of their children. By the end of the century, the resistance of property-owning whites in the South showed how social Darwinian ideas were melding with ideas about paternal sovereignty to bolster an anti-statist agenda.

And if that point of convergence between Northern Catholic opposition and the opposition of Southern white elites has been lost on historians of public schooling, it was not lost on public schooling advocates at the time. "A sudden revival of reverence for the sanctity of the Family seems to have seized upon the three classes of enemies to the American Common School," announced Reverend Amory Dwight Mayo, *Massachusetts Teachers* journal in 1873, warning the readers that a "triple-headed opponent" was waging war on the public school system, comprised of the Catholic Church, the aristocracy, and radical liberals. Mayo, a Unitarian preacher and educational reformer from Massachusetts, argued that each "head" was an import of European despotisms and had united "in opposing the authority of the parent to the right of the State." "No patriarch of olden time," he warned his fellow friends of public schooling, "could discourse more eloquently than these patriots – outraged at the pretensions of Uncle Same to invade the

sacred circle of the home, and attempt the scandalous mission of making its turbulent youth good citizens of the United States."[107]

The arguments against public schooling that converged around the property-rights of white patriarchs reverberated throughout the South after the Civil War, evidenced in the controversy that flared in Virginia. In Virginia, as with most Southern states, no statewide systems of public education existed prior to the Civil War. The state penalized anyone who educated enslaved people and prohibited the education of free African Americans. For the white population, the British "pauper model" continued to shape the educational offerings available in the state until the Civil War. As had been the case in Britain before the development of state schools, the state played a minimal role in schooling, providing meager aid for a few pauper or charity schools, while the remainder of the population was expected to rely on parental initiative and resources.[108] The Catholic, Presbyterian and Episcopalian churches provided some schooling while many wealthy whites retained tutors for their children. [109]

At the State Constitutional Convention between 1867-1869, African-American delegates with the support of some white Unionists prevailed in securing a clause in the state constitution that required the gradual establishment of a uniform system of public

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[107] A.D. Mayo, "The Parent and the State," *Massachusetts Teacher* 26, no.5, May 1873: 149-157. The parallel was also drawn in the Republican press in protesting the nomination of Zachariah Montgomery as assistant Attorney-General, with one op-ed claiming who Montgomery was a "fanatical Jesuit of the worst type" whose vicious slander of public schools and predictions the system would "soon be abolished" were the "exact sentiments of the Southern aristocracy who had always opposed public schools because the afford to children of what they are pleased to call 'common people' an equal opportunity with the own offspring." "Assistant Attorney-General*," Salt Lake Evening Democrat*, May 16, 1885, 2.

[108] Ellwood Cubberly offers Virginia as the example of the state where the British inheritance of the "pauper system" had the most lasting impact on the development of the education system. Cubberly notes that Massachusetts and Connecticut were a-typical because of the influence of Puritanism on their educational systems, whereas most former British colonies followed the "pauper model." Cubberly, *Public Education in the United States,* 21-23. For more on this point, see above note twenty.

[109] Before the Civil War, Norfolk County (and Norfolk City) was the only county within Virginia to provide some form of public schools for its residents. William A. Link, *A Hard Country and a Lonely Place: Schooling, Society, and Reform in Rural Virginia, 1870-1920* (Chapel Hill: University of North Carolina Press, 1986); McAfee, *Religion, Race and Reconstruction,* 89-91.

schools and the immediate election of a Superintendent for Education.[110] Ultimately, Virginia was one of three states compelled to include such a provision by the United States Congress– a fact that further stoked resistance to public schooling within the state.[111] In 1869, William Henry Ruffner, a Virginian Presbyterian minister who had been educated at the Princeton Theological Seminary, won the election for the officer of the Superintendent. As the newly formed Conservative Party began to exert its power in Virginian politics, Ruffner took up the task of establishing the state's first system of public education amidst a hostile political environment.[112]

Robert Lewis Dabney, a fellow Presbyterian Minister and J. William Jones, a Baptist clergyman, took a leading role in fueling opposition to public schooling in Virginia. In a long series of published diatribes, the two prominent Protestants worked in tandem to attempt to arrest the scheme in its infancy. Both men hailed from Louisa County, a county that surrounded the city of Charlottesville in the middle of the state. Born in 1820, Dabney was trained as a minister at Union Theological Seminary and became an influential theologian among Old School Presbyterians. During the Civil War, he served as a Confederate Chaplain and chief of staff to his brother-in-law, Stonewall Jackson, whose biography he later authored.[113] Jones, born in 1836, also served as a Confederate Chaplain after graduating from the Southern Baptist Theological Seminary

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110 The first state-wide school system in Virginia was established by the Federal Freedmen's Bureau in 1865, providing schooling for 33, 300 freed black children. Walter J. Fraser, Jr., "William Henry Ruffner and the Establishment of Virginia's Public School System, 1870-1874," *Virginia Magazine of History and Biography*, 79, no.3, (July 1971): 260.

111 Radical Republican, Charles Sumner, made novel use of the "Guarantee Clause" to make free schooling for black and whites a condition of Virginia's re-admission, see McAfee, *Religion, Race and Reconstruction,* 89-99.

112 William A. Link, *A Hard Country and a Lonely Place,* Thomas Hunt and Jennings Wagoner, "Race, Religion and Redemption: William Henry Ruffner and the Moral Foundations of Education in Virginia", *American Presbyterian*, 66, no.1 (Spring 1988): 1-9; Fraser, "William Henry Ruffner," 259-279; Walter Javan Fraser Jr., "William Henry Ruffner: A Liberal in the Old and New South (PhD diss., University of Tennessee, 1970), 296-442.

113 Dabney, a former classmate of Ruffner, considered himself an orthodox conservative in both his religious beliefs and his politics, criticizing the impotency of Northern conservatism that would buck to incorporate radical social changes. David Henry Overy, "Robert Lewis Dabney: Apostle of he Old South" (PhD diss., University of Wisconsin, 1967); James C. Carper and Thomas C. Hunt, *The Dissenting Tradition in American Education* (New York: Peter Lang Publisher, 2007), chapter six.

in Greenville, South Carolina. After the war, Jones became an influential proponent of the Lost Cause. He led the initial crusade against public schooling, writing under the *nom de plume* "Civis," first in a Virginian Baptist tract, the *Religious Herald,* then later in the widely circulated *Southern Planter and Farmer.*[114] Inspired by reading Jones's incendiary writings on the subject, Dabney took up arms. He penned lengthy essays in the *Southern Planter* and *Princeton Review* that ultimately prompted an extended debate with Ruffner that was republished widely in papers throughout the state.[115] Together, Jones and Dabney formed the rearguard of the Old South, marked by a defense of society where education was the privilege of a few and the exclusive responsibility of fathers.

Jones and Dabney railed against universal education as a threat to a Southern social order that was still predicated on elite white male mastery. Driven by white supremacist beliefs, they perceived that there was a mounting crisis in the mid-1870s as Congress contemplated a federal civil rights bill that included a clause mandating "mixed schools."[116] As they saw it, the dual evils of "negro suffrage and the public school" had been thrust upon Virginia by the federal government. Neither could be sustained, however, because they were based on false theories of human capacity and false principles of government. Dabney explained that the "parasitical servility and dependency of nature" of the black race meant blacks could never be equipped for the "privilege of voting," and similarly efforts to educate the black race were futile. All that

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[114] Hunt and Wagoner, "Race, Religion and Redemption;" Peter Carmichael, "New South Visionaries: Virginia's Last Generation of Slave Holders, The Gospel of Progress and the Lost Cause" in eds. Gary Gallagher and Alan Nolan, *The Myth of the Lost Cause and Civil War History* (Bloomington, Indiana University Press, 2000), 123-125, Charles Wilson, *Baptized in Blood: The Religion of the Lost Cause 1865-1920* (Athens: University of Georgia Press, 1980), 119-139. The attribution that Jones is *Civis* was made in Fraser, "William Henry Ruffner," 415.

[115] The debate between Dabney and Ruffner started in the *Southern Planter and Farmer* and played out in the *Richmond Enquirer*, *Richmond Dispatch*, and the *Educational Journal of Virginia*. See Hunt and Wagoner, "Race, Religion and Redemption," FN 17 on 9.

[116] There were also multiple education bills that proposed mixed schools, including the Hoar Bill and Sumner's proposal for a D.C. schools bill. On the civil rights bill and particularly the anger of Southerners about the mixed schools provision, see McAfee, *Religion, Race and Reconstruction,* 155-157.

came from the "pretend education" of blacks was to fill African Americans with false aspirations that would threaten the social order.[117]

The same held true for educating the white children of the unpropertied masses. In every civilized country, Jones argued, there needed to be a laboring class. Yet public schools were a "cunning cheat of Yankee state-craft… alluring the poor, harassed Southern parent" with a "bribe" that promised to "deceitfully to relieve him of his parental responsibility."[118] Public schools would rip apart the class distinctions that stratified and structured Southern society. Dabney and Jones called for the reintroduction of property requirements for suffrage to reverse the changes in Southern society. (Despite their ideological differences on the schooling question, nativists in the North also called for restrictions on suffrage during the same period to halt the changes wrought by immigration). Only by reintroducing property restrictions could political sense prevail, and Virginians begin the work of rejecting Reconstruction starting with the public school.[119]

Public schools, in their view, threatened more than the social order; they threatened the very basis of American government that depended on white men's mastery of their family. Dabney pressed that he was not arguing for the exclusion of blacks from public schools, but rather for the abolition of public school altogether. "The system is utterly indefensible, even without reference to the question of mixed races," he wrote because it was in "irreconcilable conflict with the American theory of government," particularly the Biblical doctrine of parental responsibility. "Unless arrested, it will be the death of liberty, if indeed, it has not already inflicted the fatal

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117 R.L. Dabney, "The Negro and the Common School," *Southern Planter and Farmer* 37, no. 4, (April 1876), 1.

118 R.L. Dabney, "The Negro and the Common School," *Southern Planter and Farmer* 37, no. 4, (April 1876), 1.

119 Civis,"The Public School in Its Relations to the Negro, No. IV*," Southern Planter and Farmer* 36, no.1 (December 1875): 709-710.

blow."[120] For Dabney and Jones, the institution of public education imperiled white manhood in three respects. First, it "destroys manhood by relieving men of their chief responsibility, the care of their own children."[121] Second, it "annihilated" the property rights of free men, by forcing them to shoulder the taxation burden of educating another man's child.[122] Third, they protested that education could not exist without religious instruction and if religious instruction existed in public schools it would necessarily abridge the strict separation of church and state. Thus, public schooling threatened the right of men to rear their children in their own faith, and like Zachariah Montgomery they claimed they stood with Catholics, Protestant, Jews, Muslims, infidels and Pagans in upholding the rights of all men.

At the root of their argument, Dabney and Jones, like Zachariah Montgomery, charged that public education undermined family government, the very basis on which the individual rights of independent men rested. "The old system evinced its wisdom by avoiding the pagan, Spartan theory, which makes the State the parent."[123] Drawing on the writings of Herbert Spencer, their opposition combined ideas about biological fitness with deep-seated racial prejudices to justify restricting education and suffrage to certain races and classes. "The beginnings of communism is the public school," they warned, in which the state would use its control over children to produce what Hebert Spencer had called "pattern citizens."[124] When free family government fell, so too would republican governance. Indeed, the belief in the importance of the autonomous white patriarchal household was sufficient to continually stymie the passage of child labor laws and

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120 Civis,"The Public School in Its Relations to the Negro, No. IV*," Southern Planter and Farmer* 36, no.1 (December 1875): 709-710.
121 Civis, "To Those In Virginia, Whether in Country or Town, Who Hold Property," *Southern Planter and Farmer,* 37, no.5, (May 1876): 5. Just as Justice Thornton had in his decision in *People v. Turner,* Dabney and Jones feared that if the state assumed more responsibility for the child it would negate poor men's incentives to provide for their families.
122 Civis, "The Public School In Its Relations to the Negro No. III," *Southern Planter and Farmer,* 37, no.2 (February 1876): 108.
123 R.L. Dabney, "The Negro and the Common School," *Southern Planter and Farmer* 37, no. 4, (April 1876), 1.
124 Dabney, "The International Review," *Southern Planter and Farmer* 39, no.2, February 1878: 82.

compulsory schooling laws for another three decades.[125] In the 1870s, the campaign of Dabney and Jones that relied on ideas about paternal sovereignty did not succeed in dismantling the system, but it did debilitate it by starving it of funds. The backlash stoked by Dabney and Jones created sufficient opposition to public education that the conservative-dominated state assembly consistently reduced the budget and support for education across the 1870s. The winnowing of support for public schools in Virginia had particularly deleterious effects on the standards of black schools.[126]

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The drive to enforce compulsory education in the 1890s and the Democratic Party

In 1889, the federal Commissioner of Education, William T. Harris produced a report on the status of compulsory education laws nationwide. After offering laudatory accounts of the developed and entrenched systems of compulsory education in European nations, Harris turned his attention to the puzzle of compulsory schooling in the United States. Since the Civil War, twenty-seven states and territories had introduced compulsory attendance laws. Yet, Harris conceded that with the exception of Connecticut, the laws had been "entirely inoperative." In the past three years, three states had let the attendance laws lapse and compulsory attendance bills had either been voted down or vetoed in Pennsylvania, Indiana and Iowa. Facing up to failure of these laws to increase attendance, Harris was philosophical about what had been gained. "Public sentiment," he ventured was "slowly crystallizing" in favor of attendance laws and the debates that had played out over the preceding thirty years over their adoption was

[125] Southern industrialists would often offer support for a compulsory education law in lieu child labor laws, confident that opposition to public schooling, and especially mixed-schooling and the schooling of black children, would mean that compulsory education laws were not politically feasible. Katharine DuPre Lumpkin and Dorothy Wolff Douglas, *Child Workers in America* (New York: Robert M. McBride & Company, 1937), 206.

[126] Walter J. Fraser, Jr., "William Henry Ruffner." Virginia did not introduce a compulsory education law until 1907. See Pisapia, "Public Education," 85.

"gradually silencing opposition." Almost damning the entire project with faint praise, Harris concluded: "the *principle* of compulsory education is steadily gaining ground."[127]

In the 1890s, confronted by consistent reports that compulsory schooling laws were dead letter, northern reformers faced up to the factors robbing compulsory schooling laws of their force and redoubled their efforts to achieve universal attendance.[128] As this final section details, state legislatives revised existing compulsory attendance laws to clamp down on exemptions and beefed up their bureaucratic capacities to enforce laws by employing more truant officers and building more schools. Assuming the mantle from men like Abbot and Northrop, female reformers took a leading role in the North and the South. The novel employment of women as truant officers and factory inspectors coincided with a steady uptick in compliance and prosecutions. The drive to enforce compulsory education laws in the 1890s also precipitated a new wave of resistance. A series of constitutional challenges that argued compulsory education laws abridged fundamental parental right, but found little legal footing in state courts. In politics, however, the principle of paternal sovereignty united disparate immigrant groups in the Midwest who came together to challenge compulsory attendance laws that required English language instruction in Illinois and Wisconsin. The successful campaigns in those two states demonstrated the political salience of paternal

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[127] *Report of the Commissioner of Education for the Year 1888-89, vol. 1* (Washington: Government Printing Office 1891), 15-16. Harris noted that in England, the same "abuse" of the tradition of liberty meant that England's progress towards implementing compulsory education laws was also slower than Continental Europe.

[128] Here I both agree and disagree with Susan J. Pearson; "Age Ought to Be a Fact": The Campaign against Child Labor and the Rise of the Birth Certificate, *Journal of American History*, 101, no 4 (March 2015): 1144–1165, who argues that the lack of bureaucratic capacities of states was the determinative factor in explaining why child labor laws were not enforced around the same time. The lack of bureaucratic capacities undoubtedly played a role, but I do not think they can be separated from ideological reasons – indeed as is explored below, even as lawmakers attempted to enforce compulsory education laws, their thinking still reflected deeply entrenched ideas about paternal sovereignty in carving out exceptions. As Forest Ensign, an education reformer who wrote his doctoral thesis in the 1920s on the subject, complained compulsory schooling laws in the 1890s were "half hearted measures, emasculated by those who regarded an interference with parental control over children as undemocratic, or jockeyed out of the possibility of effective enforcement by designing men who were profiting by the unrestricted labor of children." Forest Chester Ensign, "Compulsory School Attendance and Child Labor: A Study of the Historical Development of Regulations Compelling Attendance and Limiting the Labor of Children in a Selected Group of States" (PhD diss., Columbia University, 1921), 3.

sovereignty, which soon found expression in the 1892 national Democratic Party Platform.

In his national survey of the status of compulsory education laws in 1889, William Harris concluded that two factors combined to undermine the enforcement of compulsory attendance laws: "the lack of public sentiment demanding its strict enforcement" and "defects in the law itself."[129] The reports of state superintendents contained within Harris's volume cited a tapestry of reasons why compulsory education laws went unenforced. The single most common issue lay in the construction of the laws as a whole: attendance laws were so heavily laden with exemptions, primarily exceptions that excluded poor parents, that they did not apply to the very class of parents who did not send their children to school. As the Superintendent for Education in California, Ira G. Hoitt, explained: "the law enacted to enforce the educational rights of children so effectually guards against the encroachment upon the rights of parents, that it utterly fails to accomplish the purpose for which it was enacted." [130] While rhetorically, compulsory education reformers and Republicans had embraced the states coercive powers over the family, by the time that principle found expression in law it had generally been so watered down that it had no force.

The enthusiasm of compulsory schooling advocates for universal attendance had also outstripped state capacities. Superintendents in New Jersey and the District of Columbia complained that they simply did not have the classrooms available to accommodate all the children. It would be "absurd to fine people for not sending their

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[129] *Report of the Commissioner of Education for the Year 1888-89, vol. 1* (Washington: Government Printing Office 1891), 470-471.

[130] *Report of the Commissioner of Education for the Year 1888-89,* 517. The same explanation was offered in the press, see Professor J.B. Roberts, "Compulsory Education" *The Indiana State Sentinel,* February 2, 1881, 5: "These proposed enactments are, however, usually so hedged in by restrictions or blurred over by bills of exceptions that an attempt to enforce them would likely prove to be a very circuitous and expensive road to the accomplishment of nothing at all. In fact, they generally carry somewhere in the body an effectual nullification clause."

children to school when there are no schools for them."[131] Furthermore, towns had problems attracting truant officers because the pay was too measly.[132] Even if they had the capacity to police truancy, many towns lacked truant schools where children could be sent if the law were to be enforced. Others noted that attendance laws addressed the symptom, but not the causes, of truancy. Parents kept their children from school because they lacked clothing or were dependent on their labor.[133] In targeting parents as the problem, compulsory schooling laws did little to address broader structural problems that produced non-attendance, including insufficient school accommodations and insufficient state support to families that were economically dependent on their children's' labor.

But just as was evident in the resistance to public schooling in the South, resistance to the enforcement of compulsory education laws on the ground also rested on resistance to the encroachment of the state on paternal sovereignty. Compulsory attendance laws outpaced the public will to punish parents. While the "principle" of compulsory education enjoyed popularity, communities were reluctant to enforce attendance laws. In every district, a certain number of parents were unable or unwilling to voluntarily meet the attendance requirements. "There are many parents who assert what they call their rights of governance," reported Secretary Hine from Connecticut, explaining that they thought it "unjust that they send their children to school and thus lose the profit of the labor."[134] The State Superintendent in Massachusetts asked his local officers, "what better means can be provided for controlling truancy?", to which one replied, "a new set of parents."[135] The incapacity of states to enforce compulsory

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[131] *Report of the Commissioner of Education for the Year 1888-89,* 512.
[132] *Report of the Commissioner of Education for the Year 1888-89,* 473.
[133] *Report of the Commissioner of Education for the Year 1888-89,* 480.
[134] *Report of the Commissioner of Education for the Year 1888-89,* 492.
[135] *Report of the Commissioner of Education for the Year 1888-89,* 476. In Massachusetts, where compulsory education and child labor laws were long established, reformers claimed that employers were cooperative with the provisions of child labor laws and that inspectors fulfilled their duties in factory inspections,

schooling laws was inextricably bound up with attitudes about paternal sovereignty. In Kansas, the "principal and almost the only reason given for non-enforcement related to the means provided for securing a prosecution," the superintendent complained, was that "no one wishes to inform on his neighbor."[136] Another superintendent explained the law would remain inoperative until his town had a judge willing to fine the fathers brought before the court.[137]

In the 1890s, reports exposing the ineffectiveness of compulsory education laws produced very different results in the North and South. In the North, the fact that attendance laws were dead letter led legislatures to clamp down on enforcement, while in the South, it led many to double down on their opposition to the introduction of compulsory education laws. By the 1890s, Southern Progressives, especially women's clubs, had begun to lobby strongly for the adoption of compulsory education laws.[138] Opponents argued, however, that the experience of Northern states demonstrated that compulsory education did not work because it relied on false principles of government. *The Atlanta Constitution* reported in 1891, the Northern experience was a warning to "Statesman that it will not do in this free country for the state to attempt to abolish the old-fashioned Daddy." The article argued that, though few wanted to admit it, fathers had a right to control their children. Indeed, "wretchedly poor people" relied on the labor of their children. Therefore, the enforcement of the compulsory education law would require the state to come to the relief of poor – a conclusion often avoided in Northern states where the idea was popular. Thus, compulsory education should be

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including prosecuting violations. It was the provision of the law that fined parents that was "almost entirely inoperative

136 *Report of the Commissioner of Education for the Year 1888-89,* 504.

137 *Report of the Commissioner of Education for the Year 1888-89,* 477. "If you could send us a judge who would be a little firmer in dealing with the few who need severer treatment than we find necessary in most cases, you would make us entirely happy."

138 Pisapia, "Public Education," chapter four.

"vigorously opposed from the start. The less the state has to do with family government the better for all concerned."[139]

Other Southerners who had embraced the cause of universal public schooling believed that the introduction of compulsory education laws would jeopardize the entire project by pitting two fundamental institutions of the state against each other – the family and the school. Oscar Cooper, the Superintendent from Texas, gave a forthright exposition of this view before the National Education Association in 1891. Describing himself as speaking for the "conservative masses," Cooper avowed that he did not adhere to the radical doctrines of *laissez-faire* ideology that claimed the government had no role in public education. Instead, he believed that public education was the "highest duty of government," and therefore should not be jeopardized by compulsory education laws. Compulsory education was "perilous" to the development of all American institutions because it was "perilous to the most vital and essential institution" of the family. The experience of Texas was instructive. Cooper reported the compulsory attendance law that the state had been forced to adopt as part of its readmission to the Union had been so unpopular that it provoked a widespread backlash against the whole system of public education. Texas, he estimated, lost ten years of progress in public education due to that backlash and likely the same problems plagued the North now. Universal public education was vitally important, but it could not be achieved if it threatened the institution of the family.[140]

Outside the South, reports on the failures of compulsory education laws prompted renewed efforts to enforce laws. The pressure to enforce compulsory education laws came from a wide array of civil society groups, especially women's groups, including settlement workers, trade unions, women's clubs and the Women's

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[139] "Vexing the People," *The Atlanta Constitution,* March 10, 1891, 4.
[140] Oscar Cooper, "Compulsory Schooling Laws and Their Enforcement," in *National Education Association: Journal of Proceedings and Addresses. Session of the Year 1890 held St. Paul, Minnesota* (Topeka: Kansas Publishing House, 1890), 186-191.

Christian Temperance Union.[141] States revised existing laws to remove exemption clauses and employed more truant officers that were encouraged to pursue prosecutions. Efforts to enforce compulsory education laws tended to further centralize state powers over education. The system developed by Birdsey Northrop in Connecticut had the highest rate of enforcement because it had a centralized system where state bureaucrats were charged with executing the laws. By contrast, states that vested that responsibility in local towns struggled to attract truant officers willing to report on and prosecute their neighbors.[142] Across the 1890s, most states increased the number of truant officers they employed and increased their capacity to house unschooled youth.

The increased investment of states in truant officers, factory inspectors and superintendents created new opportunities for women as agents of the state and directly led to an increase in prosecutions. In many states, the first opportunity for women to exert direct influence in elections came with the enfranchisement of women on school matters. In 1875, women first gained suffrage rights with respect to school matters in Michigan and Minnesota. By 1883, women held school suffrage rights in fifteen states.[143] (Women had held school suffrage rights in numerous territories before they were admitted as states). That political power soon translated into direct opportunities for women to police the enforcement of compulsory education laws and direct educational policy as superintendents, truant officers and factory inspectors. In 1887, Ella Flagg Young became the first female superintendent of a large urban district when she was appointed the superintendent of Chicago Public Schools. In 1892, Laura J. Kelling Eisenhuth was the first woman in the United States to win an election for statewide

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141 Pisapia, "Public Education," chapter four.
142 *Report of the Commissioner of Education for the Year 1888-89,* 470.
143 "The Progress of Equal Suffrage," *Women's Journal,* reprinted in *Public Opinion,* 24, no. 15 (April 1898): 462-463. The movement to enfranchise women on school matters and to allow women to serve on school boards predictably produced the same lines of opposition grounded in sovereignty of the home. The Albany Association for Opposing Woman's Suffrage strongly opposed the appointment of women to school boards, stating "it threatens the home, threatens the sacredness of the marriage tie, threatens the Church, and undermines the constitution of our great Republic" as quoted in Millicent Garret Fawcett, *Women's Suffrage: A Short History of a Great Movement* (London: T.C. & E.C. Jack, 1912), 47.

office as the State Superintendent for Public Instruction in North Dakota. [144] Numerous states amended their constitutions to allow for women to be employed on school boards, as state superintendents and factory inspectors.[145]

In Illinois, for example, where Florence Kelley became the first woman to hold statewide office as the Chief Factory Inspector, the concentration of the efforts of a cross-class women's movement culminated in the expansion of schooling and the enforcement of the state's compulsory education and child labor laws. The Illinois Women's Alliance, with the motto "justice to children, loyalty to women" submitted a petition to the Chicago Board of Education and municipal government demanding the government account for 30, 000 children who appeared on the census but were not accounted for in "school, shop or store." The Alliance requested thirty new schools be built and demanded a second woman be appointed to the school board. [146] Over the next two decades, the pressure from women in civic clubs and as voters in Chicago, and the increase in women's roles in enforcing child labor and compulsory education laws, led to their effective enforcement. Only one prosecution of a parent in Chicago occurred between 1883 and 1899. Between 1905-1906, 1,152 parents were prosecuted.[147]

There was a spike in legal suits at the turn of the century, which challenged the constitutionality of compulsory education laws, likely due to the increased efforts at enforcement. Four state Supreme Court decisions between 1891 and 1904 upheld the

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144 See Jo Freeman, *A Room at a Time: How Women Entered Party Politics* (Lanham: Rowman & Littlefield Publishers, 2002), 37-38 on women in the Midwest, and more generally Alan Sedovnik and Susan Semel, eds., *Founding Mothers and Others: Women and Education Leaders During the Progressive Era* (New York: Palgrave MacMillan, 2002), especially Jackie M. Blount, "Ella Flagg Young and the Chicago Schools," 163-176.
145 This was true in the South as well where Louisiana, for example, amended its constitution to appoint Jean Gordon as the first female factory inspector in 1906. See Edward J. Lawson, *Sex, Race and Science: Eugenics in the Deep South* (Baltimore: The Johns Hopkins University Press, 1996), 77-79.
146 Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830- 1900* (New Haven: Yale University Press, 1995), 211-213.
147 Grace Abbott and Sophonisba Breckenridge, *Truancy and Non-Attendance in the Chicago Schools,* (Chicago: University of Chicago Press, 1917), 202; Provasnik, "Compulsory Schooling, from Idea to Institution," 299.

constitutionality of compulsory schooling laws.[148] The first case, *Patrick F. Quigley v. the State of Ohio* (1891) was a colorful case where a defiant Catholic priest invited arrest by refusing to provide a truant officer with the list of students at his local parish school. The request, he protested in court, might have appeared to be a mild form of state intervention, but the entire system demanded conscientious resistance because "little by little, year by year" public school advocates relished their small advances towards their ultimate goal of complete state control over the child. "When Herod ordered the slaughter of all the children of a certain age or sex," he offered, an unwitting participant might also have been asked to furnish state officers with the information that had been asked of him. Quigley's protest that truant law smacked of socialism and delighted communists because it represented one step further towards the abolition of the family found little legal footing. The Supreme Court of Ohio cited *Ex Parte Crouse* and upheld the compulsory education law as a valid exercise of the states' powers as *parens patriae.*[149] In defeat, Quigley complained bitterly that he had been criticized for not sufficiently considering the rights of the child. That line, he complained, was touted by the "new school, which seeks to destroy the family by exalting the wife and the child at the expense of the head of the family."[150]

The subsequent three state Supreme Court cases all held that compulsory schooling laws were a constitutional exercise of state police powers. In Indiana in 1901, the Supreme Court rejected the challenge that the state's compulsory attendance law invaded "the natural right of a man to govern and control his own children."[151] Indeed, the Court made broad pronouncements in favor of the state's powers over children and education, finding that "the welfare of the child and the best interests of society require

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[148] On the four cases, see Provasnik, "Judicial Activism and the Origins of Parental Choice," 311–347.
[149] *Patrick F. Quiglev v. The State of Ohio,* 5 Ohio Cir. Ct., 638 (1891).
[150] Patrick Francis Quigley, *Compulsory Education: The State of Ohio versus The Rev. Patrick Francis Quigley* (New York: Robert Drummond, 1894), 182-183.
[151] *State v. Bailey,* 157 Ind. 324, Ind. Supreme Court (1901).

that the state shall exert its sovereign authority to secure the child the opportunity to acquire an education." It further held that compulsory education laws were not only constitutional, but also "necessary to carry out the express purposes of the Constitution itself" – an essential function of statecraft. The decision in the *State of Indiana v. Bailey* was relied upon to uphold the constitutionality of New Hampshire's compulsory education law the next year. Finally, in 1903, a mother in Pennsylvania mounted a similar challenge to the case of *People v. Turner,* arguing that the law violated the Fourteenth Amendment. But the Supreme Court of Pennsylvania refused to entertain the claim, holding that legitimate exercises of the state police powers were exempt from the prohibitions of the Fourteenth Amendment.[152] The prediction of the *laissez-faire* constitutional scholar, Christopher Tiedeman in 1886 that compulsory education laws would be upheld as constitutional, but that efforts to enforce them would meet with a "determined opposition from a large part of the population" proved prophetic.[153]

The third frontier of resistance to compulsory education mounted in the Midwest in the 1890s where efforts to strengthen compulsory education laws led Illinois and Wisconsin to not only amend the mechanisms for enforcement, but to include a provision that required instruction be in English. In Wisconsin, like most other states, the compulsory attendance law of 1879 had never meaningfully been enforced. The State Superintendent estimated that between 40, 000 and 50, 000 school-aged children were kept out of school. By 1890, Wisconsin and neighboring Illinois were also hotbeds for nativist anti-immigrant sentiment as German, Irish and Scandinavian immigrants had come to outnumber native-born Americans. The proportion of students attending public schools had decreased as immigration to the region increased, with many immigrant

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[152] *Commonwealth v. Edsall*, 13 Pa. D.R., 509 (1903).

[153] Christopher Tiedeman, *A Treatise on the Limitations Of Police Power in the United States: Considered From Both A Civil And Criminal Standpoint* (St Louis: The F. H. Thomas Law Book Co, 1886), 559-560. For a discussion of Tiedeman's attitudes towards the child and police powers, see chapter one.

populations patronizing private religious schools instead.[154] In 1889, Illinois passed the "Edward Law" and a month later Wisconsin passed the "Bennett Law" modeled on the Edward Law. Both laws passed quietly with little debate as amendments to existing compulsory education laws. Each law, however, not only made attendance at either a public or private school compulsory but also included a clause mandating English language instruction in schools. Within a year, the Bennett and Edward laws had created a firestorm among the immigrant populations. The laws united the interests of disparate immigrant communities who viewed them as threat to their parental rights, private schools and religions, creating a sufficient coalition to realign the politics of the two states as Democrats swept the elections of 1890 in the two states that had been reliable Republican stalwarts. [155]

In Wisconsin, supporters of the Bennett Law believed the language provision was entirely in consonance with the principles of compulsory education in upholding the rights of the child. Republican Governor William Hoard trumpeted the rights of the child in his defense of the law: "The child that is, the citizen to be, has a right to demand of the State that it be provided against all contingencies, with a reasonable amount of instruction in the common English branches."[156] This sentiment was held among educational reformers outside Illinois and Wisconsin as well. In 1891, the National Education Association's Department of Superintendence adopted a resolution that claimed it did not endorse the "extreme principles" of the Wisconsin law, but nonetheless endorsed the "necessity" of English language instruction in schools. Free

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[154] Jesse B. Thayer, *Biennial Report of the State Superintendent of the State of Wisconsin, for the Two Years Ending June 30, 1888*, (Madison: Democrat Printing Company, 1888), 17-20. Thayer was also concerned by an decrease in private school attendance, reporting than the percentage of children aged seven to fifteen at private schools had decreased from eighty-six to seventy-nine percent between 1886 to 1888 which he attributed to a lack of cooperation of private schools with the state's laws, 6-7, 42.

[155] For a good overview of the controversy, see Richard Jensen,*The Winning of the Midwest: Social and Political Conflict, 1888-1896* (Chicago: University of Chicago Press, 1971), 122-149 and Carper and Hunt, *The Dissenting Tradition in American Education,* chapter four.

[156] Message of Governor William D. Hoard, Jan. 10, 1889, p. 17 as cited in Louise Phelps Kellogg, "The Bennett Law in Wisconsin," *The Wisconsin Magazine of History* 2, no. 1 (1918): 4.

tax-funded schools represented the will of the people, and existed because it was recognized that they were fundamental to the perpetuity of the nation. The statement said that it followed education in English was the "rightful inheritance of every child. It is the right and duty of the State not only to provide for this education, but to insist that no child shall be deprived of that priceless inheritance."[157] In Wisconsin, the Bennett Law stirred significant anger among the large German Lutheran population, who were mostly were staunch Republicans, but had long educated their children in their native tongue in Lutheran schools.

The Bennett law united disparate immigrant communities into a powerful voting bloc. The German population of Wisconsin had maintained close-knit communities and schools, but those communities organized along religious lines including German Catholics, liturgical German Lutherans, reformers German Lutherans and anti-clerical free thinkers.[158] The Republicans had controlled the state, save for one election, since 1885 with a coalition of native-born Protestants, British and Scandinavian immigrants and reformed German Lutherans.[159] The state had a large Irish Catholic population as well, which had long vied with German Catholics for control over the Church. Irish Catholics, who more often voted Democrat, had a longer history of scuffles with the state over schooling.[160] While initially some Irish Catholics divided over the issue, many Catholics feared the Bennett law threatened further incursions of the state in private

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[157] "Compulsory Attendance – Wisconsin" *in Report of the Commissioner of Education for the Year 1888-1889,* 512.

[158] Jensen describes theology as the biggest cleavage between German immigrants groups, writing that "German freethinkers, Catholics, pietists, and Lutherans cordially hated each other. … Politics made strange bedfellows in those days – the German Catholics and Lutherans found each other their best allies in the emotion wracked campaign of 1890." Jensen, *The Winning of the Midwest,* 82-83.

[159] Jensen, *The Winning of the Midwest,* 122.

[160] Unaffected by the language requirement, initially the Irish Catholic community was someone divided on the issue. A Republican Irish Catholic, Michael Bennett, had sponsored the law as a means to demonstrate Catholic fealty to the principle of compulsory education when it did not incur on their parochial schools, and to gain greater control of the Church from German speaking Catholics. On the "substantial minority" of Irish Democrats who supported the law, see Jensen, *The Winning of the Midwest,* 138.

education.[161] As a member of the Catholic press summarized, it was "not simply compulsory school legislation" that secured the attendance of "criminally negligent parents." "Here is something very different. Here is State interference and State control in matters which had hitherto been considered as within the exclusive right and jurisdiction of parents."[162] In playing the politics of the matter, Republicans made a strategic blunder. They cast the opponents as attacking the public school, and attempted to drum up support by stoking anti-Catholic sentiment.[163] It was a move that backfired in uniting Irish and German Catholics together with German Lutherans against the law.[164]

Democrats capitalized on these shifting alliances by trumpeting their support for parental rights. In the Milwaukee mayoral elections in April 1890, the Democratic nominee, George "Bad Boy" Peck, pulled off an upset victory by campaigning against the Bennett Law as infringing on the "natural liberty of conscience and the natural right of paternal control."[165] It was a preview of the changing political fortunes of Democrats in the state. In the state elections, Republicans walked a tightrope, declining to repeal the Bennett law but protesting that the party supported parental choice in education and would "modify" the law accordingly.[166] The Democratic Party was uncompromising and strident in its opposition. Building on its earlier successes, the party nominated Peck for Governor. It pledged to repeal the Bennett Law, stating that its "underlying principle" was "needless interference with parental rights." Equating parental rights with

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161 Milwaukee's Catholic newspaper noted that the law seemed "very much like a pretext to interfere." *Catholic Citizen*, January 26, 1889, 4.
162 E. A. Higgins, "The American State and the Private School," *The Catholic World, A Monthly Magazine of General Literature and Science (1865-1906)*, July 1891, 53.
163 Jensen, *The Winning of the Midwest,* 138-139.
164 The *Catholic Citizen* issued a "Manifesto" on March 15, 1890 declaring the protest of the Catholic Bishops against the law, demanding its repeal and "confidently hoping that Catholic Voters and All Friends of Parental Rights Will Do Their Duty," *Catholic Citizen*, March 15, 1890, 1. Richard Jensen notes that the reaction of the Germans in particular "astounded politicians with its ferocity, which exceeded the anti-prohibition reaction in the 1870s." The "Bennett law cut far deeper than the question of beer-drinking; it threatened the fundamental values of church, family and language." It was the first political battle in which the liturgical churches took an official position on a public issue. Jensen, *The Winning of the Midwest,* 146.
165 *Milwaukee Journal,* March 24, 1890, 4.
166 "Wisconsin—Republican State Platform, 1890," in ed. Thomas J. Cunningham, Secretary of State, *The Blue Book of the State of Wisconsin, 1891* (Madison: Thomas J. Cunningham), 390.

"individual and constitutional rights," Democrats denounced the Bennett law as "unnecessary, unwise, unconstitutional, un-American and un-Democratic."[167] More than that, they argued that the Bennett law typified the entire problem with the governing philosophy of the Republican Party, which was based on state paternalism. The strategy paid dividends. That November, with the unprecedented backing of a Catholic-Lutheran alliance, Democrats won the governorship and a sizeable majority in the state assembly.[168] Moreover, they secured the state's two senate seats and sent an unusually large Democratic contingent to Washington D.C.[169] The Edwards Law precipitated a similar realignment in Illinois where the election of a Democratic governor ended twenty years of Republican rule.[170]

In 1892, the Democratic Party sought to build its political successes in Wisconsin and Illinois by nationalizing the issue of parental rights. The Party included parental rights as part of its national platform when Grover Cleveland made a successful bid to return to office. The incorporation of parental rights in the national platform was a clear play to carry Illinois and Wisconsin, two states that had been solid ground for the Republicans in the 1888 national election. Still reeling from the fallout from the Bennett and Edwards laws, the swing to the Democratic Party continued to hold and Cleveland carried the two states. The combined thirty-six electoral votes helped to reverse the result of the 1888 election in the rematch between Harrison and Cleveland. The inclusion of parental rights in the Democratic Party national platform, however, was also a nod to the common interests of the party's disparate and often fragile coalition of constituents

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[167] "Democratic State Platform—Adopted August 27, 1890," in *The Blue Book of the State of Wisconsin,* 393–394.

[168] The same alliance arose in Oregon to defeat the Oregon School Law as is explored in chapter five. One Bennett law supporter warned that: "The children of Luther, and the children of the Pope, have for the first time made common cause, and, under a common flag…" Bradley C. Schey, "Letter to the Editor," *The Nation*, 1290 (March 20, 1890): 2 as cited in Carper and Hunt, *The Dissenting Tradition in American Education,* 102.

[169] Jensen, *The Winning of the Midwest,* 141-142.

[170] Dennis E. Baron, *The English-Only Question: An Official Language for Americans?* (New Haven: Yale University Press, 1990),117-121.

including urban immigrants, especially Irish Catholic voters in the North and white, predominantly rural Southerners.[171]

In both those regions, the issue of compulsory schooling could still serve as a partisan lightening-rod in local and state politics. In Pennsylvania, for instance, Robert Pattison, the only Democrat to serve as Governor between 1867 and 1933 vetoed compulsory attendance laws in 1891 and 1893 on the grounds that they "invaded traditional parental liberties." [172] And at the Kentucky Constitutional Convention in 1890, the former Democratic Governor James Proctor Knott proposed an amendment to the state constitution that stated without qualification "no man shall be compelled to send his child to any school." Arguing for the adoption of his amendment, Knott proclaimed it would "withhold from the Legislature, or any other power on earth, the right of invading the sanctity of a household; of severing… the ties of parent and child."[173] Knott's camp of supporters put up a spirited fight that divided delegate, but in the end they lost out to the more moderate proposal that secured a clause in the Kentucky Bill of Rights that prohibited the legislature from compelling attendance at public schools.[174] It was a prescient move that anticipated the movement that surfaced in the ten states in the West and Midwest in the 1920s to make public education compulsory.

Against this backdrop, the inclusion of parental rights in the national party was an effective way to speak to the common interests of its constituents and to highlight the Party's overall opposition to the perceived paternalism of the Republican Party. In the

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171 Here I disagree with Steven Provasnik who argues that the issue of compulsory education lost much of its partisan overtones after 1877. Provasnik,"Compulsory Schooling, from Idea to Institution," 157-159.
172 William Issel, "The Politics of Public School Reform in Pennsylvania, 1880-1911," *The Pennsylvania Magazine of History and Biography*, 102, no. 1 (January 1978): 59-92; Ensign, "Compulsory Education and Child Labor Laws," 180.
173 Knott noted that he had no personal stake in the debate (his only child has died), but avowed: "… if I had children, and any power in this Commonwealth was authorized to take them from the bosom of my family, to compel their attendance upon any school, I would leave the State." He supported unequivocally the right of fathers to school their children at home or not school them at all. *Official report of the proceedings and debates in the Convention assembled at Frankfort, on the eighth day of September, 1890, to adopt, amend, or change the constitution of the state of Kentucky* (Frankfort: E.P. Johnson, printer to the Convention, 1891), 1035.
174 Carper and Hunt, *The Dissenting Tradition in American Education,* 189-191.

Democratic state platforms in Illinois and Wisconsin, the party had affirmed its support for general compulsory education laws, taking objection only to the English language requirement. Accounting for the fact that compulsory education laws were still unpopular in the South, however, the national platform rolled that position back to a "most liberal appreciation of the public schools." The platform stated that freedom of education was an essential condition of civil and religious liberty that could not be interfered with under any circumstance. "We are opposed to state interference with parental rights and the rights of conscience… as an infringement on the fundamental Democratic doctrine that the largest individual liberty consistent with the rights of other insures the highest type of American citizenship and the best government."[175]

The platform held up parental rights as a central tenet of individual liberty that the Democratic Party consecrated in opposition to the interventionist, paternalist philosophy espoused by the Republican Party. Democratic newspapers celebrated the move. The *St Paul Globe*, for example, predicted that the Party would pick up new voters in every state because of its position on parental rights, as voters understood it was the "last aggression of paternalism when the state seeks to usurp the function of parents." The paper claimed it was the "crowing outrage of centralization when the state seeks to center within itself the functions of the head of each ostensibly free and independent household." Urging its readership to vote Democrat, the paper reminded readers that a vote for Democratic candidates all the way down the ticket was a vote for the "perpetuity of parental rights."[176] In the Democratic Party platform, and press reporting, the language of "individual liberty" and "parental rights" were used interchangeably. This conflation foreshadowed how the language of "individual rights" or "liberty" would often be used as shorthand for "parental rights" in political debates into the twentieth

[175] Democratic National Committee, *The Campaign Textbook of the Democratic Party for the Presidential Election of 1892, prepared by the authority of the Democratic National Committee* (New York: M. Brown Printer, 1892), 9.
[176] "On this issue… the Democratic party should and will win new recruits in every state in the Union." "The School Issue," *The Saint Paul Globe*, June 11, 1892, 4.

century, where the right implied was the individual right of the father to control the upbringing of his child.

Of course, the issue of parental rights was but a slight contribution to the many shifting alliances that resulted in the Democratic landslide in 1892.[177] The fact that parental rights surfaced in national politics, however, pointed to its salience as an issue across different demographics as states debated the finer points in establishing public education around the country. Moreover, the 1892 election provided a preview of how parental rights could serve as a watchword in national politics to unite groups in opposition to the expansion of state power. The make up of that constituency would shift as the question at hand did, as too would the partisan lines with the emergence of the Progressive Party that shook up the party system in the Progressive Era. Still, the political potential of paternal sovereignty began to be felt as homeopathic health practitioners and anti-vaccinationists waged war against establishment of National Bureau of Health and came to be mobilized with force as the questions of child labor and education became national issues in 1920s. Not only did the ideological lines in those battles have their roots in the debates over compulsory education in the late nineteenth century, but also the debates of the late nineteenth century laid bare the gendered and racialized dimensions of "parental rights." Into the twentieth century, the assumptions about paternal sovereignty and the liberty of the "citizen" that were articulated in the debates over schooling continued to lurk beneath a politics that increasingly spoke of "individual and constitutional rights" and "liberty."

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[177] The Populist Party shook up the electoral map in 1892 as a third party, and the protective tariff and gold standard were contentious issues. Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999), 125-127, Richard White, *The Republic For Which It Stands: The United States During Reconstruction and the Gilded Age* (Oxford: Oxford University Press, 2017), 746-753.

Conclusion

Out of a politically mixed legacy of republicanism, nativism, nationalism, black civil rights activism and the often-quixotic dreams of educational reformers, by the turn of the twentieth century, state governments had developed extensive systems of tax funded public education, with the indirect support of the federal government. Free public schools constituted the single largest state government expenditure and were the largest government employer by the end of the nineteenth century. The provision of education and attendance rates in the United States outstripped European nations.[178] Throughout, the nineteenth century, common school reformers had achieved a broad based public consensus that the education of children was the responsibility of the state.[179] The provision of public education, of course, varied greatly both regionally and racially. Despite continued discrimination against black children in public schools in North and South, the drive for universal education in the 1870s nonetheless did ultimately create a system that expanded educational opportunities for all children.[180] As we shall see in the next chapter, the investment and role of the state in children's lives only grew into the twentieth century as health reformers grafted public health campaigns onto the vast apparatus of public schools. By 1900, every state north of the Mason-Dixon line had a compulsory attendance law on its books, and reformers would seek to

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[178]As Theda Skocpol observed, education was one field that bucked the general trend of the US being conceived as a "laggard" in the development of state institutions and programs, noting that it was a "realm of social policy in which America was a leader among modernizing nations." *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Belknap Press, 1995), 88.

[179] Although historians have only recently began to flesh out the role of schooling state formation, David B. Tyack, Thomas James, and Aaron Benavot made this point early in *Law and the Shaping of Public Education, 1785-1954*, 44-45 where they argue: "To a greater degree than any other social services, citizens agreed that education should be a public function." Indeed, before the recent revival in studies of state formation, educational historians and political scientists had noted the odd omission of schooling from narratives of American statecraft. See David Tyack and Thomas James, "State Government and American Public Education: Exploring the 'Primeval Forest,'" *History of Education Quarterly* 26, no. 1 (1986): 39-69 and Kersch, *Constructing Civil Liberties* on how the centrality of the "labor question" has obscured from view cultural issues about schooling and religion, 236-237. For recent works on the place of education in state formation, particularly the twentieth century, Steffes, *School, Society, and State* and Michael Pisapia,"Public Education."

[180] Katznelson and Weir, *Schooling For All.*

harness the state's compulsory powers over children and their parents to enforce vaccination campaigns and compulsory medical exams.

In the South, however, well into the twentieth century, white opposition to public schooling and ideas about paternal sovereignty continued to operate against the implementation of compulsory schooling, child labor laws, and mandatory health programs. The regional variation in compulsory education and child labor laws, as we shall see in chapter four, undercut the effectiveness of child labor laws elsewhere ultimately precipitating the drive for universal federal regulations in the 1910s. In the 1920s, the same combination of nativist politics and concern about the quality of education in the South, would give rise to renewed pushes to expand federal control over education as well. At the turn of the century, however, as the same battles over public schooling continued to play out in the South, the introduction of mandatory vaccination requirements and medical examinations in other parts of the country incited opposition from new sectors of the population. As anti-vaccinationists, alternate medical practitioners, and parents who opposed compulsory medical examinations railed against the state we shall see from a new perspective how pervasive ideas about paternal sovereignty were in the early twentieth century.

Chapter Three

"Every Man's Home Is His Castle:" Compulsory vaccination, medical examinations in schools, and the development of anti-statist politics, 1890-1918

3.1 Inside Cover Image, Luther Halsey Gulick and Leonard Porter Ayres, *Medical Inspection of Schools* (New York: Survey Associates, Incorporated, 1913), ii.

Introduction

At the turn of the twentieth century, the enforcement of compulsory schooling and child labor laws created both unforeseen problems and a plethora of opportunities for Progressive reformers. In a study of school medical examinations published in 1913, Luther Gulick and Leonard Ayres, leaders of the "school hygiene" movement, explained that as the school population surged the schoolroom fast became "the most certain center for infection in the community." As Gulick and Ayres diagnosed the problem: the policy to secure "sound minds" for the state had inadvertently produced and exposed a crisis of "unsound bodies."[1] Crowded classrooms, however, were not only incubators for infectious diseases; they provided a controlled population for new forms of state intervention for the betterment of the citizenry. Medical interventions in schools started with mandatory vaccination requirements and quarantine inspections during epidemics. The purpose and purview of school medical interventions quickly grew. While

[1] Luther Hasley Gulick and Leonard Ayres, *Medical Inspection of Schools* (New York: Survey Associates, Inc., 1913), 2.

conducting medical inspections in schools, doctors and nurses noticed many children were "backward" due to untreated or removable "physical defects." Soon medical inspections became medical examinations, focusing particularly (and occasionally over zealously) on the "real significance of adenoids and enlarged tonsils, of swollen glands and carious teeth." [2] The public school was the perfect site to perfect the race, and reformers believed the school hygiene movement was transforming the very idea of education itself to include a holistic view of the child's body and mind. "In the school of the future," Gulick and Ayres promised, "compulsory education will involve compulsory health."[3]

The school hygiene movement precipitated a new round of conflict over the governance of the child. Gulick and Ayres maintained that the movement did not violate parental rights, or, as they put it, the scheme was not "trespassing upon the domain of private rights and initiatives." School medical inspections, they suggested instead, enlarged parental responsibility by alerting parents to the child's medical needs. But regardless, like compulsory schooling advocates before them, Gulick and Ayres argued that public schools were a "public trust" and that the "child himself has a right to claim protection" to be carried out by the state. They singled out the special relationship between the child and the state as justification. "The child has a claim upon the state and the state a claim upon the child which demands recognition" above and beyond parental preferences or prerogatives. Moreover, the school hygiene movements serviced the vital needs of the state. Just as the state was justified in making education compulsory for its own self-preservation and efficiency, the state was well within its bounds to extend its

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[2] Gulick and Ayres, *Medical Inspection of Schools*, 3.

[3] Gulick and Ayres, *Medical Inspection of Schools*, v. Political scientist Ken Kersch has correctly pointed out: "for many reformers, the passage of compulsory attendance laws in the American states in the late nineteenth and early twentieth century signalled not the end of their work but rather the beginning… Compulsory education was clearly imagined as the first step in a much broader state-building and nation-building project." Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge University Press, 2004), 249.

powers to secure the "physical soundness and capacity" of its children because the well-being of the state was as dependent on the health and strength of its members as on their knowledge.[4]

Many parents disagreed. The school hygiene movement pitted new classes of parents against the state. Immigrant parents would storm the overcrowded classrooms of city schools to save their children from intrusive medical exams. Many middle-class parents would marshal their class credentials as taxpayers, arguing that vaccination requirements and school medical inspections were an abuse of the state's powers over education and demanding that the state respect their parental rights with respect to medical decisions. Schools became breeding grounds in local communities for anti-statist networks. Parents would band together to form "Public School Protective Leagues" that would in turn serve as building blocks for larger anti-vaccination networks and ultimately national movements against the centralization of state power over health.

Americans who opposed school vaccination and medical schemes came from all walks of life, and thus, their activism allows us to see both how widespread ideas about paternal sovereignty were in the early twentieth century and how paternal sovereignty worked to foster and drive diverse anti-statist networks. The anti-vaccination movement in particular was a broad church and its members drew inspiration from wide array of political traditions, including classical liberalism, radical individualism, abolitionism, populism and progressivism. Recently, the works of numerous historians and public health scholars have offered important and nuanced accounts of the complex politics and beliefs of anti-vaccination activists once dismissed as faddists, cranks and quacks.[5]

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[4] Gulick and Ayres, *Medical Inspection of Schools,* 4-5.

[5] The anti-vaccination movement has received significant treatment in broader histories of vaccination campaigns, see Michael Willrich, *Pox: An American History*, (New York: Penguin Press, 2011); James Keith Colgrove, *State of Immunity: The Politics of Vaccination in Twentieth-Century America* (University of California Press, 2006); Karen L. Walloch,*The Antivaccine Heresy: Jacobson v. Massachusetts and the Troubled History of Compulsory Vaccination* (Rochester: University of Rochester Press, 2015); Arthur Allen, *Vaccine: The Controversial Story of Medicine's Greatest Lifesaver* (New York: W.W. Norton & Company, 2007) and on anti-vaccination politics, see Robert D. Johnston, *The Radical Middle Class: Populist Democracy and the Question of*

As those works demonstrate, despite their disparate backgrounds, anti-vaccinationists were nonetheless united by a common set of beliefs. Foremost, they rejected the science of vaccination, believing it was a form of blood poisoning that posed far more risks than smallpox itself.[6] Their skepticism of mainstream science combined with and fueled a strong skepticism of state power.[7] The feverish politics of anti-vaccinationists were amplified by their sentimental investment in the lives of their children and their sense that the state was stripping them of their prerogatives as parents to decide what constituted the best interests of their child. As anti-statists in an era of Progressive governance where states increased their police powers, particularly with respect to children, parents who mobilized against state medicine prized personal liberty and individual freedom.[8]

This chapter brings into relief a broader claim encapsulated in the politics of anti-statists: the freedom of the "individual" that anti-vaccination activists rallied around in assailing state medicine included a claim about the right of independent adults to make decisions on behalf of their dependent kin.[9] The rights that parents held over their

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Capitalism in Progressive Era Portland, Oregon (Princeton: Princeton University Press, 2003), 177–218; James Colgrove, "Science in a Democracy: The Contested Status of Vaccination in the Progressive Era and the 1920s," *Isis* 96, no. 2 (2005):167-191; and Nadav Davidovitch, "Negotiating Dissent: Homeopathy and Anti-Vaccinationist at the Turn of the Twentieth Century," in *The Politics of Healing: Histories of Alternative Medicine in Twentieth-Century North America,* ed. Robert Johnston (New York: Routledge, 2004), 11–28.

[6] Most believed that bodily purity was the best guard against illness and therefore that the introduction of vaccine matters into the bloodstream was a form of poison.

[7] Indeed, as the literature highlights, many anti-vaccinationists shared the anti-monopolistic sentiments of many Progressive Era reformers believing that orthodox medicine was colluding with state power to cement a monopoly, as will be discussed in relation to the NLMF. See Willrich, *Pox*; Johnston, *Radical Middle Class.*

[8] Robert Johnston has argued that: "we make a great error in thinking that opposition to compulsory vaccination simply represented a defensive libertarianism." *The Radical Middle Class,* 204. While this chapter explores the variety of political impulses that underpinned anti-vaccination politics, including the more populist-egalitarian politics of Lora Little who constitutes Johnston's primary case study, it emphasizes that libertarian ideas constituted a significant strain of anti-vaccination politics in the United States and in that respect, I am partial to Michael Willrich's denomination that many anti-vaccinationists were "personal liberty fundamentalists." *Pox,* 270. I would argue, contrary to Johnston, that what is required is a more complex reading of the "libertarianism" of the anti-vaccination movement that takes into account how ideas about parental rights over children played into the radical individualism of the movement.

[9] This chapter expands upon the existing literature by centering the child as the object of policy, focusing on the public school as a site for public health. Within the scope of the dissertation, the chapter also situates the campaigns of anti-vaccinationists and the NLMF within the broader context of resistance to state regulation of children, demonstrating the links between this particular episode and later anti-statist

children constituted a core tenet of "individual rights" or "liberty." It was an assumption so deeply engrained in popular thought that it was often unstated. Looking at the conflict over state policies over children, however, makes that linkage clear – as one opponent of school medical examinations made plain when he complained in 1912, such exams were "surely treading the dangerous ground of invasion of the liberty of the subject, which preserves inviolably the care of the child to its parents."[10] The sovereignty of the home became a salient rallying cry in anti-statist movements against state medicine precisely because state policies particularly targeted children. By the 1910s, gendered ideas about parental rights played a critical role in establishment and campaign of the National League for Medical Freedom (NLMF), an organization that formed to lobby against the establishment of a federal department of health. Forged out of the connections between anti-vaccinationists, homeopaths and parents who opposed school medical examinations, the NLMF provides a window into the connections that many anti-statists saw between local policies pertaining to schools and the threat of federal control, revealing the important role ideas about paternal sovereignty played in a growing national anti-statist movement.

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movements around child labor. Specifically, this chapter links the more extensive literature on vaccination and anti-vaccination politics with literature on school medical examinations to tell a single story about the school as a site for the expansion of the state's medical powers. On school medical examinations, the best work is Richard Meckel, *Classrooms and Clinics: Urban Schools and the Protection and Promotion of Child Health, 1870-1930* (New Brunswick: Rutgers University Press, 2013). Meckel points out in his introduction that literature on state health policies and children in the Progressive Era have disproportionately focused on maternal and infant health care programs, often overlooking the important role that public schools played. William J. Reese provides a good overview on the connections between school medical examinations and vaccination and the resistance they fostered in *Power and the Promise of School Reform: Grassroots Movements During the Progressive Era,* revised ed., (New York: Teachers College Press, 2002), 200-210. Reese argues that unlike other contemporary school reform initiatives, such as penny-lunch programs, medical examinations and vaccination programs provoked particular resistance because they had comparatively weak links to grassroots organizations, rightly noting: "The history of school vaccination is not a saga of how heroic physicians used the tools of modern science to rescue little children from diseases and premature death. It is largely a tale of conflict between the school and the home, one of the most striking controversies of the Progressive Era," 208. For a recent work that incorporates the history of school medical examines into a broader history of the role of school in state formation, see Tracy Lynn Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012), chapter four.

[10] Letter to the Editor, "Inspection of Children," *Medical Freedom* 1, no.3, 1911, 15.

Building a Healthy State: The Introduction of School Vaccination and Medical Inspection Schemes

At the turn of the twentieth century, the medial problems of school children attracted attention from educators, public health officials, prominent physicians and settlement house workers. The careers of Luther Gulick and Leonard Ayres, who authored the leading report on school medical examinations, illustrate the intersecting reform communities that came together in the school hygiene movement. Gulick was born in 1865 and grew up in Hawaii where his father was a missionary physician. He graduated from New York University medical school in 1889, and between 1890 and 1908 worked as the superintendent of physical education for the YMCA training school before heading the physical training of public schools in New York City.[11] Ayres, who was born in Connecticut in 1879, served in the United States Army and became the Superintendent of Public Schools in Puerto Rico in the early twentieth century. On his return to the United States, Ayres worked for the Playground Association of America. The two men joined forces when they both began working for the Russell Sage foundation in 1908 where Gulick served as the head of the child hygiene department and Ayres chaired the committee on backward children.[12] As leaders in the school hygiene movement, Gulick and Ayres viewed physical education as the cutting edge of educational reforms, seeking to use school health initiatives to counteract what they perceived to be the harmful effects of urban life.

The school hygiene movement was built both from the top-down by physicians at leading universities with support from philanthropic foundations, and from the

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[11] "Dr Luther H. Gulick, Educator, Is Dead," *New York Times,* August 14 1918, 9. On Gulick, see Meckel, *Classrooms and Clinics,* 85-97 and Kate Mazza, "The Biological Engineers: Health Creation and Promotion in the United States, 1880-1920" (PhD diss, City University of New York, 2013) who describes Gulick as one of the leading "biological engineers" of his generation.

[12] On Ayres, see Judith Sealander, *Private Wealth and Public Life: Foundation Philanthropy and the Reshaping of Public Policy from the Progressive Era to the New Deal* (Baltimore: Johns Hopkins University Press, 1997), 27-28 who note that Ayres had no formal training in the scientific surveys he was charged with running, and Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics and American Economics in the Progressive Era* (Princeton: Princeton University Press, 2016), 67-68 who situates Ayres in the context of dominant eugenicist thought of his era, noting his fixation on "backward" and "laggard" children.

bottom-up from the experimental programs of nurses and physicians in local schools. Dr. Dudley Sargent, for example, sought to build an army of "biological engineers" by harnessing the latest scientific techniques and technocratic expertise to improve the race and health of the nation. Sargent envisioned a far-reaching health program that would scale from elementary schools to colleges, stating that "if a child is not worth examining he is not worth educating."[13] Sargent established the Sargent School of Physical Education at Harvard University in 1881. By 1920, he had trained more than a third of the 10, 000 graduates who specialized in physical training. Sargeant's graduates found they could make the greatest inroads for enacting his vision in elementary schools.[14] Many of the innovations in the school hygiene movement came from nurses on the ground, such as Lillian Wald who founded the Henry Street Settlement (where Florence Kelley would take up residence in 1898). Wald, born in 1867 to a German-Jewish migrant family in Ohio, graduated from New York Hospital's nursing program in 1889 and pioneered the role of the "public health nurse" by working to integrate nurses into community spaces in both the public schools and at the Henry Street Settlement.[15] As we shall see, her public nurse initiatives led New York City to fund the first school nurse program in the United States.

Wald and her fellow school hygienists, as they were known, saw themselves as part of an international health movement, and like the compulsory schooling reformers before them, they borrowed heavily from European examples and initiatives. While their

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[13] Dudley A. Sargent, "The Duty of the Family Physician in Regard to the Proper Mental and Physical Development of the Children Under His Care From Infancy to Adolescence," Bulletin of the American Academy of Medicine 8 no.9 (October, 1906): 626 as cited in Mazza, "The Biological Engineers," 8.

[14] Dudley Sargent is the main case study of Kate Mazza's dissertation "The Biological Engineers," in which she notes that his comprehensive plan involving anthropometric measurements and medical examinations were costly and difficult to implement, and thus his greatest influence was on the development of the school hygiene programs for communicable diseases and "remediable defects." Gulick was one of his early students, studying under Sargeant after completing his degree at NYU. On the relationship between Gulick and Ayres and his training school, see 7-12.

[15] For Wald's own account of her efforts to create public health nursing, see Lillian Wald, *The House on Henry Street* (New York: Henry Holt and Company, 1915), especially chapter five on education and the child. See also Meckel, *Clasrooms and Clinics,* 62-63; Marjorie Feld, *Lillian Wald: A Biography* (Chapel Hill: University of North Carolina Press, 2008).

ambitions were often wider, the comparatively high attendance rates of American children at public schools in the United States led school hygienists to graft their health reform programs onto the existing bureaucracy of public education.[16] In particular, school hygienists made use of what Gulick and Ayres called the "drag-net of compulsory education" to stage wide-reaching interventions.[17] By reaching children, reformers recognized they could reach twenty-percent of the total population of the United States, and early interventions would yield great benefits to the state by improving the stock of its future citizens.[18] Both informally and formally, school hygienists became agents of the state, increasing the reach of the state over children's lives through medical interventions that targeted their bodies. In the early twentieth century, reformers made greater inroads in urban cities and found greater opposition in the South where compulsory school laws were still not commonplace. By the 1920s, however, a combination of municipal and state laws meant that medical examinations and school vaccination requirements were a common and compulsory part of school life for almost all children.

Vaccination requirements and school medical examinations were complementary policies that sought to tackle the problems of infectious diseases and epidemics among the school population. Beginning in the 1870s, school authorities had experimented with exclusion policies that sent sick children home. As with compulsory schooling laws, authorities struggled to enforce exclusion policies. Moreover, health reformers came to relize that exclusion policies, if enforced, would be overwhelmingly disruptive to schools,

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[16] In England, for example, compulsory vaccination laws applied to newborn infants instead of school aged children. Schools therefore played a less prominent role in both vaccination campaigns and anti-vaccination politics. See Nadja Durbach, *Bodily Matters: The Anti-Vaccination Movement in England, 1853–1907* (Durham: Duke University Press Books, 2004), who notes that in England, women who acted as "poor law guardians" in orphanages were often at the front lines of anti-vaccination resistance.

[17] Gulick and Ayres, *Medical Inspection of Schools,* 3.

[18] S. W. Newmayer, *Medical and Sanitary Inspection of Schools: For the Health Officer, the Physician, the Nurse and the Teacher* (Philadelphia: Lea & Febiger, 1913). Newmayer noted in particular that twenty percent of the total United States population were enrolled at public schools, presenting a unique opportunity to advance "our civilization." See also Frederick S. Crum, "Medical Inspection of Schools - A Factor in Disease-Control," An Address delivered in Newark, N.J., June 26 1915 at the First Annual Meeting of the New Jersey State Association of Medical Inspection and School Hygiene, 4, Pamphlet Collection, box 311 67047, New York Academy of Medicine.

sapping them of their populations on a routine basis as outbreaks of scarlet fever and diphtheria became frequent in the 1880s and 1890s.[19] Thus, when smallpox epidemics also began to sweep the nation, local authorities, starting with municipal ordinances in the New York, Brooklyn and Boston, began to require the vaccination of school children as a preventive measure to promote the immunity of the entire community. By the early 1890s, seventeen states had enacted school vaccination laws, as had most major cities.[20] School medical inspections grew out of vaccination and exclusion policies. Massachusetts was the first state to introduce a regime of school medical inspections in 1897 and in 1907 became the first state to make medical examinations compulsory. In 1904, 34 cities had medical inspections in schools. Between 1908 and 1911, the number increased threefold to 450 municipalities and by 1912 seventeen states had mandatory or optional systems in place.[21]

State authorities used compulsory education laws as a primary mechanism to enforce vaccination. Municipal ordinances and state laws that required vaccination as a condition of entry to public schools drew on the same authority as compulsory schooling laws, the police powers that gave states a broad grant of power to enact measures necessary to protect the welfare, safety and health of the population. While legally governments could not force citizens to submit to vaccination, compulsory schooling laws provided an indirect means to enforce vaccination for a large sector of population.[22]

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[19] For a comprehensive overview of the origins of school medical inspections see Meckel, *Classrooms and Clinics*, 38-53.
[20] Meckel, *Classrooms and Clinics*, 55.
[21] Gulick and Ayres, *Medical Inspection of Schools*, 13-15. They boasted: "In rapidity and extent, this development has been unequalled by that of any other educational movement in America," v.
[22] In 1905, the Supreme Court in *Jacobson v. Massachusetts,* 197 U.S. 1 (1905) upheld a Massachusetts state law that empowered municipal boards of health to demand the vaccination of all residents if necessary for the public health on the grounds that states possessed the power to enact laws to promote interests of the common good over the rights of the individual. The decision in *Jacobson v. Massachusetts* held that Hemmings Jacobson was not legally required to submit to vaccination, but was required to pay the fine for non-compliance because the law was valid. Based on that distinction, parents continued to argue that school vaccination requirements were unconstitutional because the combination of compulsory education laws and vaccination requirements did, in effect, compel them to vaccinate their children. As will be discussed below, this strategy produced mixed legal results in state courts but was ultimately dismissed by the Supreme Court in *Zucht v. King,* 260 US 174 (1922) which held that school vaccanation laws were valid.

Anti-vaccinationists frequently pointed out that they were "caught between two fires": they required by law to send their children to school and required by law to vaccinate their children in order to send them to school.[23] In most states, parents could get around the apparent conflict in laws by home-schooling their children or sending them to a private school (a technicality that led anti-vaccinationists to cast vaccination laws as class legislation that unfairly impinged on the rights of the poor and working-class parents.)[24] Health reformers, by contrast, viewed school vaccination requirements as an opportunity to provide necessary medical treatment to poor children. In New Jersey and New York, for example, state authorities paid physicians a set fee to vaccinate children whose parents could not afford to do so.[25] The line between inducements, coercion and compulsion was often blurred in school vaccination policies – and many stories circulated about children who were forcibly vaccinated or examined without parental consent.[26] Despite the outrage at these incidents, outside of epidemics, it was in fact more common that school vaccination laws went unenforced, as had been the case with compulsory schooling laws, due to the opposition or apathy of school boards and parents alike.[27]

US health officials also required the mandatory vaccination of residents in the Philippines and Puerto Rico, no doubt partly the result of colonial policies that treated colonial subjects as children, see Kristen Hoganson, *Fighting for American Manhood: How Gender Provoked the Spanish-American and Phillipine-American Wars* (New Haven: Yale University Press, 2000) and Willrich, *Pox,* chapter four. Prisons and the army were two other prominent sites for public vaccination campaigns. In each of these spheres, the consent of the subject was either immaterial or presumed.

[23] "Law Will Be Test: Suit To Test Legality of the Vaccination Rule," *The Saint Paul Globe*, January 27, 1901, 12.

[24] Ultimately, in states like New York, this loophole was closed with sweeping state legislation that required the vaccination of children attending private, parochial and public schools alike. As is discussed later in the chapter, the campaign of James Loyster succeeded in carving out an exemption for rural schools. Colgove, *State of Immunity,* 45.

[25] William Fowler, *Smallpox Vaccination Laws, Regulations, and Court Decisions* (Washington: Government Printing Office, 1927).

[26] In Cleveland, the Board of Health in 1910 exercised its right to "prevent epidemics" by entering schools and vaccinating 55, 000 school children during one epidemic, Meckel, *Classroom and Clinics,* 80.

[27] Anti-vaccinationist Chas Higgins, for instance, boasted that the school vaccination law had not been followed in Niagara Falls for more than ten years, see Charles Higgins, *Repeal of Compulsory Vaccination Law: Memorial to the State Legislature and Governor of New York,* (N.P., 1909), 40. Charles M. Higgins Papers, Box 1, Folder 1, Brooklyn Historical Society, Brooklyn, NY. [Herafter: Higgins Papers].

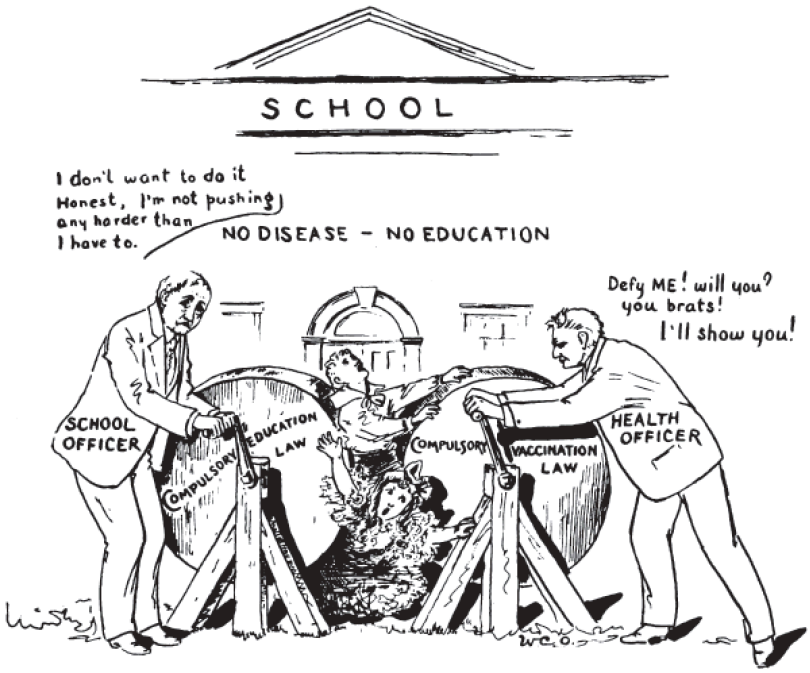

Image 3.2. Cartoon from *Medical Freedom* 14, no. 2 (1914): 23. The enforcement of vaccination laws and school medical inspections also provoked turf wars between school boards and health boards. In states where the enforcement of vaccination requirements was left to school boards, the requirements were less likely to be enforced.

Public health reformers also believed that medical examinations constituted a logical and necessary extension of compulsory schooling laws. Starting with inspections of vaccination scars, school medical exams quickly scaled up.[28] Overall, the rapid expansion of school medical examinations rested upon the discovery of a wide array of common and often treatable medical conditions in children that was brought to the attention of physicians through early inspections, as well as an overly fervent belief in medical interventions as a panacea for both genetic problems in children and health problems produced by urban conditions.[29] Between 1905 and 1910, for instance, health reformers became fixated on the significance of enlarged adenoids, leading to a surge in adenoidectomies because health reformers believed adenoids caused a large number of

[28] Much like educational reformers in the nineteenth century, health reformers were taken with the examples of compulsory medical inspections already in place in many European nations – particularly the German "Wisebaden Plan" which provided universal and periodical examinations of school children's "heart, lungs, throat, spine, skin and sense organs." See Mazza, "The Biological Engineers," 282-284.
[29] For example, the discovery of germ theory led physicians to recognize that healthy children could nonetheless carry disease and prompted them to take cultures from asymptomatic children. See Mazza, "The Biological Engineers," 283.

problems in children from dulled intellect to deviance.[30] Reformers worried about the injurious effects that urban schooling could have on the health of children, and at the same time about how health problems might impede the educational mission of schools.[31] Further, viewing the children as the future citizenry of the nation, reformers ardently believed that early and extensive medical interventions in schools would improve the race and safe-guard the nation.[32]

Image 3.3 Cover Image on the The University of the State of New York (The State Department of Education), "School Health Service Medical Inspection Law" pamphlet, 1909?, Pamphlet Collection, box 311 67047, New York Academy of Medicine.

By using schools as primary sites for public health programs, reformers thus rapidly expanded the direct role that the state already played in children's lives. This led to an attendant growth in the number of health inspectors, physicians and nurses under the employ of the state as health bureaucracies became embedded within schools. Lillian Wald, for instance, pioneered a school nurse program in New York City, inspired by

[30] e.g. Walter Stewart Cornell, *Backward Children in the Public Schools* (Philadelphia: F.A. Davis Company, 1908). On adenoids, see Mazza, "The Biological Engineers," chapter 7. Reese offers the Toledo health inspectors' proclamation that poor eyesight causes insanity as another example, *Power and Promise of School Reform,* 206. On the medicalization of academic failure, see Meckel, *Classrooms and Clinics,* chapter 3.
[31] After the Civil War, many doctors became concerned about the physical effects of "overstudy." Edward Clarke, a Harvard Medical School professor, famously claimed that excessive intellectual exertion would stunt the development of girls' reproductive capacities during puberty. Meckel, *Classrooms and Clinics,* 32-33. Concerns about poor ventilation in urban classrooms and other dangers from overcrowding in schools gave rise to broader Progressive Era reform movements including the playground movement.
[32] e.g.. Newmayer, *Medical and Sanitary Inspection of Schools.* See above note twenty.

examples she had witnessed in England.[33] In 1903, after a successful one month trial, Wald convinced the Board of Estimates to allocate $30, 000 to hire twenty-seven nurses who attended to children in thirty-one elementary schools in New York City. The nurses treated infectious conditions such as conjunctivitis, ringworm and head lice in schools and often followed up with home visits to explain to parents how the conditions could be managed and prevented. As a result of the program, there was a tenfold decline in the number of children being excluded from school from 10,567 in September 1902 down to 1,101 in September 1903. In justifying the program, Wald argued that the state had a responsibility to "the development of its citizens" and reflected that "the school is the most efficient agency" to meet that responsibility.[34] Encouraged by the experience in New York City, most large cities followed suit and by 1910, sixty seven cities employed school nurses either as health department or school employees.[35] In the early twentieth century, public health reformers were thus able to build upon the vast bureaucracy and the near-universal reach of public schools resulting from the common school and compulsory school movements of the nineteenth century.

Certain sectors of the community shared the enthusiasm of health reformers about the potential of schools as a tool for the state to improve the common weal. In newspapers across the nation, letters to the editors applauded the recent innovations and often urged school authorities to take matters further. In 1908, one physician in Ogden, Utah, urged that vaccination should be made compulsory earlier, when children were six months old, instead of waiting until they entered school. He further speculated about the possibility of the routine removal of the appendix during infancy or early childhood. "How many lives could be saved and how much suffering could be prevented by an early

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[33] Newmayer, *Medical and Sanitary Inspection of Schools*, 19-20.
[34] As quoted in Feld, *Lillian Wald,* 56.
[35] Meckel, *Classrooms and Clinics,* 62. Meckel points out that in cities like Boston, Oakland and San Francisco, nurses came to play much larger role in medical inspections than doctors. By 1916, for instance in San Francisco, nurses were performing 200, 000 in-school exams while physicians did fewer than 10, 000, see 82.

removal of this apparently useless organ!" he exclaimed.[36] A fellow resident of Utah shared his optimism about the potential of what he called "Paternalism In the Schools," applauding the initiative to introduce compulsory vaccination and arguing that it should be extended to include medical examinations for scarlet fever, diphtheria and hydrophobia. Expressing great faith in the scientific technocratic expertise of the age, he entertained the idea that the Board of Education might appoint an oculist, a dentist, a food inspector, a clothing inspector, a censor and a chiropodist to "make up for… the ignorance or carelessness" of parents. "The functions could be indefinitely extended," his letter concluded, "but the above will do for a beginning."[37]

Others insisted that health initiatives alone were too narrow. A resident of New Mexico celebrated the notion of compulsory education in a broad sense, but argued that some "defects in present laws must be remedied to make our system consistent and logical." Vaccination was a step in the right direction for promoting health, but in order for the enforcement of compulsory education to fully realize its potential, states needed to increase their investment in education and extend the services schools provided. The government, he suggested, should offer free textbooks, suitable clothing for children, more school buildings, medical inspections and free food at taxpayer expense to counter malnutrition. After all, "healthy well-nourished bodies are scarcely less vital to the welfare of a free people than healthy, well developed intellects."[38]

By expanding the purview of public schools and pushing the boundaries of state power, school medical inspections generated a lot of public controversy. Media accounts

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[36] Dr. Silver, "Address on Medicine; Diseases Conquered," *The Ogden Standard,* September 22, 1909, 7-8.
[37] N.B. Dresser, "Paternalism in the Schools," *The Salt Lake Tribune,* March 7, 1899, 3.
[38] C.E. Anderson, "Compulsory School Attendance," *The Clayton News*, February 17, 1922, 3. Reporting on the contest over compulsory vaccination in Chicago, a journalist noted that the "tendency to resist the apparent invasion of parental rights is natural," but argued that "all sanitary laws and regulations are necessarily "parental" in their nature and scope." Compulsory and free education for children was "decidedly parental." In this case, a caring state-as-parent ought to override concerned parents because "we have progressed along these lines to a point where a man cannot be permitted to contaminate the atmosphere or pollute the water supply even though he may confine his operations to his own property." "Vaccination," *Republican News*, November 30, 1905, 4.

of parents resisting school medical inspections were far more sensational than acts of compliance and therefore disproportionately dominated news reporting on the initiatives. Papers closely followed the saga in the wealthy New Jersey suburb of Montclair, where three hundred and fifty parents successfully thwarted a compulsory vaccination law by withholding their children from school for weeks and threatening to move school districts until the order was rescinded.[39] Meanwhile, across the Hudson River in New York City, headlines in the New York Times screamed "THROAT-CUTTING RUMORS REVIVE SCHOOL RIOTING" describing a "howling, surging mob" of "frantic Italian" mothers who descended upon Lower East Side schools "brandishing stilettos" upon hearing false rumours that their children's adenoids were about to be forcibly removed.[40]

These sensational media tales were not without some basis in fact, especially in recounting the fears of parents that agents of the state were forcing vaccination or medical procedures on their children. Vaccinators and school medical inspectors would often overstep the bounds in forcibly administering vaccinations or medical procedures, particularly on the children of immigrants whose poverty was often pathologized in medical terms.[41] Even when agents abided by the letter of the law, medical inspection programs could be quite invasive, intrusive and onerous. In the Greenville Parker School District in South Carolina, for instance, children were required to undergo a daily medical inspection that included questions about whether they had slept on clean linen and when they had last had a bowel movement. [42]

Arguably, public health officials overplayed the need for certain medical

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[39] "Anti-Vaccination Victory Brings Joy to Montclair: Wealthy Residents Celebrate Back Down of Jersey Town's Health Board," *The Evening World*, April 6, 1911, 3.
[40] "Throat-Cutting Rumors Revive School Rioting," *New York Times,* June 29 1906, 9, "East Side Parents Storm the Schools," *New York Times,* June 28 1906, 4.
[41] Alan Kraut, *Silent Travellers: Germs, Genes and the "Immigrant Menace"* (Baltimore: John Hopkins University Press, 1994), chapter nine.
[42] Walter McFall, "Mouth Hygiene Program, Parker School District,' *South Carolina Education,* 8 (January 1926), 138-39 as cited in David Carlton, *Mill and Town in South Carolina 1880-1910* (Baton Rouge: Louisiana State University Press, 1982), 240.

interventions and underplayed the risks as well. The smallpox epidemic that hit the United States in 1899 was less deadly than the six preceding epidemics that had occurred over the past half century. In contrast to earlier epidemics, the outbreak at the turn of the century was caused by *variola minor*, a milder strain of the smallpox virus that had a very low mortality rate and was often mistaken for chicken pox.[43] Yet, public health officials were more zealous than ever in their campaigns to enforce vaccination.[44] The risks of vaccination itself were also much higher than they are today. Doctors would use a lancet to cut the skin, leaving an open wound and then introduce cow pox from either a sample taken from an infected cow, or preferably, from the blood of a recently immunized child.[45] If the vaccine did not "take" the child could be vaccinated again and again.[46] Initially, there were few laws regulating the quality of vaccine matter.[47] Either as a result of impure vaccine matter, or infection, the procedure was often thought to have caused lockjaw (tetanus) and infantile paralysis. Often the surgeries and medical treatments that physicians and nurses recommended to parents as a part of school inspections were not medically necessary either. Yet, parents who ignored these recommendations could find their children excluded from school and risked prosecution under compulsory education laws.

The enforcement of mandatory vaccination requirements and school medical examinations galvanized many parents into episodes of civil disobedience. Parents launched wrongful death suits against physicians and health commissioners, and some

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[43] Willrich, *Pox,* 11-12. Doctors at the time did not fully understand the relationship between *variola minor* and *variola major,* and were concerned that *minor* strain could transmute into *variola major.*
[44] Willrich, *Pox,* 37-40.
[45] Durbach, *Bodily Matters,* 3-4.
[46] The ambiguity over whether vaccination had to be successful, i.e. "take" for the school vaccination requirement to be met led to multiple challenges to school vaccination laws, "When Vaccination Fails to Take: Health Commissioner Dixon Explains Provision That Is Made in Such Cases So That Children May Not Be Debarred from School," *Cameron County Press*, December 6, 1906, 8. See Reese, *Power and Promise of School Reform,* 208 on the successful legal challenge in Rochester on this question.
[47] Willrich, *Pox,* 184-193.

parents had vaccinators arrested on charges of assault and battery.[48] Others were willing to go to jail for breaching the compulsory education law in order to make their point.[49] For some, these invasive encounters were politicizing events that propelled them into a lifetime of anti-statist activism.[50] Many anti-vaccination leaders shared a common experience of grief; most blamed the death or illness of their own children on vaccination. In the early twentieth century, as networks of predominantly white middle-class anti-vaccinationists emerged, grieving parents, alternate medical practitioners and skeptics of state power were drawn together in political movements that challenged the right of the state to compel vaccination.[51]

Anti-vaccinationists articulated their grievances as cries for medical freedom in the Anglo-American tradition of liberty on behalf of their children. In doing so, their activism revealed the gendered dimensions of understandings of liberty and parental rights. The American anti-vaccination movement drew much inspiration from the ideas and tactics of the earlier English anti-vaccination movement (and indeed, many of its prominent leaders were in fact migrants from the isles of the North Atlantic). Unlike the robust, cross-class English movement that coalesced into a national movement in

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[48] "Lockjaw Germs Abound: Dr. Emery's Defense in the Suit of Little Julia Burggraf's Father. Mother may have rubbed them in: Germs Said, to Abound on the Island -- Novel Point Made in the Vaccine Suit in Brooklyn.," *New York Times*, January 11, 1896, 14.

[49] e.g. "Defies Vaccination Order: Mother Goes to Jail Rather Than Let Schoolboy Be Inoculated.," *New York Times*, April 15, 1927, F1, "Go To Jail To Test Vaccination Law: Hartford Couple Refuse to Pay Fine -- Other Connecticut Towns Await Decision in the Case," *New York Times*, May 13, 1924, 9, "Refused Vaccination; Got 15 Years," *New York Times*, May 2, 1918, A2.

[50] Here, I agree with Willrich's distinction between parents who were drawn into momentary episodes of civil disobedience and those who viewed themselves as part of a political movement and often attempted to build state and national organizations to resist vaccination policies. *Pox,* 252. As noted below, while immigrant and poor parents would often bear the brunt of heavy policing of vaccination policies, committed anti-vaccinationists tended to be white and middle-class. For a good account of German immigrant resistance to vaccination policies in Milwaukee, see Judith Walzer Leavitt, "Politics and public health: smallpox in Milwaukee, 1894-1895," *Bulletin of the History of Medicine* 50, no.4 (Winter 1976): 553-68 and Judith Walzer Leavitt, *The Healthiest City: Milwaukee and the Politics of Health Reform* (Princeton: Princeton University Press, 1982), 82–83.

[51] One important distinction on how the debate played out in England regarding children and parental rights compared to the United States was that in England the debate largely centered infants as the law required Poor Law guardians and later all parents to vaccinate infants in the first three months of life. By contrast, few jurisdictions in the United States contemplated requirements for infants but almost all introduced policies requiring school age children to be vaccinated, which raised the issue of parents' rights as taxpayers in supporting public schools.

response to nation-wide vaccination laws, the federalized structure of governance in the United States made the anti-vaccination movement in America more atomized as local movements targeted municipal ordinances and state laws.[52] Despite this, a common set of claims circulated throughout the anti-vaccination movement in the United States, and as this next section explores, gendered ideas about liberty, individual rights, parental rights and the entitlements of tax-payers collided often explosively as parents protested school vaccination laws. Indeed, by looking at the campaigns that anti-vaccinationists launched against school vaccination requirements, we can see how important ideas about paternal sovereignty were to the ideals of "liberty" and "individual rights" that anti-vaccinationists so proudly defended.

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Love and Liberty: Gendered Ideas about Parental Authority in Local Anti-Vaccination Activism, 1899-1910

Early in the fall of 1910, Jessie and Emerson Thorpe, aged six and eight, of Staten Island, New York, were sent off to school with a note from their father, Herbert A. Thorpe, a local Customs House clerk. In the note, as newspapers reported it, "Mr. Thorpe casually threatened to shoot anyone who vaccinated his children."[53] Thorpe was aware that the law required that his children be vaccinated in order to attend Public

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[52] On the English movement, see Durbach *Bodily Matters,* which describes the working-class and lower-middle class as the primary engine behind the movement. On the class tensions within the English movement, see particularly, 92. See Willrich, *Pox,* 256 on the comparatively middle-class orientation of the anti-vaccination movement in the United States.

[53] "League Will Fight: Hires Brooklyn Lawyer to Look After Interests of Children Excluded from School – Legal Warfare Has Begun," *Brooklyn Daily Eagle,* December 31, 1910, 3. In his letter to Principal Jennings, Thorpe describes his children as being in "perfect health" and the condition of his home as "perfect as sunlight, wholesomeness and cleanliness can make them." Children in perfect health, he wrote, could not be a menace to anyone else. Stating that he would not discuss the supposed virtues of vaccination, simply that it was one of the "most atrocious and absurd ever practiced upon ignorant humanity, also that I will shoot dead anyone who attempts to vaccinate any of my children. I write this advisedly and with the fullest intention of doing what I state above and will hold you responsible in the matter." Hebert Thorpe, Letter to G.J. Jenning, September 9th, 1910, box 48, folder 8, Harry Weinberger Papers (MS 553). Manuscripts and Archives, Yale University Library. [Hereafter: Weinberger Papers]. A letter from Jenning dated October 17, 1910 inquired as to the amount of schooling Jessie was receiving, detailing the hours she needed to receive on each subject. Thorpe's reply indicated she was receiving two hours of instruction a day, five days a week and only in reading, writing and arithmetic.

School No.3 in Prince Bay, forcing the hand of the school principal who promptly sent the children home. With the stunt gaining the desired attention of the press, Thorpe stood by his threat. He "promised the present of a buckshot" to anyone who vaccinated his children against his wishes, adding that "vaccination never did anyone any good, but a buckshot might."[54] While Thorpe and his wife offered their children a small amount of schooling at home, Thorpe was soon charged with violating the state's compulsory education law. Defiantly, he refused to pay the $5 fine and welcomed his day in court.

By the time the matter came before the Richmond County Court, Herbert Thorpe had secured the pro-bono legal services of Harry Weinberger. The son of Hungarian immigrants to New York, the twenty-five year-old attorney was just beginning what would prove to be an indomitable career defending civil liberties. In the teens and twenties, Weinberger became notorious for his suits on behalf of artists, anarchists and illegal aliens – most notably anarchists Emma Goldman and Alexander Berkman. When he argued Herbert Thorpe's case, Weinberger was a relatively unknown, but skilled attorney at the beginning of his radical career defending individual rights. He signed on because the case brought together two causes in which he strongly believed. Weinberger was zealous about personal liberties, a free speech fundamentalist and a warrior against state intrusions on individual rights. He was also skeptical about the science of vaccination. Indeed, he likely met Herbert Thorpe through the American Anti-Vaccination League whose president was the wealthy Brooklynite, Chas Higgins. Higgins personally covered miscellaneous costs associated with the case, brought his own personal trove of evidence to the courtroom every day and made a habit of offering Weinberger unsolicited legal advice. Despite occasional personal tensions, Weinberger and Higgins shared a set of political values that trumpeted the liberty of the individual and celebrated Thorpe's defiant attempt to take the matter of state tyranny into his own

[54] "Threaten a Strike over Vaccination: Court's Ruling in Case of Two Staten Island Children Inspires Parents," *Pawtucket Evening Times,* December 16, 1910, 8.

hands.[55]

As the *New York Times* wryly noted, Weinberger and Higgins were almost oddly invested in "the little case before the Staten Island magistrate."[56] As the two men explained to the reporter, Thorpe's case was to form "the basis and an impetus for a hotly waged war against compulsory vaccination" because it was the first case to confront the apparent conflict in laws between the vaccination requirement and compulsory schooling laws that were appearing on statute books across the country. The two men were plotting a suite of legal actions and legislative reforms to follow.[57] The magistrate dismissed the charge that Thorpe had violated the compulsory school law because he had attempted to send his children to school. But he refused to rule on whether the vaccination requirement was valid and also refused to order that Thorpe's children be re-admitted to school. Anti-vaccinationists "rejoiced" at the partial victory Weinberger secured in the Thorpe case.[58]

After the trial, Harry Weinberger trumpeted the case as a victory for liberty. Using evocative language and imagery, he explained his cause in the following terms:

> It is a question of individual freedom, a question of the freedom of the children. Shall we submit or have we a right to resist if a health doctor and a policeman come to our house while the men folk are away and try to bulldoze us into forcibly being vaccinated?[59]

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[55] For example, Weinberger would on occasion refuse Higgins's financial offers of help, and indicated it was because Higgins would then try to insist upon a certain legal strategy describing him as a "little baby or boy who is afraid to fight himself." Harry Weinberger, Letter to Herbert Thorpe, May 12, 1911, box 48, folder 8, Weinberger Papers.

[56] Threaten a Strike Over Vaccination: Court's Ruling In Case of Two Staten Island Children Inspires Parents Opposed to It," *New York Times,* December 16, 1910, 6.

[57] Threaten a Strike Over Vaccination: Court's Ruling In Case of Two Staten Island Children Inspires Parents Opposed to It," *New York Times,* December 16, 1910, 6. It was, as the article noted with reference to an earlier Pennsylvania case, not in fact the first legal challenge to the conflict in laws which dated back at least to 1893 and included high profile cases in Indiana as well. Weinberger, Higgins and Thorpe were planning a range of legal actions and reforms to follow, including requesting that the Board of Education provide separate schools for unvaccinated children, a repeal of the vaccination requirement, and a suit of malicious prosecution against the truant officer among others. See, Harry Weinberger, Letter to the Board of Education, December 30th 1910, Box 48, Folder 6, Weinberger Papers.

[58] Threaten a Strike Over Vaccination: Court's Ruling In Case of Two Staten Island Children Inspires Parents Opposed to It," *New York Times,* December 16, 1910, 6.

[59] "Condemn Vaccination as a Dangerous Practice," *Brooklyn Daily Eagle,* February 6, 1911, 6. The speech took place before a meeting of the Brooklyn Philosophical Association.

His rhetoric bore little resemblance to the dry, technical arguments he had advanced inside the courtroom on questions of administrative law. But it captured the thrust of the liberty claim evident in his client's original stunt. Underlying many anti-vaccinationists claims for liberty and individual freedom was a set of assumptions about rights, manhood and paternal prerogatives. As anti-vaccinationists of the era so often did, Weinberger's language blurred the line between the liberty of the child and the parent – the injury laid upon the child was an assault on the parent. Weinberger's incendiary descriptions of agents of the state "bulldozing" their way into the home to forcibly vaccinate – when the Thorpe children would have been vaccinated on school grounds – suggested an understanding of children as part of the private property of men's homes, even when they were in the custody of public institutions like the school.

Indeed, when prominent anti-vaccinationists boldly asserted their individual rights and wielded claims to liberty, their appeals were often laced with threats of armed self-defense or violent uprisings.[60] Anti-vaccinationists who asserted their rights generally did so on behalf of their children, just as Herbert Thorpe had done. Thus, as parents protested vaccination requirements and school medical examinations, their claims of individual rights and liberty encompassed claims for freedom that extended beyond their own personhood – it was about their rights over their children, who would actually be subject to the vaccination or inspection.

The campaigns against the adoption of school vaccination requirements, therefore, provides a unique window into the different philosophical traditions and political ideals that men and women would draw on to mount claims based on their

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[60] See for example: "There are hosts of people would stand with a shot-gun, as ready to use it upon a person attempting to put vile matter from a diseased bovine into their healthy children." "The Current Local Topic," *Deseret Evening News*, December 20, 1899, 4. "I would stand in my door with a Winchester and brace of six-shooters and forbid any outrage upon my family, even if it cost my life, "Vaccination Tyranny", *The Life,* November 1905, 222-23 as quoted in Willrich, *Pox*, 392, FN 14. A report on a man being acquitted by a jury for shooting a vaccination officer: "One Danger of Vaccination: Buckshot in Georgia for Doctor Who Tried to Force Vaccination," *New York Daily Tribune*, November 23, 1911, Box 21, Folder 2, Weinberger Papers. Weinberger wrote on the article "looks significant to me."

parental rights.

The assertion of parental rights in anti-vaccination campaigns had a different inflection depending on whether men or women marshaled them – based on men's rights as citizens and women's rights as a moral force. While mothers made up a crucial component of anti-vaccination societies, men dominated the leadership ranks of anti-vaccination campaigns. Starting with those male leaders, we can see how many anti-vaccinationists viewed their campaigns as a vital defense of the tradition of Anglo-American liberty on which the United States was founded and on which its system of government depended. By looking closely at the gendered ideas that underpinned their arguments about liberty, moreover, we can understand more broadly why political arguments about sovereign home in the long Progressive Era were so closely bound up with men's rights.

The American Anti-Vaccination League, which backed Thorpe's case, for example brought together predominantly liberty-loving businessmen. Its president, Chas Higgins, an Irish immigrant to the United States, had made a fortune inventing the patented Higgins India Ink for fountain pens. With anti-vaccination activism as his greatest tribute, Higgins spent his life consecrating the traditions of liberty and "inalienable rights" of his adopted homeland, proudly boasting of his membership of the Constitutional Liberty League of America, American Rights League and American Medical Liberty League among others.[61] Indeed, Higgins love of liberty carried over to his death. He arranged to be buried at the top of Battle Hill at the historic Greenwood Cemetery in Brooklyn, the site of the first major battle in the Revolutionary War. There, he constructed an "altar to liberty" by erecting a statue of Minerva, the Roman goddess of wisdom, strategically positioned to lock eyes with the Statue of Liberty in New York Harbor -- to keep an ever mindful eye over the Revolutionary tradition he felt was all too

[61] See, for example, Charles M. Higgins, *Unalienable Rights and Prohibition Wrongs: Freedom in Choice of Food and Drink Is an Unalienable Right of the American People* (N.P.1919). Box 1, Folder 1, Higgins Papers.

often overlooked by Americans.[62] His campaigns were no doubt helped by his close friendship with his next-door neighbor Judge William Jay Gaynor the future Mayor of New York, who shared his libertarian inclinations and who had intervened from the bench to stop vaccination raids among the general population by a health commissioner who had overstepped his power.

Image 3.4 The "Altar to Liberty" constructed by Higgins with the Higgins family tomb behind at Greenwood Cemetery in Sunset Park, Brooklyn. Higgins was dedicated to promoting America's revolutionary history and was the driving force behind the establishment of the Brooklyn Historical Society.

Higgins formed the American Anti-Vaccination League in 1908 with John Pitcairn, a wealthy industrialist from Pennsylvania. Pitcairn was born in Scotland and arrived in Pittsburgh, Pennsylvania, with his parents and six siblings in 1846. After working on the railroads in his youth, Pitcairn made a fortune in the 1870s investing in oil and building the first natural gas pipeline. In 1883, Pitcairn co-founded the Pittsburgh Glass Company, which was responsible for sixty-five percent of the U.S. plate glass market by 1900. Having bought out his partners already, Pitcairn retired in 1905, remaining the chairman of the board until his death in 1916 at that point his company's capital stocks were valued at $22, 750, 000. [63] Unlike other industrial moguls of the era,

[62] Higgins had also been the treasurer of the Brooklyn Anti-Vaccination League.
[63] John W. Jordan, *Encyclopedia of Pennsylvania Biography* vol. III (New York: Lewis Historical Publishing Company, 1914), 805-808. The company had factories in Pennsylvania, Missouri and Illinois with 7, 000

Pitcairn's philanthropic interests were relatively narrow. His first cause was the General Church of the New Jerusalem, a church devoted to the teachings of Emmanuel Swedenborg. Pitcairn converted to this faith on meeting his wife in the 1880s and bought the Church land in Bryn Aythn, Pennsylvania, to establish an autonomous community for its followers. On that land, he spent over two million dollars constructing a grand Gothic Cathedral, and served as the chairman of the Church's corporation, which had complete jurisdiction over its civil affairs. [64]

His next major causes became the anti-vaccination and medical liberty movements. Swedenborgians rejected impurities being introduced to the body, and many subscribed to homeopathy and vitalism.[65] As such, many Swedenborgians rejected the science of vaccination and the Bryn Aythn community ignored the state laws that required all school children to be vaccinated.[66] In 1906, during a smallpox outbreak, the Pennsylvania Commissioner of Health sent two medical inspectors to enforce compliance and the community was divided. [67] Half complied as per the directive of the Church's Bishop, but the other half rallied with Pitcairn in defiantly refusing to yield. Pitcairn's opposition blended the personal with the political. His eldest son Raymond had suffered blood poisoning when vaccinated as an infant in 1885. Moreover, Pitcairn believed that the state should play a minimal role in how citizens conducted their lives, reflected by his pursuit of an autonomous community for his fellow Swedenborgians. Later that year with his own funds, Pitcairn founded the Anti-Vaccination League of

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employees in total. The general biographical portrait of Pitcairn is drawn from the above and Richard Gladish, *John Pitcairn: An Uncommon Entrepreneur* (Bryn Aythn: Academy of the New Church, 1989).

[64] "Raymond Pitcairn," *Young Men,* 51, 1925, 105-106.

[65] Pitcairn described homeopathy as "our noble science," and praised it for its "distinct recognition of spiritual forces." Richard Gladish, *John Pitcairn: An Uncommon Entrepreneur* (Bryn Aythn: Academy of the New Church, 1989), 330-335.

[66] William Tebb, the chairman of the National Anti-Vaccination League, was also a devotee of the teachings of Emmanuel Swedenborg. Tebb was influential in the development of anti-vaccination networks in the United States, and had spent considerable time in the United States working to support Underground Railroad for the abolitionist cause. It is likely that Tebb's prominent stance against anti-vaccination was particularly influential in Bryn Aythn. On Tebb, see Nadja Durbach, 'Tebb, William (1830–1917)', *Oxford Dictionary of National Biography*, Oxford University Press, May 2006 and Durbach, *Bodily Matters*, 40, 79-86

[67] Allen, *Vaccine*, 106.

Pennsylvania that claimed to defend the "liberty of the individual and his sacred precincts."[68] Weeks later the League claimed success when the parents of 4,000 children in Erie, Pennsylvania, withdrew their children from school rather than comply with the state law.[69] Pitcairn used his stature in the community and his substantial financial means to support political candidates he believed would overturn the school vaccination law. He also instigated a state commission to look into vaccination, where he and the League's secretary Porter Cope provided the minority view.[70]

Like Higgins, Pitcairn grounded his opposition in the Anglo-American tradition of liberal rights. Before the Pennsylvania General Assembly, Pitcairn adapted John Stuart Mill's treatises *On Liberty* to ask: "We have repudiated *religious* tyranny; we have rejected *political* tyranny; shall we now submit to *medical* tyranny?"[71] The refrain became a common cry in anti-vaccination circles. In 1908, Higgins and Pitcairn launched the American Anti-Vaccination League by bringing together fifty well-known anti-vaccination activists for a conference at Griffith Hall, Philadelphia. The League's founding principles were modeled on the American Anti-Slavery Society. The immediate goal of the League was to "promote universal acceptance that health is nature's greatest safeguard against disease" and that therefore no state had the right to compel medical practices that were injurious to health. Its broader purpose was to abolish "oppressive" medical laws and "counteract the growing tendency to enlarge the scope of state medicine at the expense of individual freedom."[72] While anti-vaccinationists were united in their repudiation of the science of vaccination, organizations like the American Anti-

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68 "Anti-Vaccination League of Phililadelphia,"2 Box 4, John and Gertrude Pitcairn Papers, Bryn Athyn Historic District Archives at the Glencairn Museum, Bryn Aythn, PA. [Hereafter John Pitcairn Papers]. At the behest of the Bishop who did not want to make anti-vaccination a Church cause, Pitcairn made the repeal of compulsory vaccination laws his political cause outside of Bryn Aythn.

69 Allen, *Vaccine*, 102.

70 Allen, *Vaccine,* 102-103.

71 John Pitcairn, "Vaccination: An Address before the Committee on Public Health and Sanitation of the General Assembly of Pennsylvania" at Harrisburg, March 5, 1907 (Philadelphia: Anti-Vaccination League of Pennsylvania, 1907), 1.

72 American Anti-Vaccination League Statement of Principles, 1908?,. Box 4, John Pitcairn Papers.

Vaccination League couched he their opposition to state vaccination laws in the language of individual rights and liberty rather than on the basis of science. Their appeals included, and indeed blended, natural rights, constitutional rights, the rights of taxpayers and parental rights.

The American Anti-Vaccination League particularly targeted school vaccination laws and in doing so, the League members emphasized the rights of taxpayers with respect to schools. With the same zeal that many taxpayers had opposed paying for public education in the nineteenth century, anti-vaccinationists argued that because they paid taxes, their children were entitled to public education. This line of argument figured prominently in Higgins's anti-vaccination tracts in which he argued that vaccination laws undermined the "exercise of our most valuable and important legal right of our citizens and taxpayers, the right of free education for children in our common schools."[73] And in legal suits, like the Thorpe case, anti-vaccinationists offered an interpretation of the compulsory education law that contended that the statute compelled the state to provide their children with a free education. (This stood in contrast to the anti-vaccination movement in England where a contingent of middle-class campaigners opposed both compulsory education laws and compulsory vaccination laws on the grounds that both abridged parental autonomy.)[74]

Anti-vaccination activists further argued that school vaccination requirements criminalized otherwise upstanding citizens. In the face of frequent mockery and derision from progressive politicians and the press, many anti-vaccinationists strongly asserted

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[73] Higgins, *Repeal of Compulsory Vaccination Law,* 5. At other times, Higgins charged that the fact that legislatures were picking on children was emasculating for lawmakers, compromising the "manly acumen of the legislature." He called on "vaccination fanatics" to stand up to their principles and deny the right to men who would not submit to vaccination, a proposal that had been considered in New Jersey and implemented in the Netherlands. Such a measure, he claimed, "would be more manly and proper than to deny public schools to our little children." Higgins, *The Case Against Compulsory Vaccination: An Appeal to Common Sense to the Governor, Legislature and People of The State of New York, By A Layman*, i. The same proposal surfaced in New Jersey, see: "'No Vaccination, No Vote' Edict Is Issued for Area in Newark," *New York Times*, May 19, 1931, 14.

[74] Durbach, *Bodily Matters,* 88-89. As noted above, in England, vaccination laws generally targeted infants, meaning the school figured less prominently in battles over children and vaccination.

that the indignity of the law was that it targeted the respectable. In Minnesota, where anti-vaccination sentiment ran high, one editor argued that the vaccination law was a "great fraud." As opposed to other laws being introduced around the time that infringed on the rights of "unfit parents," including negligent and dependent parents, the "shameful outrage" of the vaccination law was that it forced men of independent standing who paid for the public schools with their taxes to keep their children out of those schools.[75] "We are law abiding citizens ready at all times to uphold the dignity of the law and demand its observance but we do protest against this so-called authority that allows a lot of scavengers… to go into schools compel our daughters to bear their arms," read the protest of a St. Paul citizen's group in 1901.[76] "Man for man and woman for woman," anti-vaccination activists in Minnesota insisted, the opponents of vaccination had just "as high an average of intelligence as its adherents."[77]

Vaccination laws, therefore, were more than an assault on the bodies of innocent, defenseless children – though such appeals had a powerful resonance on their own terms. They were an affront to the liberal rights of respectable, tax-paying citizens. The rhetoric of anti-vaccinationists revealed the persistent gendered associations between manhood, tax burdens, property rights, and the liberal rights of citizenship that coalesced in questions of parental rights.[78] This association was revealed most forcefully in a letter to the editor of the *Hartford Herald* in Kentucky in 1917 signed simply "A. Layman." "Heavily taxed as you are to maintain the public schools," he pointed out, children "in perfect health" whose parents opposed vaccination were declared a menace to public safety and the state claimed it was authorized to exclude such children from public schools. "Was this flagrant outrage nominated in the bond when you voted the school

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[75] Harry B. Bradford, "State Medical Imposition," *The Washington Herald*, January 20, 1908, 11.
[76] "Are Opposed to Vaccine: Citizens' Meeting Held to Protest Against Inoculation of School Pupils," *The Saint Paul Globe,* January 27, 1901,12.
[77] "Personal Rights Involved," *The Saint Paul Globe*, February 15, 1901, 4.
[78] Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1999).

tax," he questioned, "does not this violation morally absolve you from the tax?" In an apoplectic fashion, the "layman" waxed lyrical:

> In spite of all the canons that safeguard your home as your castle where even kings may not enter unbidden, this odious gang may send a burley Hessian without charge or warrant, as if unvaccinated you were worse than a criminal to break down your door, invade your home, assault your person, rope and tie you down like a wild beast and corrupt your flesh and blood with a festering sickening pus… [as] another human sacrifice thrown to the pitiless Moloch of police power.[79]

In his tirade, the letter writer left no doubt about his attitudes towards vaccination or police powers. Compulsory vaccination was the most "flagrant and shameless" of all the "crowning outrages perpetuated in the name of the police power." Indeed, the present era, "very debauch in police power," had "completely shattered" the sacred rights enshrined in the Declaration of Independence. These rights were so fundamental, so "inherent, imprescriptible… so impossible of abrogation" that no matter what the intentions or efforts of legislators, they could not be overridden or revoked.[80]

Isaac Peebles, an anti-vaccination activist and a spiritualist in California, championed the anti-vaccination movement specifically as the manifestation of an Anglo-American tradition of liberty. In his writings, Peebles aligned the anti-vaccination cause with a four hundred year tradition of personal liberty that started when the "Saxon" insisted that "his personal liberty shall be respected and held inviolate." The Anglo-Saxon tradition had resulted in numerous "world-famed movements" on behalf of liberty, namely Luther's revolt against religious tyranny, Cromwell's revolt against the absolute power of the King, and George Washington's revolt against British colonial tyranny. The anti-vaccination movement was the inheritor of this noble tradition, which explained why in his view the anti-vaccination movement was far more successful in the

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[79] "'Solar-Plexus' Delivered to Compulsory Vaccination," *The Hartford Herald*, April 25, 1917, 3. The article also appeared in the *Ohio County News,* April 23, 1917, 3.
[80] "'Solar-Plexus' Delivered to Compulsory Vaccination," *The Hartford Herald*, April 25, 1917, 3.

British and American contexts. Governments in continental Europe and elsewhere had less trouble enforcing compulsory vaccination laws because Europeans took "far less account of personal liberty than Anglo-Saxons."[81]

Peebles own appeals were firmly steeped in a gendered conception of the individual and his rights to his home that underpinned the Anglo-American common law tradition. Like Weinberger and the layman from Kentucky, Peebles cast school vaccination laws as a threat to the sovereignty of the home. At a time when suffrage was still a right of manhood in most parts of the country, Peebles called for the "American voter" to rise up against this "flagrant outrage upon his personal rights. The American's house is his castle and no doctor with poisoned lancet has a right to cross the threshold of his door and poison and scar his children." Invoking the old Anglo-American common law maxim that a "man's house is his castle," Peebles and his fellow anti-vaccinationists laid bare their contention that "personal" or "individual" rights included the sovereign rights of men over their kin and home.[82] And in doing so, Peebles also revealed something of a contradiction, or tension, between his message and his audience. As heavily laden with ideas about manhood as his appeals were, Peebles understood that mothers represented fertile ground for recruitment to the anti-vaccination cause. He appeared before mothers' associations, in his own words, "clad with armor … vehement if not violent" in his opposition, calling on mothers to "positively refuse" vaccination.[83]

The broad church that housed the anti-vaccination movement in America, diffuse and diverse as it was, drew from a wide array of political traditions and contained

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[81] J.M. Peebles, *Vaccination: A Curse and a Menace to Personal Liberty* (Los Angeles: Peebles Publishing Company, 1905), 89-99.
[82] Peebles, *Vaccination: A Curse and a Menace,* 103. "Certainly every man's feelings, every man's conscientious convictions, are entitled to respect. Every man's house is his castle, and upon the constitutional grounds of personal liberty, no vaccination doctor, lancet in one hand and calf-pox poison in the other, has a legal or moral right to enter the sacred precincts of a healthy home and scar a child's body for life."
[83] Edward Whipple, *A Biography of J.M. Peebles* (Battle Creek, Michigan: Self Published, 1901), 506-511. The discussion, he described, was "hot" and his opposition "was vehement if not violent. I defied the law. I pronounced it unconstitutional; and treasonable or not, I advised the mothers present to positively refuse to have that damnable poison put into their children's arms."

multiple, sometimes contradictory, ideological impulses. The gendered politics of the anti-vaccination movement were particularly complicated, a fact that reflected the broader unresolved cultural politics of the home which was stamped as a mother's domain, but where men still stood as the head of the household.[84] Given that the care and health of children primarily fell to mothers, anti-vaccinationists relied on mother's groups and women's associations to agitate and organize the movement. In Massachusetts, for example, the Mothers' Protective League of Pittsburg worked to establish a private school to provide a way of avoiding the vaccination requirements for families in their area.[85] While women in the anti-vaccination movement shared many common beliefs with their male compatriots about vaccination and health, their involvement exposed the gendered inflections of parental rights that drew on different political traditions and sources of authority.

Lora Little was among the most effective anti-vaccination activists in the United States. Like many anti-vaccinationists, Little was politicized by the grief of losing her only child, Kenneth, in 1896 from complications she believed resulted from his vaccination. As she recounted in her anti-vaccination tract, *Crimes of the Cowpox Ring,* she had harbored reservations about having her son vaccinated. She relented after learning he would not be admitted to the local school in Yonkers, New York, fearing that he would "miss the common lot, and be marked as an exception, perhaps as queer, with a freakish mother." Unable to watch the procedure, Kenneth was pulled out of class to have it administered

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[84] This tension came to the fore in England when the government decided to adopt a conscientious objection clause in 1907 and a public debate erupted over whether mothers could legally be recognized as the parent in filing for an exemption certificate. Conservatives in parliament and the press urged that the right be restricted to men to recognize that they held sole legal authority over children, while others urged that even if fathers had custody of children mothers were primarily responsible for their health and could undertake the process of seeking an exemption while their husbands worked. The initial vote allowed women to claim certificates, passing by a margin of two votes, but ultimately the House of Commons accepted an amendment from the House of Lords that replaced the words "either parent" with "he." The word "parent" and not "father," however, ultimately appeared in the bill (the same was true in the United States where it was assumed that a parental right meant a paternal right in most circumstances) and a year after the 1907 Act was passed, the *Local Government Chronicle* offered an interpretation of the Act that would allow mothers to apply for an exemption. See: Durbach, *Bodily Matters,* 191-196.

[85] "Against Vaccination," *Pittsburg Dispatch,* September 8, 1899, 12,

and in the following months, suffered from catarrh, measles and finally diphtheria – dying shortly after his seventh birthday. "My child was really torn from me by the vaccinator, as tho he had died the day his arm [was] punctured," Little reflected.[86] The remainder of her life was consumed by her efforts to build a movement against state control of medicine.

Lora Little's activism resulted in major challenges to vaccination laws in three states, two of which were successful. Shortly after her son's death, Little and her husband relocated to Minnesota where she founded the *Liberator*. The journal took the name of William Lloyd Garrison's famous abolitionist journal, deliberately positioning itself, as many anti-vaccinationists did, as the inheritor of the radical tradition of abolitionism, which defended the autonomy of the body against state-sanctioned tyranny. (Garrison himself opposed compulsory vaccination). Little edited the *Liberator* until 1907, and it became one of the most popular anti-vaccination tracts in America. In 1903, at her instigation, the Minnesota legislature revoked the power of health authorities to compel the vaccination of children except in an epidemic. From 1906 onwards, the point at which her husband disappeared from her life, Little began travelling widely as an anti-vaccination activist in the United States and England.[87]

In 1909, Little settled in Hood River, Oregon, where she became involved in a range of political movements. As the vice-president of the Anti-Sterilization League, she coordinated a voter drive in 1913 that defeated a bill granting the health board broad powers to sterilize "habitual criminals, moral degenerates, and sexual perverts."[88] In 1915, Little ran unsuccessfully as a candidate for Oregon's Progressive Party and the

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[86] Lora Little, *Crimes of the Coxpox Ring: Some Moving Pictures Thrown on the Dead Wall of Official Silence* (Minneapolis: Liberator Publishing Company, 1906), 74-75.
[87] For a full profile of Lora Little see Johnston, *The Radical Middle Class,* 200-210.
[88] As many scholars of anti-vaccination politics have pointed out, anti-vaccinationists fears about what the broad grant of state power allowed by courts for vaccination policies meant for bodily autonomy were not without merit: judicial decisions upholding compulsory vaccination would become the precedent cited by the Supreme Court in upholding compulsory sterilization in *Buck v. Bell,* 274 US 200 (1924). See Davidovitch, "Negotiating Dissent" and Allen, *Vaccine,* 98-99.

following year she instigated a citizen's initiative to ban compulsory vaccination in Oregon that failed by a narrow margin. Soon after, Little moved to North Dakota, and during World War I, she campaigned against compulsory vaccination law in the military, leading to her arrest under the Espionage Act there. Her agitation, however, led to a legal challenge that resulted in the North Dakota Supreme Court overturning the state's compulsory vaccination law. Finally, in the 1920s, Little was the driving force behind the American Medical Liberty League that assailed the American Medical Association and state control of medicine.

Little's politics championed bodily autonomy and parental rights, but she disavowed the traditional patriarchal associations of parental rights and rejected naked libertarian politics. As a candidate for the Progressive Party for Oregon's state legislature, Little promised to fight state medicine and uphold "the home, parental responsibility and personal freedom."[89] Her earlier activism revealed, however, in contrast to her male counterparts at the time, Little's incantation of parental rights was rooted in women's equality and mother's rights within the home. In Minnesota, Little was an outspoken member of the Minnesota Women's Suffrage Association.[90] In her editorship of the *Liberator* as well, she reflected some of the more radical political views about women's rights that had also inspired the earlier abolitionist editors of the original *Liberator*. For example, in 1906, Little wrote an article entitled "Socialism and Marriage," seeking to correct the misperception that socialists were against marriage. Instead, she sought to identify how socialist critiques of marriage could be reconciled with Christian marriage. Her critique pinpointed male headship as the problem with Christian marriage,

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[89] *Medical Freedom* 3, no. 9 (May 1915), 14.

[90] "Their Hope Is High" *The Saint Paul Globe*, January 15, 1902, 1 for example refers to Lora Little as the organizer of the Minnesota Suffrage League. I first came across the reference to Little's suffragist activism in Robert Johnston's biographic profile in *The Radical Middle Class* which cited numerous *Minneapolis Journal* articles on the subject such as "Will Organize In St Paul," *Minneapolis Journal*, November 27, 1901, 7. "Debate on Suffrage," *Minneapolis Journal*, April 12, 1904 , 8. Johnston notes that there is no record of Little's suffragist politics in Oregon.

explaining that women lost all independent standing. Even when women married for love, "she holds henceforth the place of a dependent." No matter how magnanimous her husband was, the wife's "independence was lost forever, not only in the home, but in the state." Under socialism, both married partners might be considered equal individuals.[91] Thus, when Little called on parents to reject vaccination, she clearly had mothers in mind and likely much of her success lay in her motivating women who identified with her.

Little's primary political interest, however, was in promoting "natural health." While there was considerable overlap between anti-vaccinationists who opposed compulsion and those who opposed vaccination – with one conviction generally leading to the other – Little's views were aligned with the anti-vaccination position.[92] Like most anti-vaccinationists, Little rejected orthodox medicine, including germ theory, believing that illness was the result of the body being out of balance or an individual failing.[93] She channeled her energies into building the health culture movement. In Oregon, she set up her own "School of Health Culture," promising her students self-government in medical care.[94] She marshaled her authority as a grieving mother to promote populist medical politics that attacked the monopolies of state medicine. In doing so, she expressly rejected the "common contention of anti-vaccinators that vaccination is purely a question of personal liberty."[95] Instead, she thought it was primarily a question of health.

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[91] Lora Little, "Socialism and Marriage," *The Liberator,* 9, no. 1 (April 1906), 16.
[92] In one of her calls to action, Little explained: "it is because vaccination robs of our physical integrity, contaminates and destroys our bodies, that we object to it." *Crimes of the Cowpox Rings,* 62-63.
[93] Harry Weinberger, for instance, also believed that all bodily ailments, including viruses, could be "cured by fresh air, sunshine, exercise, dieting and bathing." Harry Weinberger "Vaccination, a Phase of Medical Oppression," Box 48, Folder 12, Weinberger Papers.
[94] Robert Johnston aptly describes her politics as evincing a "populism of the body," *The Radical Middle Class.*
[95] Little, *Crimes of the Coxpox Ring,* 62. The historiographical debate over whether libertarianism was the dominant philosophical tradition that animated anti-vaccination politics is very much shaped by which anti-vaccination leaders are under study, which is why I have attempted to survey a diverse cross-section of different anti-vaccinationists in this chapter. In his focus on Little, however, who clearly apprised that her views were not entirely with sync with other anti-vaccination activists, Johnston overstates how democratic and populist the movement was and accordingly underestimates the importance of radical individualism. As I point out later, as well, men with "radical individualist" or libertarian politics such as Higgins and Pitcairn wielded a disproportionate influence because of their wealth. See Johnston, *The Radical Middle Class,* 204.

Once the population had questioned the science of vaccination because it was invasively being imposed upon them, they would in turn come to embrace "health culture" – rejecting orthodox medicine altogether and practicing bodily purity.

Lora Little's politics represented a significant strand of anti-vaccination activism that espoused local democratic control of health, pacifism, women's rights, vegetarianism, and anti-imperialism among other causes. It seems clear that her egalitarian conception of parental rights was born of out of own experiences as mother and as a woman in the male dominated realms of anti-vaccination activism and politics more broadly.[96] Nonetheless, many male anti-vaccinationists shared Little's values and outlook. One such example was Immanuel Pfeiffer, a leading anti-vaccination activist in Boston. Pfeiffer, who considered himself a "natural physician," also believed that good health guarded against smallpox – a point that he went to dangerous lengths to prove in willingly exposing himself to the disease in a public battle with Boston's health commissioner.[97] Pfeiffer was the editor of another anti-vaccination tract, suggestively titled *Our Home Rights.* The pages of *Our Home Rights,* which Pfeiffer claimed had 10, 000 subscribers, were a vehicle for much more than his diatribes against vaccination and physician licensing laws. Pfeiffer also used it as a platform to push what he viewed as a related set of political causes, including a single tax, vegetarianism, spiritualism, the rights of labor over capital, pacifism, and women's rights. *Our Home Rights* was a populist medical tract seeking to restore the autonomy of people over their bodies, children and

[96] Margaret Foley was a prominent suffragist who campaigned against vaccination, providing another example of how the politics of suffrage, motherhood and anti-vaccination were entwined. An Irish Catholic born in Boston in 1875, Foley campaigned on behalf of the Massachusetts League Against Compulsory Vaccination. She came to suffrage politics through the union politics at the hat factory that she worked at, and was the only speaker for the Massachusetts Suffrage Association with a working–class background. Her suffrage politics made her something of a maverick within the Catholic Church as well. She disavowed radicalism, particularly Bolshevism and socialism. Like many of the maternalists of the era, despite not having children herself, Foley fervently advocated that the "chief business of women is mothering," arguing that goal of suffrage was not to eradicate sex difference but to bring maternal solicitude into government. "Suffrage and the Saloons," *The Remonstrance,* October 14, 1914, James J. Kenneally, "Catholic and Feminist: A Biographical Approach." *US Catholic Historian* 3, no. 4 (1984): 229-253. Anti-vaccinationists therefore reflected the broader complexity of the suffrage movement, which did not always equate women's right to vote with women's equal rights, particularly in the home.

[97] Karen Walloch offers an extensive profile of Pfeiffer in *Antivaccine Heresy,* chapter six.

labor in an egalitarian vain.[98]

These variants regarding ideas about parental rights and the sovereignty of the home in the anti-vaccination movement that ran the spectrum from Lora Little's position to that of Isaac Peebles revealed how and why parental rights could operate as a political watchword to bring together diverse coalitions. In the radical individualism of the many anti-vaccinationists who championed traditions of liberty, the same assumption that permeated nineteenth century liberalism, that the individual rights-bearer was an Anglo-Saxon man who, as the head of the household, held the right to govern his kin carried over into Progressive Era. Particularly as public health reformers focused on schools as a vehicle for vaccination campaigns, ideas about paternal sovereignty animated the anti-statist activists who opposed the state's increasingly interventionist role in their children's lives and the use of the states' police powers. The associations among voting, taxes, property-ownership and citizenship continued to resonate strongly with many anti-vaccinationists for whom the call to defend their child was at the same time a call for them to defend their manhood. Those assumptions persisted despite the rising status of motherhood and the growing movement for women's suffrage (and in some cases as we shall see in the next chapter, after the passage of the nineteenth amendment, because of that fact as anti-suffragists worked to defeat the federal child labor amendment).

The anti-vaccination movement, however, also revealed that the concept of parental rights held a strong appeal for women as well whose political authority was in many ways tied to their status as mothers. In part, the pervasiveness of ideas about parental rights in anti-statist campaigns owed to the plasticity of the concept of parental rights. Lora Little touted parental rights as part of a radically egalitarian democratic-populist platform for self-government in medical care. And while many anti-

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[98] For example, *Our Home Rights* 4, no. 1 (December 1903-1904); *Our Home Rights,* 4, no. 2 (February – March 1904); *Our Home Rights,* 3 no. 5 (November 1905). With thanks to the librarians at the University of Wisconsin for scanning and sending these to me.

vaccinationists were suffragists, ideas about the sovereignty of the home did not necessarily need to rest on an egalitarian conception of domestic relations in order to hold appeal to mothers and fathers alike. Appeals to mothers to defend their children were generally based on the popular trope of mother-love.[99] As one anti-vaccinationist explained in answering a hypothetical question about whether parents would stand idly by while the state forced the "delicate and nervous child… through the mill of vaccination?" "Ask the father and he will say no. Ask the mother, whose love surpasses any earthly love, as she holds her little darling to her bosom, and she will answer no. She would risk her life to save her child from such useless suffering."[100] The various ideas about parental rights worked in concert together as anti-vaccinationists called on parents to defend the sovereignty of their home against the state, an appeal that both elevated women's authority as mothers and affirmed men's rights as fathers.

The gendered appeals to parents coalesced around the call to defend the innocent child. The driving force behind the anti-vaccination movement was at its root the belief that vaccination was a dangerous procedure, one that was killing and maiming defenseless children. As an editorial in the *St Paul Globe* announced, there was "no greater emergency or cause for alarm" than the fact that the health commissioner was asserting the right to "shoot dope' into a helpless child." It was a proposition "utterly repugnant to every sensitive man and woman" and the editor was confident that "thousands of parents in this state would resort to any device to preserve the bodies of their little children sacred and inviolate."[101] Higgins dubbed school vaccination schemes "a crime against children," explaining that children were both the victims of the procedure of vaccination and of the conspiracy between the moneyed interests of mainstream

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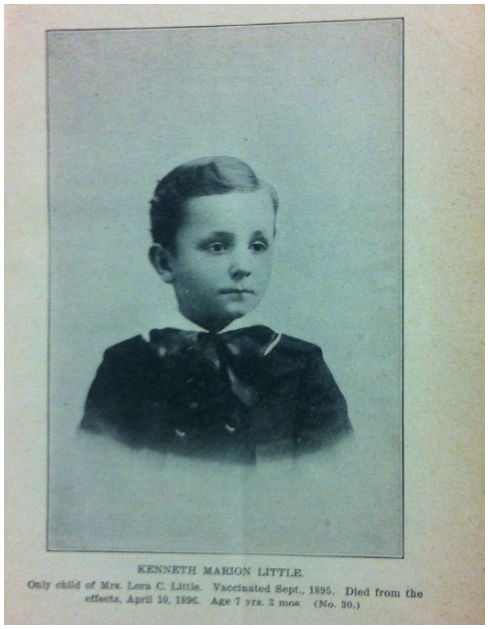
[99] For an excellent account of the trope of mother-love and its political force, see Rebecca Jo Plant, *Mom: The Transformation of American Motherhood* (Chicago: University of Chicago, 2010).
[100] A.J. Remsburg, "Dr. Remsburg Gives His Reasons for Being an Independent Candidate," *The Fulton County News*, October 15, 1908, 4.
[101] "No Compulsory Vaccination," *The Saint Paul Globe*, March 4, 1903, 4.

medicine and the state abusing its coercive powers. In this respect, anti-vaccinationists vied with Progressive reformers, who favored interventions within the family, to beat them at their own game – marshaling claims about the rights of defenseless children to legitimate a set of political claims.



3.5. Image of Lora Little's deceased son, Kenneth, from her anti-vaccination tract *Crimes of the Coxpox Ring* (1906)

Photographs and individual stories of children who, as Lora Little put it, were the victims of "legalized child murder by vaccination" were the primary weapon of anti-vaccinationists.[102] Little was a pioneer of the genre. In her *Crimes of the Conpox Ring,* images of cherubic healthy children were erected like tombstones above testimonies about their untimely deaths caused by vaccination. The strategy mirrored the muckraking photographic expositions of anti-child labor activists of the time like Lewis Hine, and photographs became a staple of anti-vaccination tracts. As with the more confronting images of children maimed by industrial labor, the iconography of the anti-vaccination movement became more visceral over time. Anti-vaccinationists like Higgins did not shy away from sharing images of children disfigured by tetanus and blood

[102] Willrich, *Pox,* 268-269.

poisoning. The images were so powerful that ultimately pro-vaccinationists responded in kind, circulating visceral images of children ravaged by smallpox. Whereas most Progressive reformers championed the rights of the child to call in the state, anti-vaccination activists aimed to have the opposite effect. Their campaigns called on voters, judges and legislators to recognize that a child's health and welfare was solely the domain of parents. On the West Coast, anti-vaccinationists would make the same point that donned the cover of an anti-vaccination pamphlet published in New York City, "the School is public, but I want to say that the child is not."[103]

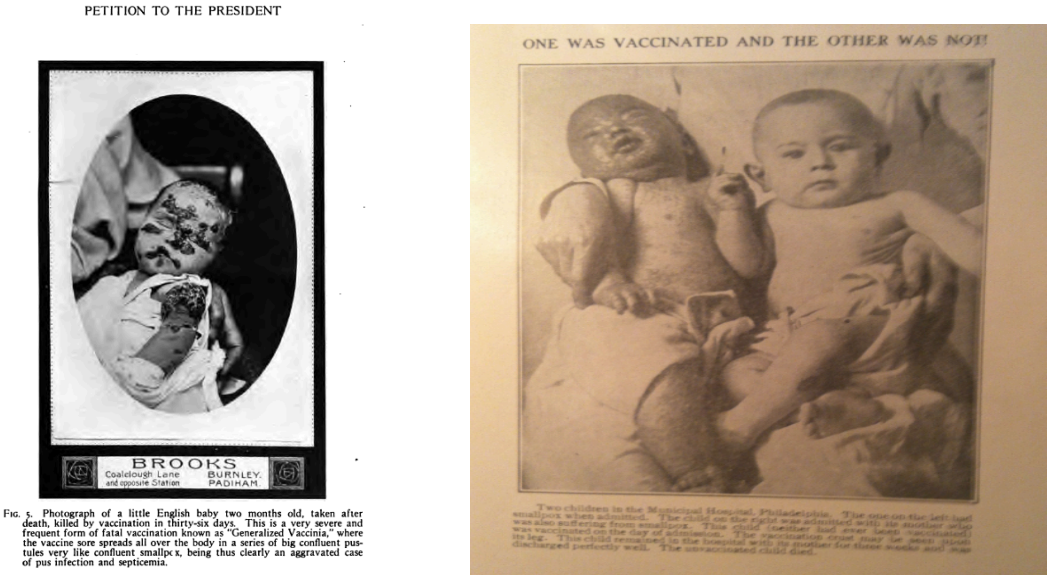


Fig. 5. Photograph of a little English baby two months old, taken after death, killed by vaccination in thirty-six days. This is a very severe and frequent form of fatal vaccination known as "Generalized Vaccinia," where the vaccine sore spreads all over the body in a series of big confluent pustules very like confluent smallpox, being thus clearly an aggravated case of pus infection and septicemia.

3.6 Images from anti-vaccination and pro-vaccination tracts between 1918-1920. The use of images became more confronting over time. The image on the left is from Charles Higgins, *The Horrors of Vaccination Exposed* (1920) and shows a deceased two-month old English baby that Higgins claims died from "generalized vaccinia," a "very severe and very frequent form of fatal vaccination" where the vaccination sore spread across the body. The image on the right is from the Illinois Board of Health vaccinaion pamphlet (1918) that shows the images of two infants at the municipal hospital of Philadelphia where the infant on the left has contracted smallpox after not being vaccinated. It shows how public health reformers began to borrow tactics from anti-vaccinationists to counteract their movement.

Anti-vaccinationists chalked up a mixed score card when it came to challenging school vaccination requirements. The conflict between compulsory education statutes and vaccination requirements produced test cases in nearly every state, and state

[103] "Voice Their Opposition," *The St. Joseph Observer*, January 12, 1918, 5.

judiciaries came to different conclusions about the how the two laws interacted. Numerous states did strike down vaccination requirements, often on grounds that the health commissioner or school attendance officer did not have the power to make such regulations. But, importantly, those cases generally affirmed that the legislature did have the power to introduce vaccination requirements for schools.[104] In Pennsylvania, it was held that both laws were valid, and like the decision in Thorpe's case, the obligation to send one's child to school under the Compulsory Education law had been met so long as the child had in fact been sent to school, even if the child was not allowed to remain there because he or she was unvaccinated.[105]

But in New York, Weinberger's partial victory in the Thorpe case was soon overturned. In 1914, when Weinberger represented another father, Hagbard Ekerold, in similar circumstances, the Court of Appeals of the State of New York found the father guilty of breaching the compulsory education law.[106] Indeed, the Court held that "a parent could not escape his duties under the compulsory education law" by merely claiming to object to vaccination.[107] Weinberger complained, "when Herbert A. Thorpe and his little gun on Staten Island were victorious, we thought we had killed the snake of medical compulsion, but now we find we had only scotched it."[108] *Ekerold* became the leading precedent in other state decisions, and ultimately the Supreme Court held in *Zucht v. King* in 1922 that schools had the right to restrict entry when smallpox posed an

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[104] e.g. *Potts v. Breen,* 167 Ill. 87 (1897); *People ex rel. Lawbaugh v. Board of Education,* 177 Ill. 572 (1899); *Mathews v. Kalamazoo Board of Education,* 127 Mich. 530 (1901); *State v. Burdge,* 95 Wis. 390 (1897); *Ex. Rel Co*x v. *Board of Education of Salt Lake City,* 21 Utah 401 (1901); *Sherman v. Board of Education,* 165 Ga 889 (1928); CF: *Blue v. Beach,* 155 Ind (1900). 121 For a full overview of legal decision, see Fowler, *Smallpox Vaccination Laws, Regulations.*

[105] The Attorney-General affirmed the view judgment of a lower court, see "May Evade Vaccination Law - But Children Will Be Deprived of the Privileges of Public School," *The Fulton County News*, September 27, 1906, 1 and for reporting on the decision of Judge Fanning in *Commonwealth v. E.L. Smith* in Bradford County 1898, see "Conflicting Laws: Judge Fanning Decides on Vaccination Law Not Compulsory on Part of Parents and Guardians," *The Fulton County News*, October 11, 1905, 1.

[106] Weinberger's subsequent civil suit for Thorpe claiming $10, 000 in damages for a denial of education was summarily dismissed. "Suit Over Vaccination: Staten Island Man Asks Big Damages from Department of Education," *Brooklyn Daily Eagle,* January 15th 1912, 3.

[107] *People v. Ekerold,* (1914) 211 N. Y. 386 at 389.

[108] Harry Weinberger, Letter to the Anti-Vaccination Inquirer, London on *People v. Ekerold,* July 3, 1914, Box 21, Folder 4, Weinberger papers.

"immediate threat."[109] Overall, the judiciary proved to be immune to the arguments of anti-vaccinationists.[110]

Politically, anti-vaccinationists fared better, especially in Western states. In Utah in 1901, a groundswell of anti-vaccination sentiment led the legislature to pass the McMillan Bill, which prohibited any state authority from excluding unvaccinated children from schools. The bill became law after the legislature voted to override the veto of the Governor. Many anti-vaccinationists, including the American Anti-Vaccination League, held up the victory in Utah, which occurred in the state's infancy, as the gold standard for the movement.[111] After a long struggle for statehood where the Mormon practice of polygamy, or celestial marriage, had proved a sticking point, Mormons were wont to view state dictates, particularly with regard to family and freedom, with suspicion, and to zealously guard local democratic control in matters of faith and politics. When smallpox entered the state in 1899, a storm of controversy ensued, as the state's first health commissioner, Dr. Theodore Beatty, attempted to contain the epidemic via various means.[112]

The driving force behind that storm was William P. Penrose, the editor of the *Deseret News,* the official organ of the Mormon Church. Between 1899 and 1904, Penrose used his platform as editor to drum up outrage over school vaccination requirements. Officially, the Church of the Latter Day Saints approved of vaccination though Penrose

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[109] *Zucht v. King,* 260 US 174 (1922). Most courts allowed a broader construction as well tthat did not require epidemic in order for the power to come into force, making children more subject to general vaccination requirements than the population at large, Steffes, *School, Society and State,* 138-140.

[110] As was discussed in the last chapter, this is another arena in which the courts should be regarded as instrumental in promoting Progressivism, including the Supreme Court. On the contrast between the fate of civil liberties and economic liberties before the Supreme Court as represented by contrast between *Lochner* and *Jacobson,* both heard in the same term, see Lawrence O. Gostin, "*Jacobson v Massachusetts* at 100 Years: Police Power and Civil Liberties in Tension," *American Journal of Public Health* 95, no. 4 (2005): 576–81.

[111] Weinberger held up Utah as the gold standard. Higgins thought it was politically unrealistic in New York and that they should push for a conscientious objector clause instead. Harry Weinberger to Chas Higgins, June 27, 1914 and Chas Higgins to Harry Weinberger, July 2, 1914, Box 21, Folder 4, Weinberger Papers.

[112] Beatty was a non-Mormon who was raised in Illinois where he completed his medical training.

did much to further the impression that it did not.[113] Penrose was a migrant from England, who had converted to Mormonism in his youth and quickly made his mark as an editor in Mormon journals. His editorship of the *Millennial Star* in England in the 1860s and 1870s offered several clues that he had imbibed the anti-vaccination sentiment that had swept his homeland and that he was attracted to Mormonism because it reinstated patriarchal family government.[114] The irony that compulsion was being contemplated in his adopted homeland, founded on a defense of Anglo-American liberty against apparent British tyranny, was not lost on Penrose. It was "rather too late in the day" to attempt such a retrograde policy he opined. "Even Great Britain," he explained, "has found it necessary to abolish the compulsory clause of its vaccination law," and "thousands" had now "availed themselves of the degree of personal liberty thus granted."[115]

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[113]"There are a great many people in this city and state who have an impression that vaccination is contrary to the teachings of Mormonism, and that its practice is condemned by the head of the dominant church. This impression has been created unconsciously and unintentionally, no doubt, by the attitude of the *Deseret News*, which being the official organ of the church, is supposed by many to speak authoritatively upon every topic that it treats…"*Salt Lake Tribune,* December 21, 1899. Throughout the controversy, the Church was mum on the question of compulsion, but in 1900 issued a public declaration "recommending the people of the State avail themselves to vaccination for protection." Utah State Board of Health, Circular, Archives of the Church of the Church of Jesus Christ of Latter-Day Saints, Salt Lake City, Utah, November 1900, Microfilm, 4. Scholars have debated the relative role that religious views played in the dispute in Utah. Michael Willrich has argued there is "little evidence to suggest that most Mormons viewed anti-vaccination as a Mormon cause," *Pox,* 277 and Eric Bluth in "Pus, Pox, Propaganda, and Progress: The Compulsory Smallpox Vaccination Controversy in Utah, 1899-1901" (M.A. thesis, Brigham Young University, 1993) similarly argues "the religious factor played a minor role in this controversy," 129. Ben Cater challenges this position, arguing that the religious views were salient in the dispute in "The Religious Politics of Smallpox Vaccination, 1899-1901," *Utah Historical Quarterly,* 84, no. 1, 2016. He notes in passing that Penrose "bemoaned the growing reach of the state by appealing to family privacy and sovereignty, central components of the Mormon doctrine of eternal marriage and kinship" on 14. Per the note below, my research into Penrose suggests that ideas about paternal sovereignty were central to his conversion to Mormonism, and no doubt played a role in his opposition to vaccination as well. Mormon sensitivity about the sovereignty of the family, combined with Mormon practices of bodily purity prescribed by the Word of Wisdom, made them culturally pre-disposed to be suspicious of vaccination and school vaccination requirements.

[114] "The spirit of personal liberty is running to such excess…parental and marital authority are both dethroned and family government has become democratic instead of patriarchal." The resistance of wife and child to the patriarch's authority "manifested widely in rebellion against all regulations and restrictions, whether of family, the Church or the State." "The importance of a return to the ancient patriarchal principles of family government cannot be overestimated," Penrose declared. William Charles Penrose, "Family Government," *The Latter Day Saint's Millennial Star*, 20, vol. 30 (1868), 1-3. Penrose would also re-print articles warning of the dangers of vaccination, see for example: "Vaccination in Ireland," *The Latter Day Saint's Millennial Star,* October 27, 1869, 704-705.

[115] *Deseret Evening News*, February 2 1899, 4.

In early 1899, the proposal for a vaccination requirement for public schools in Utah first surfaced as part of the appropriation bill for the newly adopted health department amid the smallpox epidemic. But, Penrose quickly whipped up sufficient public outcry that the provision was dropped. By the end of the year, however, the controversy came to a head when Beatty invoked his discretionary powers as health commissioner to deal with epidemics by issuing an edict requiring the vaccination of all school children. Over the winter break of 1899 - 1900, the conflict heated up as many Utahans protested the apparent usurping of the rights by the Health Commissioner. Beatty was confident that Utah's 12,000 school children could be vaccinated over the winter break, but when school resumed in January, 8,000 school children were absent with only 38 per cent of enrolled children "present with the scars of vaccination entitling them to their seats."[116]

In January, the Utah Anti-Compulsory Vaccination League formed and backed a legal challenge of J.E. Cox, the chairman of the League, on behalf of his daughter Florence. Like the American Anti-Vaccination League, the Utah league brought respected bookkeepers, bankers and salesman who focused their opposition on the compulsory aspects of the law based on arguments about infringement of their rights as citizens and tax-payers who patronized public schools. As was the case with Penrose, Pitcairn and Higgins, half of the League's members were migrants from Europe, mostly from England.[117] The day after school resumed in January, John E. Cox won his case in the Third District Court. The presiding judge, Justice Cherry, avowed he was a believer in vaccination but announced that nonetheless the case presented "purely a question of law." On that question, he held that the "Board of Health has assumed legislative authority which it does not possess." Schools were closed until the epidemic abated.

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[116] Smallpox and Vaccination, *Standard Examiner*, January 26, 1900, 4.
[117] Willrich described the league as "bastion of white, male tax-paying respectability," and much of the background here is drawn from *Pox,* 275-276.

The campaign mounted by the Utah Anti-Compulsory Vaccination League and Penrose evinced a strong commitment to republican ideas about the separation of powers, popular sovereignty and the rights of citizens. They were incensed by the fact that the Health Commissioner, as a non-elected bureaucrat, had gone against the will of the legislature in issuing a vaccination edict. One letter writer urged the *Deseret News* to continue its "agitation in favour of the right of the people and against the arrogance of the usurpation of a few petty public officials having a little brief authority."[118] Anti-vaccinationists advocated a strict adherence to proper spheres of power, using similar language to demark the jurisdictions of health commissioner, the legislature and the family. The *Deseret News* proclaimed it advocated "the liberty of the citizen within the lines of statutory law," pleading with the Health Board to leave parents to "exercise their judgment" and "let the school boards and health doctors keep within the lines which define their official authority." Similarly, Penrose noted that that anti-vaccinationists held no desire to prevent those who believed in vaccination from submitting to the practice "within their own family limits." When Beatty reintroduced the vaccination edict following another smallpox outbreak that summer, the League secured the support of British Mormon, William McMillan, a Republican who introduced the "McMillan Bill" which prohibited any authority from excluding unvaccinated children from schools. More than two thousand petitions circulated demanding the legislature take action because the Board of Health edict violated their "God given constitutional rights."[119] The House approved the McMillan Bill with thirty-seven voting in favour, seven against and two abstentions.[120] After the Senate approved the bill, it was sent to the Governor for his assent on February 1, 1901.[121]

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[118] "Compulsory Vaccination," *Deseret Evening News,* December 18, 1899, 4.
[119] *Deseret Evening News*, December 26, 1900, 13.
[120] Utah State House Journal, 1901, 245.
[121] All Mormon Democrats supported it, except one and so too did the majority of Mormon Republicans. Bluth, "Pus, Pox, Propaganda, and Progress," 121-122.

The battle over vaccination in Utah went through one final round when Governor Wells vetoed the bill, believing that by allowing the school vaccination requirement to stand, he was discharging the special duty, and power, the state held over the child. The decision did weigh heavily on Wells. He telegrammed every state in the union to ascertain their policy on the question, before deciding to veto the bill. In his letter to the House of Representatives he noted the "American citizen is naturally and properly jealous of his rights, and abhors anything that smacks of compulsion." But in carefully laying out his reasoning for supporting compulsory vaccination, Wells cited the unique relationship between the state and the child. Pointing to the compulsory schooling law, he noted that children were "in one respect wards of the State. It has an interest in them, and can exercise a control over them, which may not be applied to adults." The Health Board was well within its powers to enact a compulsory vaccination edict. It was the "bounden duty of the State" to give children "not only the best mental training within its powers, but also the greatest possible protection against physical injury or disease." [122] Governor Wells' lengthy and considered explanation for his veto was not enough to stay the surge of popular demand for a zealous regard of the "liberty of the citizen." Later that month, the legislature overrode his veto. The McMillan Law remained on the books until 1933.

In Wisconsin, the same outcome was achieved, but it was the Governor himself who vetoed a compulsory vaccination law in 1901. In his veto, Governor La Folette noted the broad range of respectable citizens who opposed compulsory vaccination, "compulsory vaccination and like laws are repugnant to many people not opposed to vaccination from religious beliefs and prejudices." Thus, he concluded: "I am unwilling to approve legislation to abridge the security of the person or the home without the

[122] "Veto Message," 8, February 8, 1901. Governor Wells Series 235, Reel 11 1901, Utah State Archives.

presence of a greater emergency."[123] Ultimately, seven states used the political process to repeal compulsory vaccination statutes: California, Illinois, Minnesota, West Virginia, Wisconsin and Utah.[124] For the men behind the American Anti-Vaccination League, however, fewer legislative gains were achieved. Weinberger and Higgins failed in their multiple efforts to repeal the New York State vaccination order or secure a conscientious objection clause. But where they failed, a grieving father and Republican insider succeeded. James Loyster, a Republican delegate from Cazenovia, New York, lost his son aged eleven to infantile paralysis. Loyster claimed he had been a believer in vaccination and had vaccinated his son in an "honest effort to comply with the law." He deliberately disavowed being an anti-vaccination partisan. His report into the twenty-seven children who had died, and one hundred children who had taken ill after vaccination in rural New York led to a compromise being struck in Albany. The law relaxed compulsory requirements in rural parts of the state, but tightened them in the cities.[125]

Indeed, the American Anti-Vaccination League fell short of Higgins and Pitcairn's ambitions across the board. In Pennsylvania, Pitcairn pressed for the repeal of the compulsory vaccination school law, a motion that was approved by the House 133 to 9 and the Senate 27 votes to 11, but was subsequently vetoed by Governor Edwin Stuart.[126] Moreover, Higgins and Pitcairn hoped their League would create a "national confederation" of affiliated societies. But it only ever listed regional directors in eight

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123 "No Compulsory Vaccination," *The Saint Paul Globe,* March 4, 1903, 4. "No Compulsory Vaccination," 4. Chas M. Higgins, *The Case Against Compulsory Vaccination: An Appeal to Common Sense to the Governor, Legislature and People of The State of New York, By A Layman* (n.p, 1909), i.

124 Johnston, *The Radical Middle Class*, 183.

125 James A Loyster, *Vaccination Results in New York State in 1914: Being a Study of Forty-Nine Cases with Portraits and Certain Conclusions* (Syracuse, N.Y.: Allied Printing Trades Council, 1915), i–v; see also Lora C Little, *Crimes of the Cowpox Ring: Some Moving Pictures Thrown on the Dead Wall of Official Silence* (Minneapolis: Liberator Pub. Co., 1906). Despite his effort to distance himself from anti-vaccination partisans, his report was nonetheless picked up and published by anti-vaccinationists like Higgins, see: Chas Higgins, *Horrors of Vaccination Exposed and Illustrated, Petition to the President to Abolish Compulsory Vaccination in Army and Navy,* (Brooklyn, N. Y.: C. M. Higgins, 1920). On Loyster, see also Colgrove, *State of Immunity,* 45, 64-65.

126 Pitcairn felt betrayed by Governor Edward Stuart. Stuart had courted Pitcairn as a representative of anti-vaccinationists in the state during the gubernatorial race, promising them a fair hearing but upon being elected vetoed a bill prohibiting compulsory vaccination that had passed in the House 133-9 and in the Senate 27-11. Allen, *Vaccine,* 102-103. Pitcairn and his treasurer, Porter Cope, to make up two of the five members appointed to a state commission to investigate the safety of vaccination in 1913.

states.[127] The financial records suggest that Pitcairn and Higgins were the sole financial backers of the league.[128] Nonetheless, in the small circle of dedicated anti-vaccination activists, money could buy a disproportionate influence. Pitcairn bailed out Lora Little on multiple occasions, making her life-long activism possible.

The connections forged between anti-vaccination leaders – both ideological and financial—were also important for the development of related national movements, particularly the National League for Medical Freedom. Pitcairn, Higgins and Cope were all advisory members to the League. From 1910 onwards, the NLMF's advocacy shows how anti-vaccinationists and those who opposed medical school examinations fanned out into broader anti-statist movements, and how their ideas about the child, liberty and parental rights did as well. As the final section of this chapter explores, ideas about paternal sovereignty, and the communities of anti-statist groups that had already organized to oppose school vaccination and medical examination schemes, formed a critical component of the larger campaign of the NLMF against the adoption of a federal Bureau of Health. The campaign of the NLMF provides another example of how the watchword of "parental rights" could be used together to stitch together constituencies and to mobilize community groups against the expansion of the federal government power. The next section explores how the NLMF built upon the local battles against school vaccination requirements and medical examinations, both conceptually and logistically, to create a forceful national movement in which paternal sovereignty figured prominently. The role that paternal sovereignty played in the successful campaign of the NLMF further provides a preview of the galvanizing role of that paternal sovereignty would play in national anti-statist movements in the early twentieth century.

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[127] Colgrove, "Science in a Democracy: The Contested Status of Vaccination in the Progressive Era and the 1920s," *Isis* 96, no. 2 (2005), 173.
[128] See Box 4, John Pitcairn Papers. There is considerable correspondence between John Pitcairn and Lora Little in which she requests, or he acknowledges, sending money for her activism and expenses.

The National League for Medical Freedom and The Role of Paternal Sovereignty in building Skepticism of Federal Power

The National League for Medical Freedom was established in 1910. Its primary objective was to thwart the establishment of a federal bureau or department of health. Irving Fischer, a political economist at Yale, had been the driving force behind the proposal for a federal department of health. In 1906, he established the Committee of One Hundred to meet President Roosevelt's request that he demonstrate there was sufficient public interest in the initiative to establish a department. By 1909, Fischer had built a movement to support his proposal, enlisting the backing of business and agricultural leaders, conservationists and reformers, and some prominent politicians.[129] Buoyed by the election of President Taft in 1908 who had campaigned on the issue, Fischer's committee set in motion the groundwork putting forward a proposal for Congress. The Owen Bill, named for its sponsor, Senator Robert Latham Owen of Oklahoma, was introduced to congress in April 1910 and proposed to establish a national Department of Health.[130] The NLMF was formed in May, sounding the "alarm… to the Homeopaths, the Eclectics, the Osteopaths, the Christian Scientists" and to "members of the Anti-Compulsory Vaccination League and the Anti-Vivisection Society."[131] It proved to be a pernicious thorn in the side of Progressives, stoking sufficient opposition to sink the Owen Bill and several subsequent proposals for a national bureau across the decade.

Members of the NLMF were alarmed by the apparent monopolistic collusion between "allopathic" medicine, namely the American Medical Association and state

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[129] George Rosen, "Public Health Then and Now: The Committee of One Hundred on National Heath and the Campaign for a National Health Department, 1906-1912," *American Journal for Public Health* 62, no.2 (February 1, 1972): 261-263.

[130] For background on the Committee for One Hundred and the political struggles for the national bureau, see Mandred Waserman, "The Quest for a National Health Department in the Progressive Era," *Bulletin of the History of Medicine* 39, no. 3, (Fall 1975): 357-366.

[131]" The First Report of the National League of Medical Freedom: Issued to Its Members, August 1910," (New York City: National League for Medical Freedom, Metropolitan Building, 1910), 6.

health initiatives.[132] Since the 1890s, the American Medical Association had been making significant headway in standardizing medical schools and tightening medial licensing procedures. At the turn of the century, it was estimated that five million families in the United States subscribed to "irregular medicine" and that there were 28,300 drugless healers compared to 40,000 AMA members who practiced "allopathic medicine." [133] By the end of the decade, prompted by a famous report in 1908 that Abraham Flexner prepared for the Carnegie Foundation that exposed the "miserable standards" of medical schools and called for "fewer and better doctors," there was a crackdown on medical schools and licensing. As a result, the AMA cemented its accreditation and licensing powers. The number of graduates from medical schools dropped by fifty percent as the number of medical schools fell. By 1912, only four homeopathic medical schools remained in operation.[134]

Concurrently, local and state governments increasingly used the police powers of the state to mandate orthodox medical practices, namely vaccination and school medical examinations. For the NLMF, these two trends signalled the intention of the AMA to use the "machine" of state power to further monopolize the medical industry and to "force its theories upon the public" through the coercive arm of state power. [135] In 1911, the NLMF noted that all of the 6,253 doctors currently employed by the government were members of the AMA. [136] Thus, the raison d'être for the formation of the NLMF was scientific dissent – its membership opposed the beliefs and practices of orthodox medicine and opposed the growing power of the AMA in medical licensing,

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[132] The term "allopathic" was coined as a term of derision by alternative medical practitioners but did not gain wide currency. Alternative medical practitioners also labeled the AMA "regular" doctors and at times embraced the self-descriptor "irregular" doctors/practitioners.
[133] Stephen Petrina, "Medical Liberty: Drugless Healers Confront Allopathic Doctors, 1910-1931," *Journal of Medical Humanities* 29 (2008): 211-21.
[134] Petrina, "Medical Liberty," 211-21.
[135] "The First Report of the National League of Medical Freedom: Issued to Its Members, August 1910," (New York City: National League for Medical Freedom, Metropolitan Building, 1910), 6.
[136] "Medical Medievalism in the Twentieth Century," 1911, Collection 533, folder 09 1910-199, AMA Archives Chicago [hereafter cited as: NLMF Papers].

and its influence on state health policy.[137] In what was obstensibly a dispute over science, however, the liberty of the parent and freedom of the home figured surprisingly prominently in NLMF materials and complaints.

Viewed through the eyes of the NLMF, the linkages between the public health initatives of local authorities and school boards, and the proposal for a federal bureau of health were strong, sinister and urgent. The apparent tentacles of medicine started small – with children and school health campaigns and threatened to scale up to the highest reaches of government. As the NLMF saw it, the "movement," began quietly with quarantine measures in schools and medical inspections during epidemics. Next, doctors demanded compulsory vaccination. Soon after that, governments entertained proposals for state salaried doctors to be placed in public schools and nurses who would follow up in children's homes to see if doctors orders were being yielded. [138] It was a "political move" driven by the AMA. "It has its final expression in the Owen Bill: its intent is to establish a medical control, through a department of health, which shall not be amenable to even to the President."[139] Thus, the NLMF waged war against "political doctors" at all levels of government to stop them from fastening "their monopolistic tentacles upon the citizens of this country." [140] Public health campaigns concerning children constituted not only the thin edge of the wedge, but a highly invasive incursion of state power into the home that typified the risks of "state medicine."

For Irving Fischer, the lead proponent of a National Department of Health, this

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[137] The NLMF represented numerous strains of progressivism in its anti-monopolistic agenda against the AMA and the establishment of a federal bureau for health. It strived to expose the collusion between private medical practice and the government, and the inherent dangerous of state medicine.
[138] "Political Medicine in the Public Schools," *Medical Freedom* 2, no.1 (September 1912): 3.
[139] "Inspection a Political Move," *Medical Freedom* 2, no.1 (September 1912): 11. [article reprinted from the Denver *Chronicle*.]
[140] "Political Medicine in the Public Schools," *Medical Freedom* 2, no.1 (September 1912): 3. The NLMF circulated a letter from Edmund Vance Cooke to Irving Fischer as an exemplar of this view. The letter read that Cook was as "sincerely interested in the conservation of public health" as Fischer, but pointed to the "arbitrary and sometimes outrageous acts of municipal and State boards of health" along with "malicious prosecutions" under medical laws to ask "what reasons there is for supporting that a National Bureau would be any less biased than a State bureau?", N.D., 533-09, NLMF Papers.

world view was perplexing. As he saw it, the League had a "vivid but peverted imagination" that fueled their scare-mongering campaign.[141] Fischer's head had been left spinning after the NLMF launched a multi-flanked attack on the Owen Bill at Congressional Hearings in June 1910 – one month after League came into extistence.[142] Before the "League for Medical Freedom suddenly appeared on the horizon our movement had encountered substantially no opposition," Fischer complained in June 1910.[143] The NLMF assault on the Owen Bill was enough to spark seeds of opposition and inflame internal tensions among those who favored a federal agency and by January 1911, the Owen Bill had been tabled.[144]

The NLMF delegation at the Congessional Hearings was headed by John L. Bates, a former Governor of Massachusetts. Echoing John Pitcairn's anti-vaccination campaign, Bates stated on the Senate floor that it was as important to "have medical freedom as it is to have political and religious freedom."[145] Flanked by anti-vaccinationists, anti-vivisectionists and homeopaths, the NLMF threw a barrage of

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141 Irving Fischer, "Memorial relating to the conservation of human life as contemplated by bill (S.1) providing or a United States public health service." Presented by Mr. Owen, April 5, 1912, 62nd Congress, 2nd Session, Document No. 493 (Washington: Government Printing Office, 1912), 62.

142 Luther Gulick testified at the hearings in favor the establishment of a federal Bureau of Health, arguing that there was insufficient scientific research and information being produced to support the school hygiene movement that might be supported by a federal agency. "Statement of Dr. L.H. Gulick." Proposed Department of Public Health, Hearing Before the Committee on Public Health and National Quarantine, United States Senate
(Washington: Government Printing Office, 1910): 96-101.

143 Irving Fischer, "Defines Opposition To the Owen Bill," *New York Times* June 18, 1910, 8.

144 The Committee for One Hundred did succeed in passing the Mann Act for the "Public Health and Marine-Hospital Service" which had investigative powers within the Treasury Department, but fell short of the movement's primary goal to centralize the health mandates spread across five federal agencies. The Committee for One Hundred, and Senator Owen, continued to push for a national department into the 1920s with the NLMF maintaining their publicity campaign against the proposal. The NLMF claimed victory for the defeat of the Owen Bill and Irving Fischer blamed them. The chances of the Owen Bill succeeding, however, were already diminished due to internal divisions amongst its advocates over whether to push for a national department, as Owen favored, or merely a national bureau which the Committee for One Hundred had apprised as having a greater chance of success. The lack of unity was evident in the testimony of those in favor of the Owen Bill before Congress. Moreover, states' rights advocates within Congress had long signaled their intention to oppose the move as they had with the 1906 Pure Drug and Food Act as well. Finally, the Committee for One Hundred failed to coordinate a publicity campaign to drum up support a national health agency that would have been a match for the NLMF propaganda onslaught. "Senator Owen Advocates a Department of Health," *Journal of the American Medical Association* 14 (1910): 1146–1147; Petrina, "Medical Liberty," 211-21.

145 J. L. Bates, "Medical Freedom," in Hearings to Establish a Department of Health and for Other Purposes, US Congress, Senate, Committee on Public Health and National Quarantine, 61st Cong., 2nd Sess. (Washington, DC: Government Printing Office, 1910), 178.

attacks at the proposed entity: it was unconstitutional, abridged states' rights, tryannized the individual and represented the dangers of paternalism in government. "The more paternal care is exercised [by government] the less capable are the people of taking care of themselves or their children," one member testified.[146] The NLMF funded a torrent of advertisements in local newspapers alleging the same. The rapidly assembled opposition signaled the ease with which anti-statist activists could spook the public and stymie federal legislation by stoking fears of centralized government and state paternalism.

With the Owen Bill dead in the water, Senator Owen urged Irving Fischer to write a report to make sense of what had happened and to resussitate the movement for a federal health agency by launching a counterattack on the NLMF. The report published in 1912, and presented by Owen to Congress, excoriated the NLMF – alleging the "tainted money of patent medicine men" lay behind the organization, despite its protests to the contrary.[147] Fischer argued it was otherwise utterly implausible that an organization could bankroll such an expensive propaganda exercise so quickly without even collecting dues from its members. He based his allegations on a muckraking expose published by *Collier's Magazine* that estimated the NLMF was outlaying $25, 000 a week on publicity materials in its campaign against the Owen Bill.[148] Fischer

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146 Dr. Williams, "Hearings Before the Committee On Interstate and Foreign Commerce of the House of Representatives on Bills Relating To The Health Activities of General Government Part III," June 4, 1910, (Washington D.C.: Government Printing Office, 1910) 255. Dr. Williams was Presbyterian minister who claimed to represent the 2000 Tennesseans who had joined the League for Medical Freedom.

147 Fischer, "Memorial relating to the conservation of human life," 62. Fischer reported that NLMF claimed the have been donated by philanthropic citizens interest in the cause of "freedom" for the people, which very feasibly might have been John Pitcairn. Senator Owen had registered his surprise that "somebody" was "spending a very large amount of money on this sudden propaganda" during the Senate Hearings, *US Congressional Record*, 61st Congress, 2nd Session, 1910, 6847 as cited in Waserman, "The Quest for a National Department of Health," 347.

148 "A Bad Bunch," *Collier's* 6 May 1911, 1. *Collier's* continued to try to expose the NLMF, demonstrating the links between the president, B.O. Flowers and the patent medical industry, see "Liberty," *Collier's,* June 3, 1911, 1; "More Freedom," *Collier's,* June 10, 1911, 1. The NLMF responded "The facts about "Collier's" attack on the National League for Medical Freedom" (New York: National League for Medical Freedom, 1912), stating the NLMF grew out of earlier state chapters in Colorado and California and the efforts other nationally active individuals, and claimed to be preparing a list of the 2750 individual financial contributors to the NLMF but that Normal Hapgood had published his responder in *Colliers* without waiting for their full response, see Committee on Publicity and Education, "The facts about "Collier's" attack on the National League for Medical Freedom," Folder 0534-11, NLMF Papers. Later, the AMA would estimate

charged that the NLMF was far from a "philanthropic movement to protect the 'liberties of the people"' as the organization presented itself. It was a front for the financial interests of homeopathic and patent medicine interests, fueled by a hatred for allopathic medicine. The campaign was diversionary: "It is the cry of the thief to 'stop thief!' to distract attention from himself." [149] The report concluded that the essence of that diversionary scare campaign was that any federal health agency, backed by "regular doctors" would "put 'the liberties of the people' under a Government strong arm." Fischer summarized:"The 'regular' doctor would 'imperil your freedom,' says the quack; would brutally 'invade the sancitity of your home,' 'you would have government by doctors – 'regular' doctors at that; you would have 'State medicine." [150]

Fischer argued that these attacks were baseless, premised on what he percieved to be a deliberate misreading of the constitution and a conscious "garbling" of his materials.[151] He was particularly angered by the allegations that a federal health department would lead to a national policy of compulsory vaccination and medical examinations of school children, and "invade the sacred precincts of the individual home."[152] He felt these allegations were not only patently false, but utterly fanciful. The constitution made it impossible that any federal agency could enforce vaccination or "invade the home." The power to enforce vaccination, he pointed out, was expressly reserved to the states under the Tenth Amendment. All a national bureau might be able to do on the issue would be to hold an inquiry into the efficacy of vaccination which would give the NLMF and anti-vaccinationists the promiment platform that they were so hunrgy for. Drumming up fears of federal agents invading the home was even more far-

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that the NLMF had outlaid as much at $50, 000 in its initial assault on the Owen Bill. "Once More the League for Medical Freedom," *Journal of the American Medical Association* 62 (1914): 1038.

[149] Quoting John A Wyeth in *Harper's Weekly*, Fischer, "Memorial relating to the conservation of human life," 63.

[150] Fischer, "Memorial relating to the conservation of human life," 65.

[151] Fischer, "Memorial relating to the conservation of human life," 64, 72.

[152] Fischer, "Memorial relating to the conservation of human life," 74.

fetched. No existing federal government agency attempted to do such a thing, he pointed out, and nor did it need to do so to carry out its business.[153]

While Fischer was frustrated that the NLMF had deliberately misrepresented the powers and scope that a federal agency would hold with respect to the individual and the home, he understood that the enlargment of state responsibility for health would necessarily raise questions and concerns about the rammifications for the private responsibilities of citizens. Like many reformers, Fischer believed that infants and children represented the best and most effacicious opportunity to promote the hygiene and health of the population. For that reason, his own advocacy had focused on the importance of maternal and infant health programs and the use of the school to promote hygiene. As Gulick and Ayres had, Fischer avowed that his advocacy for an "increased sense of public responsibity for health" did not "countenance a shirking of the personal, or parental responsibility." To the contrary, he argued there needed to be greater responsibility across the board among "all four modes of promoting public health" – the individual, the family, schools and the state. Fischer argued that the enlargment of state responsibility for health would "stimulate" greater responsibility among families and individuals as school medical programs alerted parents to their children's health needs, and the hygiene lessons children learned at school prepared them for life. He conceived of a cooperative relationship among these four modes in the promotion of health, arguing they were "mutually supplementary rather than competitive," and he sought to anticipate and allay concerns about the state intruding into the domestic sphere.[154] Thus, despite his outrage at the long bow the NLMF had drawn between school programs and the federal government, he understood the underlying anxiety that the NLMF sought to tap into and exploit.

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[153] Fischer, "Memorial relating to the conservation of human life," 74-75.
[154] Irving Fischer, "Public Responsibility for the Health of Infants and Children" in Proceedings of the Child Conference for Research and Welfare 1909, Held at Clark University, July 6-10, 1909 (New York City: G.E. Strechert & Co., 1910), 83-91.

Indeed, whatever role money from patent medicine and anti-vaccination groups played at the higher levels of NLMF lobbying, the nexus between state medicine and the home was crucial for building its base. Parents were the footsoldiers of its local chapters. The NLMF established affiliate branches in thirty-two states and had over five hundred speakers who delivered lectures and talks around the country. In a public lecture before a mass meeting at Carnegie Hall in 1911, Robert Baker alleged that the AMA had admitted that "compulsion, not persuasion is the key note of state medicine" because "the great majority of mankind are neither wise enough voluntarily to submit either themselves or their loved ones to the sanitary laws." In so doing, Baker told the audience that state medical doctors "mark you – the individual who refused to permit his home to be invaded, who refuses to permit himself to be made the experiment station, as unwise quack, incapable of self-government." Calling state medicine "paternalism run mad," his lecture ended with a call to action to those gathered to halt the movement afoot that aimed to "substitute the state… for the home, to enthrone bureaucracy and terrorism and to destroy liberty."[155] Mass meetings for the NLMF in Nevada, Kansas, California, Illinois, Oregon and elsewhere stirred local parents to action, forming local leagues of the "National Public School Protective League." The Public School Protective Leagues, which were particularly active on the West Coast, pushed for measures to prohibit compulsory vaccination and organized boycotts of medical examinations.[156]

Nationally, the NLMF newsletter, *Medical Freedom* was its primary propaganda tool. The pages of the monthly newsletter were filled with attacks on the science of vaccination, warnings about the dangers of medical monopolies, polemics by Herbert

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[155] Address of Hon. Robert Baker at National League for Medical Freedom Mass Meeting, Carnegie Hall, October 24, 1911 (filed April 6, 1912). League Library No. 6., 0533-09, NLMF Papers.

[156] The United States Bureau of Education*, Report of the Commissioner of Education For the Year Ended June 30, 1918,* 59-60, noting the prevalence of Public School Protective Leagues in the "Pacific States," noting that in Yakima County, Washington the School Superintendent was the President of the League that opposed "paternalism in the public schools" because it "deprives individuals and families of their sacred rights and duties under the United States Constitution."

Spencer and like-minded thinkers and rousing calls for parents to defend their rights and their homes against state medicine. The frequent invocations of paternal sovereignty in the pages of this journal suggested that the NLMF understood that the public at large would zealously protect the liberties of parents and the sanctity of the home. The entire September edition of *Medical Freedom* in 1912, for example, was dedicated to encouraging parents to resist school medical inspections. The editorial stated the aim was to awaken "thousands of earnest American citizens" to the dangers of school medical examination.[157] An earlier editorial in the same journal had insisted that the controversy could be easily settled so long as it was "constantly borne in mine and insisted upon, that it is the school and not the child that is public."[158]

The NLMF offered multiple lines of argument against school medical examinations and vaccination. Underlying each was an insistence that it was the private right of parents to make medical decisions on behalf of their children. The argument most frequently offered was that school medical examinations trespassed on the "jurisdiction" of the home. The April 1912 edition of *Medical Freedom* included a reprint of an address given by Dr. J.E. Lautner of Northern State Normal School in Michigan, stamped as the "most clear summary of the wrong done to parents and children by medical inspection." In that address, Lautner argued that medical inspections were dangerous because "the jurisdiction of the home is separate and distinctive from that of the school." While each jurisdiction had a distinct and important role to play in the training of youth, the school was necessarily subordinate to the home because the jurisdiction of the home derived from "natural rights" whereas the powers of schools only came from "custom and legislative enactment."[159] Other contributions emphasized that the dangers of school medical inspection and vaccination schemes lay in the fact that

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[157] "Compulsory Examination of School Children is a National Issue," *Medical Freedom* 2, no. 1 (September 1912): 1.
[158] *Medical Freedom* 1, no.10 (June 1912): 1.
[159] "School Inspection Unjust: An Invasion of Sacred Precincts," *Medical Freedom* 1, no. 8 (April 1912): 8.

they threatened to undermine the function of the home and the responsibility of parents toward their children by transferring responsibility to the state. A related line of argument rejected the scheme as a dangerous and insulting paternalist proposition, as one physician put it "based on the presumption that the American people are not intelligent enough to take care of their own children." [160] State paternalism had a literal resonance for the anti-statists behind *Medical Freedom;* paternalism meant the state assuming the paternal role inside the household.

Medical Freedom appealed to mothers as a moral force and fathers as citizens to defend their rights as parents. Women constituted an extremely important and active base for the NLMF, and they assumed high-ranking positions in the organization as well. For example, Delaine Belais, who was the President of the New York Anti-Vivisection Society became the Director of the National League for Medical Freedom, and used her platform to rouse women into action by appealing to their moral authority as mothers. In her address before the first annual conference of the NLMF, held in Chicago in November 1911, Belais warned that one of the tactics of "political doctors" was to exploit the fears of women and children by drumming up widespread panics about epidemics. Having frightened women into submission, doctors could then "invade the home with autocratic powers." Thus, it behooved women to inure themselves against such fear-mongering. Belais aligned the causes of the NLMF with the upsurge in women's progressive activism in the early twentieth century, declaring that it was the "beginning of women's day" and that "women's hour and cause are here." While making no claims regarding the equality of men and women, she argued that women were coming to recognize their full powers and that "it has never been questioned that the

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[160] "Physician Opposes Medical Examination of School Children," *Medical Freedom* 3, no. 8 (April 1914): 7. "The medical examination of school children in un-American, unjust and a meddlesome system that eventually will tend to destroy the social structure and the home itself. Every duty taken from a parent and assumed by the state makes the parent more careless of his children."

moral force of women is incomparable and that once roused it carried all before it."[161] The pure and unwavering love that a mother held for her child would ensure that women would rise up against medical tyranny.

By contrast, appeals to men spoke to their liberties as rights-bearing citizens. The pages of *Medical Freedom* were richly adorned with the symbols of American liberty, including an image of the liberty bell that figured on every cover with the by-line "eternal vigilance is the price of liberty." During the decade when women's agitation for suffrage reached a climax with the proposal for the nineteenth amendment, the longstanding association between manhood, citizenship, and property-rights continued to color the invocations of liberty, both consciously and unconsciously. In 1913, on the fiftieth anniversary of the Gettysburg Address, the League appropriated Lincoln's famous words – promising to deliver the "new birth of freedom" for those who stood up against tyranny and oppression: "The citizen does not need an inspector to stand guard over him, his children and his home." Indeed, the editorial urged that the citizen must "jealously guard the rights given to him;" specifically the right to control over his own children and the right to have his home respected as a "castle."[162] The Anglo-American common law maxim that a "man's house is his castle" was offered as the "basic principle" that the NLMF had been fighting for, as the editors enthusiastically endorsed the sermon of a Brooklyn minister who declared: "a man's home is his castle, a citadel that cannot be invaded even by the power of the state."[163] Indeed, the pages of *Medical*

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[161] "An Eloquent Appeal," *Medical Freedom* 1, no.4 (December 1911): 12. *Medical Freedom* reported that sixty delegates from twenty-five affiliate state chapters attended the meeting.
[162] Joseph C. Mason, "A Citizen's Movement," *Medical Freedom* 2, no.12 (August 1913): 1.
[163] "A Man's Home – His Castle," *Medical Freedom* 4, no.6 (February 1915): 1. The common law maxim "a man's house is his castle" was famously articulated by Sir Edward Coke in 1604 as one of the limits on the King's sovereign authority. The maxim was politically potent in the American Revolution because British troops, under the writs of assistance, routinely raided the homes of colonists without cause, which was seen as a quintessential example of how British colonial rule trampled on the liberties of the colonists. The right to castle thus made its way into the founding Bill of Rights as a defining liberty of the New Republic. When James Otis famously invoked the right to castle in a court case challenging the writs of assistance on the eve of the American Revolution, he tweaked it to be the rights of men as against the government, rather than the rights of men against their neighbors and this version made its way into the founding

Freedom used the language of violent masculine resistance to describe the opposition that was "relentlessly rising" in order to further stoke its ranks. Ordinary citizens, one editorial evocatively suggested, "in their anger over the oppression and autocratic assumption of rights" by state medical doctors would take those very doctors "by the throats" to remind them "you are the servants of the people not their masters."[164]

The man's right to his castle was offered as common cause to link the plight of poor immigrants with the crusade being launched by the more well to do backers of the NLMF. Chas Higgins authored a letter to *Medical Freedom* that vividly detailed the forced inspection and vaccination raids that occurred in densely populated tenements that housed many of New York City's immigrant population. Such an invasion, he ventured, spoke to the need for the supporters of the NLMF to call out the excuses being made for such outrages against the citizen and home based on the fear-campaign of "smallpox panic mongerers and vaccination extremists."[165] Reports of actual raids that took place in the tenements on the Lower East Side that terrified immigrants amplified the fears among middle and upper-middle class native born NLMF members to the extent that they saw even more mild forms of state intervention, such as a school nurse following up on a sick child with a home visit, as the same type of assault on the sovereignty of the home. Indeed, even when state medical programs proposed no home visitation, anti-statists were quick to conjure up incendiary imagery of the state violently trespassing onto the sovereign territory of the home. Connecting that fear with the actual experiences of poor immigrant families who were subject to vaccination raids made the threat real, and united the interests of all heads of households in calling for a defense of the "inviolability of the home" from any form of state intrusion.

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mythology of the Republic. Leonard Williams Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 2001), 151–152.

[164] Joseph C. Mason, "A Citizen's Movement," *Medical Freedom* 2, no.12 (August 1913): 1.

[165] "Mayor Gaynor Stops Force," *Medical Freedom* 1, no.12 (May 1912): 13.

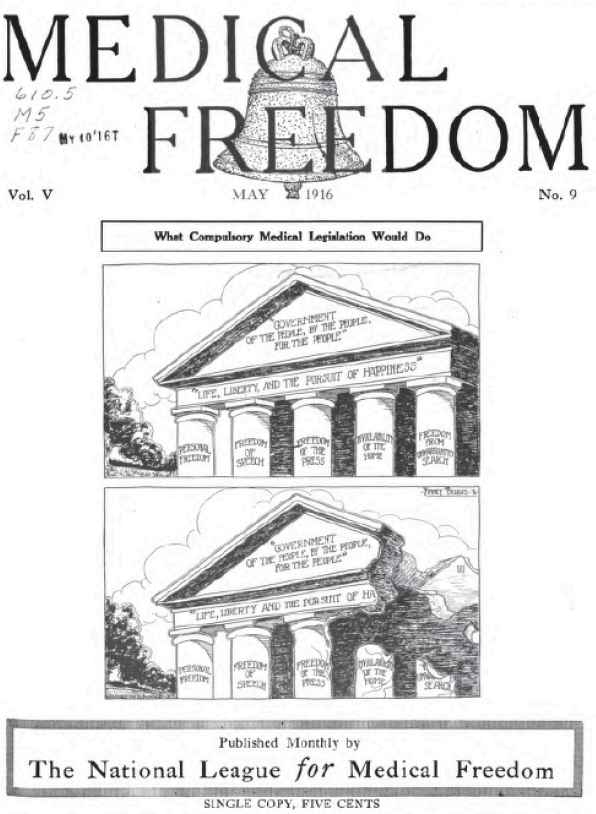

Image 3.7. Cover of *Medical Freedom* in May 1916 on "What Compulsory Medical legislation Would Do." The "five pillars" of liberty supporting the United States Government in the image are personal freedom, freedom of speech, freedom of the press, inviolability of the home, and freedom from unwarranted search. In the second image, the last two pillars have crumbled.

Medical Freedom published and celebrated sensational accounts documenting cases when a bureaucrat or judge refused to uphold or enforce the state's mandate to medically treat children. For instance, the Board of Education in Passaic, New Jersey, brought an action against the town's own City Sanitarian (the "virtual head of the board of Health") because he refused to have his own child vaccinated – the doctor declared he would "move out of New Jersey before he would submit." The journal applauded the doctor's bravery in defending himself against the charge of being a disorderly person as he grandstanded, declaring that parents were within their rights to not subject their children to the hazards of vaccination.[166] In Philadelphia, it was reported, Judge Sulzberger refused a petition from the Society for the Protection of Cruelty Against Children to be appointed the guardians of a seven-year old boy so that he might receive surgery to

166 "Health Officer Opposes Compulsion," *Medical Freedom* 1. no.8 (April 1912): 4.

correct defects arising from rickets that his parents had deemed too risky. Recounting the case, *Medical Freedom* trumpeted: "the rapid drift toward paternalism in government and the Spartan theory that children belong to the State and not to the parents, was given a sharp setback yesterday."[167] Such stories were designed to inspire parents to assert their rights against "political medicine."

The NLMF's calls to action were further bolstered by the writings of popular thinkers of the era. *Medical Freedom* would regularly extract passages from the writings of Herbert Spencer on state medicine to lend authority to their claims. At other times, the extracts came from less expected sources– such as Emerson Hough, the popular writer of Western and historical fiction who authored more than twenty best-selling novels on life on the frontier. Hough warned the readers of *Medical Freedom* that the modern tendency was to "wipe out the home." His pet issue was sex hygiene classes in schools. Teaching children sex education was a "task of terror" for anyone, he wrote, but it was properly the "parent's task of terror." His point, however, was broader: the trend afoot of transferring parental responsibilities to schools threatened to eviscerate individuality. "When you throw open that sacred sanctuary of the home for all the world," Hough warned, the consequences would reach much further than one's own home – parents would be "facing the ruin of your children and of your country." Hough urged parents to resist the invitation to delegate their responsibilities for their children and encouraged them to insist on their rights.[168] From sensational legal trials to the wisdom of literary scholars, the content of *Medical Freedom* was designed to rouse parents to assert their rights against the creeping encroachment of the state on the home.

Finally, the NLMF warned its readers that the compulsory child medical schemes were only the first step in the sweeping plans political doctors held for state medicine. As the NLMF understood it, it was no coincidence that the various projects of creeping

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[167] "Court Upholds Parents' Rights," *Medical Freedom* 1, no. 11 (July 1912), 14.
[168] "Famous Novelist Says Tendency is to Wipe Out the Home," *Medical Freedom* 3, no.7 (March 1914): 5.

state medicine that vitiated individual rights centered on children; state medicine began with children because they did not possess rights or the capacity to understand and consent to medical treatments. The state was preying on the incapacity of children by compelling them to submit to medical examinations and vaccination. But this was just the "opening wedge." People had blithely accepted the propaganda of "political doctors" that the medical inspection of school children was preventative and for the betterment of the race. However, in July 1914, the NLMF reported that AMA had declared at its annual meeting that the "next great task… was the inauguration of a universal periodical medical examination as an indispensable means for the control of all diseases," alleging the plan attracted national attention. The League reported that the mainstream media was beginning to recognize "the verity of what *Medical Freedom* has been saying for three years – that the home, the foundation of Republican government, is being invaded and menaced by this subtle campaign of medical high priests."[169] The tendency of the League to leap to the conclusion that any general public health provision would necessarily entail the "medical hierarchy invading the privacy of the home," regardless of the provisions of the proposal, spoke to the talismanic power of the home as the cornerstone of the liberty of citizens.[170]

The National League for Medical Freedom officially disbanded in 1916 because it had succeeded in its mission. At the federal level, the NLMF had once again contributed to the defeat of a new iteration of the Owen Bill, and the leadership felt confident that the proposal for a federal department of health was dead in the water. Diana Belais, who had risen to the presidency of the organization by that point, believed that "the NLMF deserves a prominent place as a movement in line with the struggles for liberty which

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[169] "Compulsory Examination of Adults is Aim of Political Doctors," *Medical Freedom* 3, no. 11 (July 1914): 5.
[170] "Medical Inquisitors of the State," *Medical Freedom* 2, no.14 (December 1912): 13.

have played such an active part in the history of the U.S." [171] On a local level, the activism of the NLMF outlived the organization itself. In addition to its efforts to stop the establishment of a federal bureau, affiliate chapters chalked up numerous victories in schools, townships and counties across the country. The Pennsylvania branch, for example, where John Pitcairn sat on the advisory board, was particularly active. While Pitcairn had been unsuccessful in repealing compulsory vaccination in the state, the League succeeded in securing an 'optional' clause in the legislation for medical inspections and as a result of their campaign 1, 617 school districts opted out in 1911.[172]

Many of these local chapters carried on their boycotts and political work at the local level after the NLMF disbanded. Public School Protective Leagues, offshoots of the NLMF local chapters, pursued statewide, ultimately unsuccessful, initiatives in California and Oregon in the 1920s to ban vaccination requirements for schools. No doubt aided by deep pockets, the NLMF nonetheless forged a national movement that largely grew out of the local experiences of parents with state medicine in their children's schools, and one that thwarted the expansion of the federal government. Through that movement, in concert with skepticism about mainstream medicine, the NLMF stoked fears about a state monopoly of medicine by painting the proposal of a National Bureau of Health as a threat to the rights of parents and the sovereignty of the home, uniting homeopaths, Christian Scientists, chiropractors, vaccination skeptics and cautious parents to form the base of a broad movement for medical liberty.

By World War I, anti-vaccination sentiment had largely receded in the United States. The imperative to mobilize for war fueled a patriotic drive for healthy bodies, one that would provide a similar boon to the contemporaneous drive for national child labor laws as well. Moreover, public health officials in the 1920s gradually prioritized

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[171] The Medical Question; **"**Compulsory Medical Inspection Defeated by Popular Vote,**"** *Medical Freedom* 5 (October 1915): 21, **"**The Closing of the League,**"** *Medical Freedom* 6, no. 1 (September 1916): 1

[172] "On The Medical Inspection of 469, 000 School Children of Pennsylvania," *Pennsylvania Health Bulletin* 1, no. 71, July 1915, 1-12.

educational campaigns over coercive strategies in implementing vaccination policies.[173] The post-war era, however, did not mark the end of the anti-statist careers of many prominent anti-vaccinationists. Chas Higgins and Lora Little, in particular, railed against the adoption of the Prohibition Amendment throughout the 1920s, and Little formed her own association for medical freedom, the American Medical Liberty League.

John Pitcairn died in 1916, but his cause would live on. In his final years, he gave $100,000 to the anti-vaccination cause and left a further $10,000 in his will.[174] The remainder of his considerable fortune went to his sons, Raymond, Theodore, and Harold who continued their father's work in funding the Bryn Aythn church and anti-statist causes. Raymond Pitcairn, the eldest son, took over his father's company and spent thirteen years overseeing the construction of the Bryn Aythn Cathedral, a "monument to filial devotion." Raymond was the heir to his father's political legacy as well, assuming the presidency of the anti-statist lobby, the Sentinels of the Republic in the 1930s.

Throughout the 1920s, the Pitcairn brothers bankrolled the Citizen's Medical Reference Bureau, which had been founded in 1919 in New York City. Behind the Citizen's Medical Reference Bureau sat one man, H.B. Anderson, a retiring figure who sought the limelight for little but his campaigns for "liberty." He continued the fight against compulsory school medical examinations and vaccination with slogans such as "advocating no form of treatment but in defense of parental Control over Children." Anderson, who was the sole salaried officer of the Citizen's Medical Reference Bureau, testified against infant health care programs before Congress in the 1920s and 1930s and fought against fluoridation into the 1940s and 1950s.[175] His 1929 treatise, *The Facts Against Compulsory Vaccination,* bore a dedication on the inside cover to the late John Pitcairn, "one of the most outstanding opponents of compulsory vaccination in the

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[173] Colgrove, *State of Immunity.*
[174] Gladish, *John Pitcairn,* 332.
[175] Colgrove, *State of Immunity,* 54-56.

United States." The outside cover captured the heart of the claim for liberty marshaled by anti-vaccinationists for the three decades prior, making use of the refrain made popular by the NLMF, "It is the school and not the child that is public."

Image 3.8 Cover of H.B. Anderson's anti-vaccination tract, *The Facts Against Compulsory Vaccination,* published in 1929.

Conclusion

In the early twentieth century, school medical programs rapidly grew in number and scope. In the 1880s, schools and municipal authorities began to experiment with quarantine programs and school exclusion policies to counteract the rapid spread disease that resulted from the growing school population, often housed in overcrowded urban classrooms. By the 1890s, school hygienists had found more effective means to stop the spread of disease by mandating vaccination as a condition of entry to public schools and introducing medical inspections. Massachusetts again led the way as it had with compulsory attendance and child labor laws. It was the first state to introduce mandatory vaccination requirements in 1855, and the first state to make medical examinations compulsory at all schools in 1890. By 1890, seventeen states either required vaccination

for entry to schools or permitted local authorities to make that enactment.[176] Into the twentieth century, school medical inspections grew into mandatory medical examinations in the early twentieth century – as one physician put it in 1909: the evolution was a "striking instance of how a means of defence may become an instrument of progress."[177] By 1923, thirty-nine states made school medical inspections compulsory either for cities or on a statewide basis, and 1, 100 cities used mandated medical examinations in schools.[178]

In the first decades of the twentieth century, school clinics, nurses and physicians became regular fixtures the lives of children. School nurses in particular would often bridge the gap between school and home with follow-up home visitations. One of the reasons why school medical programs expanded so rapidly in the early twentieth century was because the school hygienist movement attracted a diverse array of reformers, from settlement workers to physicians, who could all unite in desire to improve the race by focusing on children. The second reason was that public schools offered a unique site for state interventions: the state held compulsory powers over children that it did not hold over the population, and by harnessing those powers, school hygienists realized they could stage wide-reaching interventions that would affect the population as a whole because twenty-percent of the entire United States population attended schools. These two factors, the ability to build broad-based reform coalitions and the state's unique powers over children, would also give rise to the national movement to end child labor as we shall see in the next chapter. Like school hygiene campaigns, the nationalist drive for healthy bodies would give a similar boon to the efforts of child labor reformers in the early twentieth century.

The expansion of state medical schemes, of course, also precipitated vehement

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[176] Meckel, *Classrooms and Clinics,* 54.
[177] Roland Falkner, "The Medical Inspection of Schools," *The Journal of Education* 69, no. 5 (February 1909): 120.
[178] Steffes, *School, Society, and* State, 135.

anti-statist movements. In the United States, anti-vaccination movements tended to congregate around schools because so many vaccination schemes and orthodox medical programs relied on the state bureaucracy of schooling. In the South, as with compulsory education and child labor laws, the opposition was sufficient to forestall the roll out of school medical programs outside of Southern cities. With respect to health laws, however, it was the Southwest, Midwest and West where populist movements were particularly successful in overturning vaccination laws and opposing school medical examinations as we saw in Utah at the turn of the century. New classes of parents marshaled ideas about paternal sovereignty in those conflicts to oppose the role of the state in setting minimum health requirements for children. In the predominantly white middle-class anti-vaccination networks that sprang up in the early twentieth century, mothers would marshal their moral authority and fathers would invoke their rights as tax-paying citizens. In the 1910s, the NLMF mobilized both the ideas and the organizational networks of local anti-vaccination campaigns to successfully lobby against the establishment of a federal Bureau of Health. The advocacy of the NLMF revealed the power of paternal sovereignty in anti-statist campaigns that sought to arrest the expansion of the federal government. In the 1920s, as we shall see in the next chapter, conservative lobby groups such as the Sentinels of the Republic would mobilize the same ideas to campaign against the federal Child Labor Amendment.

Chapter Four

"Every Home Is a Sentry Box!": The Defeat of the Federal Child Labor Amendment, 1904-1924

Introduction

On any given day in 1904, one in five American children were estimated to be "prematurely toiling" for their "daily bread." The founding report of the National Child Labor Committee (NCLC) claimed that children as young as four could be found "bending under heavy burdens in the coal mines of Pennsylvania" for more than ten hours a day. In the "death-dealing glass factories of New Jersey," young children who worked through the night to pocket as little as $2.50 a week were joined across the border by their brothers and sisters, "slaving into the night in the reeking sweatshops of New York." The NCLC was particularly concerned with the ever-growing number of small, nimble white fingers spinning the wheels of the cotton mills in the rapidly industrializing South, "toiling unceasingly for hours so long that strong men would break down under the strain." The report singled out the Southern states for their flagrant lack of child labor laws: the NCLC estimated that forty-two percent of boys between ten and fifteen labored in the South and comprised three times as much of the total workforce as children did in the North. The existence of statutes prohibiting child labor and mandating compulsory education had also done little to curb the rates of industrial child labor in the North.[1] Of the Northern States, Pennsylvania had the "unenviable reputation of being a veritable slaughterhouse of children." 120,000 boys alone were employed in Pennsylvania as opposed to the 60,000 boys and girls employed in all the mills of the southern states combined.[2] At the turn of the twentieth century, then, industrial child labor seemed to a problem national in scope, and growing by the day.

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[1] Frederick Boyd Stevenson, "Preliminary Survey of Conditions by the National Child Labor Committee Reveals a Startling State of Affairs," *New York Times* November 27, 1904, SM8.
[2] Austin Lewis, "The National Disgrace--Child Labor," *Overland Monthly and Out West Magazine* 48, no. 3 (September 1906): 8.

This chapter charts the rise and fall of national efforts to end child labor between 1904 and 1924. Between 1865 and 1900, twenty-eight legislatures introduced a range of child labor laws, as complements to their compulsory education laws, to prohibit the labor of young children and to limit the hours and conditions under which older children labored. Yet, as with compulsory education laws and school medical examinations, there was great variance regionally. Northeastern states like Massachusetts had led the charge in the introduction of compulsory education laws and child labor laws, but in 1900, no state south of the Mason-Dixon line had a compulsory attendance law on its books, and only a few Southern states had feeble child labor laws. Lax regulations gave the South a comparative advantage in cheap child labor as the region vied to capture the textile industry from industrial heartland of the Northeast.

Moreover, outside of the South, child labor laws lacked teeth. Just as with compulsory education laws, the combination of deeply seated ideas about paternal sovereignty and the weak regulatory capacities of the states at the turn of the century made child labor laws ineffectual. Additionally, the unprecedented rates of immigration to the North and attendant population growth continued to augment the supply of cheap child labor. Thus, despite the growing number of child labor laws and compulsory education laws that were introduced between 1870 and 1900, the rates of industrial child labor nonetheless continued to climb. The 1870 census revealed that one in every eight children in the United States worked, and by 1900, that number was one in five, representing an increase from one million to two million children in total. In the 1890s, labor reformers such as Florence Kelley began to work systematically to tighten and enforce the provisions of child labor laws, but Kelley realized that state-level child labor laws would never be fully effective as long as competition existed between the states. It was for this reason that Kelley joined forces with child labor reformers in the South in 1904, and set about building a national movement to end child labor through the NCLC.

Over the next two decades, the NCLC was highly effective in building broad-based support for federal action to end industrial child labor. In its first decade, the NCLC worked to generate public outcry over the evil of "white child slavery" by exposing the conditions under which children labored and by revealing how widespread the problem was. Focusing particularly on the plight of native-born white children in mills of the South, the NCLC emphasized debilitating effects of premature labor on bodies of white children, rousing the same nationalist concerns about the quality of the stock of future citizens that health reformers did in their campaigns for school vaccination schemes and medical examinations. The NCLC mobilized a political movement against child labor by promoting a "new view of the child," one that fashioned rights based on the white child's dependency and innocence.

Whereas compulsory schooling advocates, and health reformers had asserted, often vehemently, the supremacy of the state over the family, child labor reformers made quite a different argument that drew on ideas about paternal sovereignty. They claimed state interventions would in fact restore the traditional gender hierarchy of the autonomous white family. The NCLC argued that "child breadwinners" perverted the natural order of the family by dragging down the wages of men and granting children a dangerous degree of independence. State interventions would therefore vindicate the unique rights of the child, save the nation from race suicide, and restore the independence of the white male head of the household.

Eventually, the NCLC had channeled these arguments into political will for federal action. By 1916, all three political parties, the Republicans, the upstart Progressive Party and the formerly recalcitrant Democratic Party supported federal child labor legislation. The United States Congress passed two federal child labor laws, first in 1916 and again in 1919. While the Supreme Court struck both down laws, bi-partisan congressional support carried over into the 1920s, when Congress proposed amendment

to the United States Constitution, known as the Child Labor Amendment, to give itself the "power to limit, regulate and prohibit the labor of persons under eighteen years of age." The proposed twentieth amendment to the Constitution was submitted to the states for ratification in 1924.

But in 1924, support for federal action to end child labor rapidly receded. The campaign to ratify the Amendment received a stinging blow in Massachusetts in November 1924. In Massachusetts, the state legislature opted to refer the decision on ratification to the people in the form of an advisory referendum. The Sentinels of the Republic, a conservative citizen's lobby, sprung into action to turn public opinion against the Amendment. At the states' election on November 4, 1924 the Amendment was soundly defeated 697,563 votes to 241,461. The Sentinels incited widespread opposition by changing the terms of the debate from the rights of the child to the rights of the family, stitching together a coalition comprised of middle and working-class voters, the Boston Brahmin and the Catholic Church, farmers and anti-feminists, Republicans and Democrats alike. The defeat of the Amendment in the state that had pioneered child labor reform sounded the death knell for federal regulation of child labor. By the summer of 1925, only four states had ratified the Amendment while thirty-four states followed Massachusetts' lead, rejecting its adoption in quick succession. Efforts to revive the movement for ratification in the 1930s would prove unsuccessful as well.

The defeat of the federal Child Labor Amendment represented a turning point for the fate for Progressive reforms that focused on children. While reformers had made much headway over the past forty years in overcoming frequent political opposition grounded in paternal sovereignty to establish compulsory education laws, child labor laws and school medical exams at the state-level, with the assistance of state courts, the push grant the federal government powers over child labor in the 1910s and 1920s would not succeed in the same way. The same sources of opposition and ideas about paternal

sovereignty that had delayed and stymied the introduction of compulsory education and child labor laws in the South, which had given rise to the very need for federal action, would come to a head in the more conservative political moment of the 1920s. The drive to further centralize state powers over children in the Child Labor Amendment also worked to centralize the opposition.

This chapter seeks to explain the ultimate reversal of popular support for federal regulation of child labor. Most accounts emphasize the role of industry, which, so the argument goes, cunningly hoodwinked voters into opposing reform by championing the traditional bogeymen of states' rights and parental rights to mask their own interests.[3] In a nation in the grip of a Red Scare, industrialists exploited fears of socialism and communism with inflammatory rhetoric about federal bureaucrats invading the home.[4]

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[3] Walter I. Trattner, *Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in America* (New York: Quadrangle Books, 1970); Stephen B. Wood, *Constitutional Politics in the Progressive Era: Child Labor and the Law* (University of Chicago Press, 1968); and Anne Kruesi Brown, "Opposition to the Child Labor Amendment Found in Trade Journals, Industrial Bulletins, and Other Publications for and by Business Men" (masters thesis, University of Chicago, 1937). There has been a recent revival in the literature on child labor, but most scholars have been concerned with explaining the origins of the industrial child labor, specifically the perception that child labor was a problem, see Hugh D. Hindman, *Child Labor: An American History* (New York: M.E. Sharpe, 2002) argues that industrialization was both the cause of the *problem* of child labor and later its eradication whereas James D. Schmidt, *Industrial Violence and the Legal Origins of Child Labor* (Cambridge: Cambridge University Press, 2010) emphasizes the role of the law in constructing and legitimating industrial child wage labor. Both briefly dismiss the opposition to federal regulation citing the reasons stated above. Shelley Sallee, *The Whiteness of Child Labor Reform in the New South* (Athens: University of Georgia Press, 2004) focuses on the importance of the racial composition of industrial child labor in explaining the success of reform movements. In particular, Elizabeth Marjorie Wood, "Emancipating the Child Laborer: Children, Freedom, and the Moral Boundaries of the Market Place, 1853-1938" (PhD diss., University of Chicago, 2011) provides an incisive and illuminating account of the development of the problem of child labor within the broader context of the history of capitalism and the changing meanings of freedom and emancipation before and after the Civil War. On the question of the reversal of support of child labor regulation, Julie Novkov, "Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor," *The American Journal of Legal History* 44, no. 4 (2000): 369–404 does a wonderful job of arguing that rapid reversal in support for child labor regulation requires more scholarly attention and a less reductionist approach, her narrow focus on the courts however leads her to understate the role of parental rights played in political campaigns. Wood offers an excellent complementary treatment of the defeat of the federal Child Labor Amendment in rural areas, though her analysis attributes ideas about paternal sovereignty to religious fundamentalism in the 1920s without acknowledging the longer roots of such arguments, see "Emancipating the Child Laborer," chapter five.

[4] Here, I joined the work by women's scholars that places gender at the crux of the Red Scare and note the important role that a gendered conception of family played in the ideology of conservative women opposed to the Child Labor Amendment as well other Progressive reforms of the era, including the Sheppard-Towner Act, see Kim E. Nielsen, *Un-American Womanhood: Antiradicalism, Antifeminism, and the First Red Scare* (Columbus: Ohio State University Press, 2001); Kristen Delegard, *Battling Miss Bolsheviki: The Origins of Female Conservatism In The United States* (Philadelphia: University of Pennsylvania Press, 2010); and Erica Ryan, *Red War on the Family: Sex, Gender and Americanism in the First Red Scare* (Philadelphia: Temple

This chapter both confirms and complicates that rendering by taking seriously the rhetoric that the Child Labor Amendment "invaded individual and states' rights." The fingerprints of manufacturing interests were indeed all over the opposition campaign, but the Amendment's opponents succeeded because they struck a nerve in the populace based on a deeply engrained assumption about the place of the family within the structure of the state. The individual right at stake, as most people understood it, was the right to govern one's own family, presumed to be held by the sovereign individual of liberal democracy, the white male head of the family. The success of the anti-ratification campaign of the Sentinels and their allies rested on their ability to envelop the long-standing opposition to state laws based on paternal sovereignty to arguments about state's rights.

As the battle over child labor makes clear, paternal sovereignty was prized by a wide range of Americans as the cornerstone of a system of statecraft rooted in local self-government. Indeed, the seeds for the Sentinels appeal were sown within the NCLC's campaign for federal legislation itself, that had for two decades prosecuted the case for removing children from the workforce by arguing that it would restore the autonomy of the white male-headed family. In the 1920s, the Sentinels simply flipped that argument on its head to cast the Amendment, instead of child labor, as the threat to the autonomy of the white family. Thus, the changing political circumstances: the onset of the Red Scare, the backlash to the Eighteenth Amendment that prohibited alcohol and the Nineteenth Amendment that granted women suffrage, only served to give greater salience and urgency to long-standing arguments about paternal sovereignty. By looking at the anti-ratification campaign mounted by the Sentinels, we can see how anti-statists in

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University Press, 2015). I build on their contributions by demonstrating the wide coalition that coalesced around paternal sovereignty, and tracing the lineage of that movement back into the nineteenth century. Whereas these works all acknowledge a resurgence of patriarchal ideals about the family, my dissertation instead suggests that it was not a resurgence so much as a culmination of political ideas about the patriarchal family that had consistently surfaced throughout the proceeding decades, and gained increased salience in the context of the Red Scare.

the 1920s infused the standard argument used to oppose federal legislation about states' rights with a political urgency by tying together the rights of the family and the rights of the states as two interlocking zones of sovereignty that structured the decentralized, federalist Republic and reserved the powers of the state in the hands of the governed.

* * *

"The Divine Right to do Nothing:" The NCLC and the Case for National Action

In 1904, the NCLC came together at the suggestion of Reverend Edgar Gardner Murphy. Murphy had founded the Alabama Child Labor Committee, the first of its kind in the country in 1901. In 1902, Lillian Wald and Florence Kelley formed the New York Child Labor Committee. Soon after, Murphy reached out proposing they combine forces to establish a National Committee to coordinate campaigns across the North and South. From the outset, the NCLC derived much of its political power from the broad cross-section of the community that made up its ranks. Murphy was respected and connected among the conservative Southern elite, and recruited Senator "Pitchfork" Ben Tillman, Hoke Smith, the future Governor of George, and Samuel Spencer, the President of the Southern Railroad corporation as founding members. The NCLC also drew on the expertise of the female veterans of the Settlement House Movement, such as Wald and Kelley, and clergyman constituted a third key base of the NCLC. While the Northern wing outnumbered the Southern wing, the NCLC made efforts to balance the structure of the Committee to avoid the appearance that it was a Northern institution meddling in the South. Owen Lovejoy, a Methodist minister from Jamestown, Michigan, who shared Kelley's socialist politics, served as the Northern assistant secretary.[5] Alexander

[5] Lovejoy was asked to serve as the assistant secretary based on his stirring investigations into the anthracite coal strike in Pennsylvania in 1902. In 1907, he would become the General Secretary of the NCLC. "Preacher Joins Child Labor Cause," *New York Times*, October 10, 1904, 5, "Owen R. Lovejoy, Crusader, 94, Dies. Former Minister Was Long a Foe of Child Labor," *New York Times,* June 30, 1961, 27.

McKelway, a Presbyterian minister of a church in Fayetteville, North Carolina, flanked Lovejoy as the Southern Assistant Secretary.[6]

In bringing together reformers North and South, and a mixture of social gospel clergymen, female social workers, socialists and conservative businessmen, the strength of the NCLC lay in its ability to mobilize a broad coalition in support state action to end child labor based on principles on which all if its members could agree. First and foremost, the NCLC argued that industrial child labor violated the fundamental rights of the child. Based on a middle-class conception of the vulnerability and innocence of white children, the NCLC did much to prosecute the case that children had distinct rights that the state was bound to respect. The rights of children were framed as the inverse of the rights of adults, captured in McKelway's "Declaration of Dependence" modeled on the country's declaration of independence – or as Murphy put it, the most "distinctive" right of the child was the "divine right to do nothing." [7]

Second, the NCLC argued that industrial child labor posed a threat to the sanctity of the family by reversing natural hierarchies of independence and dependency. Child workers undermined paternal breadwinners, and removing the "child bread-winner" from the work place. And while the 1900 census revealed that one million of the two million child workers labored in agricultural fields, including a disproportionate number of black children, the NCLC focused its efforts on the growing numbers of white children laboring in industrial conditions. In doing so, the NCLC argued that premature child labor would lead to racial degeneracy, and child labor laws were necessary to protect and preserve the white stock of the nation's future citizenry. Based on these three core arguments, the NCLC mounted a successful national movement over the first two decades of the twentieth century that did much to build a broad social

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[6] Trattner, *Crusade for the Children*, 62–64. McKelway's work as a journalist for the *Charlotte News* exposing the conditions child labor in Carolina mills served as his credentials for the Committee.

[7] Edgar Gardner Murphy, *Problems of the Present South* (New York: MacMillan Company, 1904), 112-113.

consensus in favor of labor legislation to protect children. Initially, in line with the vision of Edgar Gardner Murphy, the NCLC did not pursue federal action. Rather, it aimed to expose the extent of the child labor problem nationally, and hoped that through education and coordinated reform, the system of piecemeal state-based regulation could be perfected and enforced on a local level. Within a decade, however, the NCLC would depart from Murphy's original vision and transform its national campaign to raise awareness about white child labor into a campaign for federal action.

The diverse array of activists that the NCLC brought together was perhaps best captured in the contrast between Florence Kelley and Edgar Gardner Murphy. Florence Kelly moved to New York City in 1899 to lead the National Consumers League and took up resident at the Henry Street Settlement. Along with Jane Addams and Lillian Wald, Florence Kelley helped form the New York Child Labor Committee in 1902. During the 1890s, as the Chief Factory Inspector for Illinois, Kelley had gained significant experience in crafting and enforcing effective labor laws. In particular, the Factory Inspection Act that she drafted for the Illinois State Legislature in 1893 became the standard to which many states aspired.[8] In 1895, Kelley had completed a law degree at Northwestern and immediately put it to use to defend the constitutionality of her factory inspection act before the Illinois Supreme Court. While the Court struck down the protective labor laws for women, the child labor provisions still stood as law.[9] As a key part of her legacy, she boasted Illinois's child labor laws were the "most radical in the world, and a rigid inspection enables its enforcement."[10] By the time she arrived in New York in 1901, her reputation for being the "finest rough and tumble fighter for the good

[8] Trattner, *Crusade for the Children*, 35.
[9] Sklar, *Florence Kelley and the Nation's Work,* 281-283.
[10] Florence Kelley, "Prosecuting the Sweaters," *Chicago Record,* 9 November 1893, Nicholas Kelley Papers, New York Public Libary as cited in Sklar, *Florence Kelley and the Nation's Work,* 249.

of others" preceded her. "Any weapon," as one admirer put it, "was a good weapon in her hands – evidence, argument, irony or invective."[11]

In New York, Kelley played a key role in strengthening the state's child labor laws as well. For Kelley, who viewed factory inspectors as the "militia men" in the socialist struggle of labor against capital, her continued focus on child labor laws was born both out of her belief that children deserved the full protection of the law and a political calculation about how to make inroads for broader labor reforms.[12] Since the 1890s, Kelley had learned that it was much easier to "find approval by appealing to the sympathy of the masses for the welfare of helpless working women and children" than it was to campaign for protective labor legislation for men.[13] No doubt, that experience informed Kelley's decision to join the NCLC and she crafted her appeals for protection legislation to appeal to middle-class values about the white male-headed family. In 1912, for instance, she argued that men were "no longer the breadwinner," because of child labor, a fact that contravened the "American tradition" that "men support their families."[14] Kelley, however, was also undoubtedly attracted to the NCLC as a potential platform for national action. From the outset, Kelley envisaged the NCLC pushing for federal legislation to offer all children the same protection of the law.[15]

This was but one issue that separated her politics and worldview from Edgar Gardner Murphy, who initiated the NCLC. An Episcopal clergyman who hailed from Fort Smith, Arkansas, Murphy had attended the University of the South before studying at the General Theological Seminary in New York City. A great lover of the South,

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[11] The complement came from Jane Addam's nephew Webster Linn as quoted in Sklar, *Florence Kelley and the Nation's Work*, 185.
[12] Florence Kelley, "A Footprint in New York," *Workman's Advocate,* March 15, 1890. In this article, Kelley wrote that child labor laws would "check the devastation of childhood, which Capitalism unbridled is working on the rising generation." See also Sklar, *Florence Kelley and the Nation's Work,* 155-156.
[13] Florence Kelley, "Die weibliche Frabrikinspektion," (Women factory inspectors), *Archiv fur Soziale Gesetzgebung und Statistik* 11 (1897): 142 as cited and translated in Sklar, *Florence Kelley and the Nation's Work,* 258.
[14] Florence Kelley, "Minimum Wage Laws," *Journal of Political Economy* 31 (August 1921): 521-543.
[15] Trattner, *Crusade for the Children,* 33-35, 123-124.

Murphy was avidly in favor of industrializing and modernizing the New South after the Civil War. While Murphy supported the expansion of industry, he viewed the attendant growth of child labor not only as a moral evil, but also as a feature of an economic system that would condemn (as slavery had) the South to stagnate economically by spoiling its next crop of workers through premature labor.[16] As Elizabeth Wood put it, Murphy's worldview rested on an "enlightened white supremacy:" he believed all races were capable of improving their status, if unequally, and he supported educational opportunities for black children. But he was particularly concerned with the degenerative effects, mentally and physically, that would result from the growing number of native-born white children in industrial labor.[17] The racial order of the South framed Murphy's understanding of the problem of child labor, and the Southern political tradition framed his understanding of the solution. Murphy disavowed that the federal government should have a role in legislating child labor. In his view, the strategy to pursue state-reforms through national campaigns formed "inviolable compact" in the founding of the NCLC, and his own position would block the NCLC from supporting federal legislation for the first decade it was in operation.[18] While Northern members like Kelley outnumbered Southern members of the NCLC, the philosophy of its Southern members prevailed in the Committee's political disputes, and the growing number of white children laboring in the South would come to dominate in its campaigns.

The early surveys of the NCLC described child labor as a nationwide problem, although the composition of laboring children differed starkly in the North and the South. In the North, the late nineteenth-century influx of twelve million immigrants from eastern and southern Europe meant the problem of child labor was perceived as

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[16] Trattner, *Crusade for the Children*, 50–58.
[17] For a more recent take on Murphy, one that particularly emphasizes his "enlightened white supremacy," see Wood, "Emancipating the Child Laborer," chapter three, especially 145-154 on his racial politics.
[18] Edgar Gardner Murphy to Felix Adler, May 27, 1907, Edgar Gardner Murphy Papers, the Southern Historical Project, University of North Carolina as quoted in Trattner, *Crusade for the Children,* 91.

problem of the foreign-born. While the Committee would soften its tone in later reports, painting both parent and child as victims of the ravages of industrial capitalism, the Preliminary Report of the Committee in 1904 laid the blame squarely on the foreign parent. "The foreign parent looks upon the placing of his child to work as a shrewd economic move. He considers the more children he can get off to work at the earliest possible age, the better off he will be." The foreign child was laboring to support the "idleness and ease" of his father.[19] Just as compulsory schooling advocates had done in the 1870s, child labor reformers argued that the need for the "educational and legal forces of the state" grew out of the fact that many of the immigrants came from Southern Europe where "neither Saxon nor Teutonic influences have prevailed."[20] It was necessary for child labor laws to be enforced to uphold the "inalienable rights" of the child, safeguarding the "citizenship of the future" and protecting "those ideals which are precious to every American."[21] The report argued that the strong arm of the state was required to enforce the rights of the child because foreign-born parents did not adhere to the mores of the American middle-class in appreciating the importance of education and a protected period of childhood

By contrast, Southern mills relied, as Murphy put it, almost entirely on the "unlettered masses of the white population." As a reflection of the racial segregation that marked Southern life, blacks made up an "infinitesimal" proportion of the mill labor force.[22] Indeed, it was a great cause of consternation to many middle-class white Southerners that while poor black families pressed for their children to be educated, poor

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[19] Samuel McClune Lindsay as quoted in "Preliminary Survey of Conditions by the National Child Labor Committee," SM8. Dr. Lindsay, a professor in sociology at the University of Pennsylvania, was the first secretary of the committee before Lovejoy took over in 1907. The report alleged that some immigrant parents "go so far as to plan to stop all labor altogether at thirty five and live entirely from the wages of their children."

[20] E.W. Lord, "Child Labor in New England: Report of the Secretary for the New England Committee," in *Child Labor and Social Progress: Proceedings of the Fourth Annual Meeting of the National Child Labor Committee* (Philadelphia: National Child Labor Committee, 1908), 38.

[21] Lord, "Child Labor in New England," 39.

[22] Murphy, *Problems of the Present South*, 103.

white families put their children out to work.[23] It was viewed as a quintessential problem of "race suicide" and "degeneration." [24] Jean Gordon, a factory inspector in Louisiana, captured that view in her report to the National Child Labor Committee in 1908:

> As far as my experience goes, I have yet to find a Jew or a negro child in a mill, factory or department store. They are at school, well nourished, playing out in our glorious Southern sunlight, waxing strong and fat; it is only your white-faced, sunken- chested, curved-backed little Christians who are in the mills and department stores.[25]

As the number of cotton mills in the South exploded in the 1890s and 1900s so too did the problem of white child labor. After the Civil War, the rapid industrialization of the South based on its cash crops tied the economic fate of the region to its comparative advantage in cheap labor, low tax rates and lax regulation. The number of textile mills in the South climbed from 161 mills in 1880 to 400 by 1900.[26] By the time the NCLC formed in 1904, Murphy claimed the number had more than doubled again, reaching a total of over 900.[27] The efforts to "bring the cotton mills to the cotton fields" to modernize the "New South" saw the family wage system of Southern agriculture transferred to Southern industry.[28] The number of youth employed in Southern factories

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[23] It was a concern shared by Murphy and McKelway even as they favored black education. Wood, "Emancipating the Child Laborer,"148-154, especially for her discussion "white illiteracy" being at the "core of the disorder in the New South."

[24] Edward Devine, "The New View of the Child," in *Child Labor and Social Progress,* 6.

[25] Jean M. Gordon, "Why The Children Are In The Factory," in *Child Labor and Social Progress*, 68. Gordon was a leading force behind the adoption of the Louisiana's first child labor law in 1906, and at the time the law was introduction the state constitution of Louisiana was amended to allow for women to be appointed to enforce the act. Gordon was the first female inspector in the state, and along with her sisters, was active in women's suffrage circles. Her profile captured the way in which white supremacy and white women's reform culture shaped the campaign in the South, as her work in child labor led her to become a leading eugenicist in Louisiana as well. See Edward Larson, *Sex, Race and Science: Eugenics in the Deep South* (Baltimore: Johns Hopkins University Press, 1995), 77-79. The strategy of emphasizing the racial threat posed by child labor, and framing the problem of child labor as a moral cause rather than a criticism of capitalism, predated the NCLC in the region. It was a strategy that underlined Samuel Gomper's activism in the region in the 1890s as well. Gompers hired Irene Ashby to lead the efforts in Alabama, who like Gordon, framed the problem as a threat to the Anglo-Saxon race. Together, she and Gompers demanded the federal government act to end white child labor as they had slavery. See Sallee, *The Whiteness of Child Labor Reform,* 41-67.

[26] Broadus Mitchell, "The Rise of Cotton Mills in the South" (PhD diss., Johns Hopkins University, 1918), 113.

[27] Murphy, *Problems of the Present South,* 121.

[28] Southerners also defended child labor as an ordinary part of Southern life, particularly on the farm, arguing that concern had only been confected by the rise of industrial child labor, which constituted a necessary state of industrialization. It was further defended on paternalistic grounds as a beneficent

tripled between 1890-1900.[29] Children made up one quarter of the workforce in the Piedmont district mill towns.[30] The perception of the mounting crisis of child labor in the South was a crucial factor that gave rise to the national movement to end child labor. And as child labor became a Southern problem, the whiteness of child labor became a cause of national concern. Due to the "Anglo-Saxon" stock of southern child laborers, Alexander McKelway explained, "we make bold to say that child labor in the South is more a national question than the child in New England or Pennsylvania." In the South it was "the breed of American that is threatened with degeneration." [31]

The figure of the white, defenseless child became the symbol of the national movement against child labor.[32] The Southern, native-born white child loomed disproportionately large in the public imagination. "So much prominence" had been given to the "condition of child employment in the South, particularly in the great cotton mills in recent years," one charity magazine reported in 1908, that "many people, particularly in the North, have the (mistaken) impression that child labor is pre-eminently a southern evil."[33] That impression was furthered through the photography of Lewis Hine who illustrated the problem of the white child laborer in his photographic exposés on behalf of the NCLC. Hine became the photographer for the Committee in 1908,

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economic opportunity for poor white families. See for example: Holland Thomas, *From the Cotton Field to the Cotton Mill: A Study of Industrial Transition in North Carolina* (New York: The McMillan Company, 1906), 219-248. Even Broadus Mitchell who would later become renowned as Southern socialist described child labor in the 1890s as "not avarice then, but philanthropy; not exploitation, but generosity and cooperation and social-mindedness." After 1900, as Mitchell came to view the mills as more capitalist, Mitchell became highly critical of child labor but still viewed industrial child labor as necessary economic process up to a point, claiming that child labor had become "as cruelly unjust as at first it was natural." See Daniel Joseph Singal, "Broadus Mitchell and the Persistence of New South Thought," *The Journal of Southern History* 45, no. 3 (August 1979), especially 361 from which these quotes are drawn. On the segregation of Southern jobs post-Reconstruction where most industrial jobs were reserved for whites, see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988), 581 and on the movement and recruitment of yeoman families to mill towns, see Edward Ayers, *The Promise of the New South* (Oxford: Oxford University Press, 1992), 113-115.

[29] Stevenson, "Preliminary Survey of Conditions by the National Child Labor Committee," SM8.

[30] Jacqueline Hall et al, *Like A Family: The Making of the Southern Cotton Mill World* (Chapel Hill: University of North Carolina Press, 1987), 56.

[31] A. J. McKelway, "Child Labor in the Southern Cotton Mills," *The Annals of the American Academy of Political and Social Science* 27 (1906): 4–5.

[32] It was not until 1922 that investigations into child labor included substantial research on black children. Wood, "Emancipating the Child Laborer," 292.

[33] "National Child Labor Committee Meeting," *The Survey* 19 (1907-1908): 1788.

spending most of the next decade documenting child labor in the Carolina Piedmont region where cotton manufacturing, and accordingly white child labor, was most intensive. In most of Hine's photographs, children appeared alone with no adults in the frame, accompanied by a biography and detailed story of the child's life – an approach that emphasized the child's individuality.

The photographs communicated the child's suffering, and the injury of premature labor, in three primary respects that revealed the preoccupations of the movement. The photos bore the tagline of the reported age of the child, but the children generally appeared to be smaller and younger than their chronological age to give the impression that premature labor stunted physical development. Alternatively, children would be photographed doing something else perceived to be taboo, such as smoking; this intimated that child labor perverted the natural order by making children prematurely mature. In both constructions, Hine's photographs made the child's rights claim legible by capturing their suffering, often through confronting photos of their injuries, and their dependence.[34] While each image focused on a child, the photographs as a whole offered a broader critique of the ways that industry was ravaging traditional ways of life, especially family life. The images of children bearing the weight of industrial production, or engaging in prematurely adult behaviors, spoke to and reinforced broader concerns the fact that the home was no longer a haven that protected young children, who instead competed with their fathers in the marketplace for wages. The whiteness of the subjects, including in the photographs of immigrant children in the North, seared into the public mind that child labor was a threat to white children and therefore the nation at large as Hine's works were disseminated nationally.[35]

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[34] Elizabeth B. Clark, "'The Sacred Rights of the Weak': Pain, Sympathy, and the Culture of Individual Rights in Antebellum America," *The Journal of American History* 82, no. 2 (1995): 463-493. On the relationship between suffering, individual rights and the state, see also Drew Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Alfred and Knopf, 2008), 135-137.
[35] Trattner, *Crusade for the Children,* 105-106.

Image 4.1 A sample of Lewis Hine photographs from the National Child Labor Committee Papers, Library of Congress and New York Public Library Digital Collections.

The trope of "white child slavery," through frequent analogies to black chattel slavery, served to unify the plight of native born Southern child laborers and the predominantly European born foreign laborers in the North.[36] Muckraking exposés of "white child slavery" proliferated during the first decade of the twentieth century. Elinor Story's 1906 expose "Child-Labor" was typical of a genre that contrasted the enslavement of black children with "white slavery" to cast child labor as a problem more urgent and more morally damning than the original stain of race-based slavery. Story decried the living conditions of white child laborers, finding them "so foul, unsanitary and degrading" that the children toiled in a "in a bondage more bitter, and fraught with

[36] Child labor in the North had also long been referred to as "white child slavery," but the connection between North and South gave particular force to whiteness of the child. See for example, Florence Kelley Wischnewetzky in a symposium on "White Child Slavery," *The Arena* 1, no.5 (April 1890), 595-610. The concept of "white slavery" as a racialized critique of industrial wage labor had a longer history back to the 1830s, see David R. Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class*, (New York: Verso, 2007). From 1870 onwards, the term "white slavery" was used by a growing transnational movement opposed to the trafficking and prostitution of white women, which was its most common meaning in the Progressive Era United States. See David J. Pivar, *Purity and Hygiene: Women, Prostitution, and the "American Plan," 1900-1930* (Westport: Praeger, 2001); Brian Donovan, *White Slave Crusades: Race, Gender, and Anti-Vice Activism, 1887-1917* (Chicago: University of Illinois Press, 2005).

baleful influences in the life of the nation than any black bondage that every existed." Story asserted that the life of the "little negro children was free, they were fed, housed, clothed" and that they were saved from the "anxious care about to-morrow" that befell white children who were *"put out* to work" in the "midst of the most abject slavery."[37]

Emphasizing the whiteness of child laborers was an effective strategy for mobilizing public outcry. As Shelley Sallee has argued, it was a deliberate strategy of Southern reformers designed to accommodate and harness the white supremacist politics of upper-class southerners. Reformers leveraged the whiteness of child laborers to build a transregional reform effort that transcended the traditional class politics of labor reform.[38] Indeed, at the fourth annual meeting of the National Child Labor Committee in 1908, the Vice Chairman of the North Carolina Committee, Clarence Poe, made an optimistic forecast about the "very bright" future of the child labor legislation in the South based on the white supremacist views of the region. "If there are two points that the South emphasizes more strongly than anything else," he professed, "they are its respect for womanhood and the racial supremacy of whites." As those two points were "so much involved in this question" of child labor laws, there seemed to be "no possible doubt of the success of the cause."[39]

But Poe's optimistic forecast overlooked perhaps the most important component of white Southern ideology – the autonomy of the white patriarchal household. While Sallee is correct in accounting for the force of the figure of the white child in building transregional, cross-class support for the anti-child labor cause, a necessary corollary of this move was that it shifted the target of state policing to include white parents.[40] Many

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[37] Elinor Stoy, "Child-Labor," *The Arena*, December 1, 1906, 584.
[38] Sallee, *The Whiteness of Child Labor Reform*.
[39] Clarence H. Poe, "Report of the North Carolina Committee," *Child Labor and Social Progress,* 140.
[40] Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*, (Chapel Hill: The University of North Carolina Press, 1998); Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South* (Chapel Hill: The University of North Carolina Press, 1988).

white Southerners had viewed the Civil War and Reconstruction as an assault on the white patriarchal household, and accordingly, the defense of the patriarchal household against government intervention remained the defining ideology of the Democratic Party in the South long after the war. [41] The economic rights of independent white men - mill owners and their employees – perhaps conveniently, were conflated as two sides of the same coin. In the slaveholding South, there had long been a strong association between state interventions into the labor market and state intervention into the home as the hub of the plantation. In the late nineteenth and early twentieth century, Southern industrialists relied on such associations to paint state level child labor regulations as unwarranted interference not only in the private enterprise of mill owners, but also in the domestic matters of their employees. Parental rights were also held up to forestall compulsory education laws, preserving the privileges of white Southern manhood and bolstering segregationist aims. Mississippi was the last state in the Union to introduce compulsory schooling laws in 1918. [42]

Even in the North, where compulsory education laws and child labor laws had long been on the books, reformers struggled to enforce these laws because engrained ideas about paternal sovereignty worked against their enforcement. State-level child labor laws had suffered from a similar fate as compulsory education laws. In Kelley's view, the fact that formal politics was the exclusive province of men was one of the root causes of non-enforcement at both ends. "Mothers, and teachers, the women fitted by nature and by training to guard the welfare of children are prevented by law from electing the

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[41] Rebecca Edwards, *Angels in the Machinery: Gender in American Party Politics from the Civil War to the Progressive Era* (New York: Oxford University Press, 1997).

[42] Child labor advocates would often complain that Southern mill owners, aware of the vehement opposition of many white parents to compulsory schooling based on fears of racial mixing and an educated black population, often offered compulsory schooling laws as a substitute to child labor laws confident the former would never come about. See, for example, Katharine DuPre Lumpkin and Dorothy Wolff Douglas, *Child Workers in America* (New York: Robert M. McBride & Company, 1937), 205-206.

officers who enforce the laws," Kelley pointed out.[43] The enforcement of the law, however, not only depended on the quality of men elected to enforce the laws, but on the quality of the community in which those men hold office."[44] The apathy of the community at large to the plight of the child laborer, and in particular, the deference enforcement agents showed to the paternal prerogatives of fathers meant the laws often went unenforced.

Florence Kelley offered New York City as an example of a locale that had among the most "drastic and enlightened" laws in the nation, but where enforcement still lagged. The head of the city truancy department, she complained, "excused his own incompetence" by shifting the blame onto the magistrates who refused to fine any fathers he brought before the court.[45] Though child labor laws and compulsory education laws were designed to override the common law rights of fathers, judges did not always see it that way. In one case in Washington D.C., the judge explained he had worked out the "obnoxious" feature of the law, striking down "absurdities" that would mean an honest father could not put out to work his children who were under fourteen years of age in his own butcher shop.[46] Few cases even made it to court. Spineless factory inspectors took at face value the word of factory owners who swore the children hidden in plain sight were of age and the falsified affidavits of parents protesting the same.[47] The first goal of the NCLC was to encourage Southern states to adopt child labor and compulsory education laws, and to use public awareness to create sufficient public

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[43] Florence Kelley, "Persuasion or Responsibility," *Political Equality Series* 2, no. 8 (1907): 5; Forest Chester Ensign, "Compulsory School Attendance and Child Labor: A Study of the Historical Development of Regulations Compelling Attendance and Limiting the Labor of Children in a Selected Group of States" (PhD diss., Columbia University, 1921).

[44] Florence Kelley "Obstacles to the Enforcement of Child Labor Laws" in *Child Labor and the Republic* (New York: National Child Labor Committee, 1907), 52.

[45] Kelley, "Persuasion or Responsibility," 6-7.

[46] See, for example, Judge DeLacy's decision as reported in "Parents and Children," *The Washington Post,* October 4, 1908, E4.

[47] Kelley, "Obstacles to the Enforcement of Child Labor Laws," 50. Compared to the battle waged in England over child labor sixty years earlier, however, Florence Kelley felt that American reformers were armed with one advantage. No manufacturers protested that child labor was good for the child. They simply denied it happened.

pressure for their enforcement as well. In both regions, though, the NCLC knew that paternal sovereignty would be a considerable barrier to those goals.

Edgar Gardner Murphy was acutely aware of how Southern political ideology, rooted in the patriarchal household, could retard reform efforts on a state level. It was his hope that the "new view of the child" would come to hold such sway that it would override concerns about state paternalism and the usurpation of parental rights. "The right of parents is not the only truth of our democratic institutions," Murphy argued; "these institutions also rest on the rights of the child." Noting that the State already prevented a parent from hurting or killing children, he argued that it was therefore within the state's prerogatives to "prevent a parent from killing or injuring the child by enforced and unnatural labor." The preservation of the child was fundamental to the ordering of human society and to its future – the right of the child was therefore paramount. "It is a right which is much more important to home and society than the right of the parent to shift the burdens of the breadwinner to the shoulders of his defenseless children."[48]

The intervention of the state to protect the rights of the child was therefore not inimical to liberty, but fundamental to the realization of liberty. Child labor regulations were not a restriction, "but the enlargement of liberty," and the enforcement of such laws was not paternalism, but democracy." Once the public's conscience had been awakened the National Committee was confident that a "moral revolution" would "sweep over the nation."[49] The "new view of the child" would trump traditional opposition to state intervention, even in the South. "The consideration of the child, as a child, of his rights as a child, of his claims as a child to protection and care," Alexander McKelway announced in 1908, "is fast demolishing the old laissez faire philosophy

[48] Murphy, *Problems of the Present South*, 112–113.
[49] Alexander McKelway, "The Awakening of the South Against Child Labor," *Child Labor and the Republic* (New York: National Child Labor Committee, 1907), 35.

which has so long been the curse of Southern political thinking."[50] The ascendancy of a new political order that respected and upheld the universal rights of the child seemed inevitable "for the child means more to humanity than any material gain. Self-interest cannot withstand the universal interest in the welfare of the child." [51]

Yet, in advocating this "new view of the child," the NCLC was treading a fine line between blaming parents who put their children out to work, and attempting to reassure the public at large that child labor regulations would in fact bolster paternal authority in the home. Reformers firmly believed that they were rehabilitating the male-headed family unit, not signaling its end. While they recognized that the concept of parental rights was often marshaled to oppose child labor laws, they believed that unfettered capitalism was destroying the sanctity of the family and that therefore it was necessary to use government as an instrument to reinstate natural domestic hierarchies. "The family," Owen Lovejoy hailed, was "the fundamental institution of our civilization and the glory, thus far, of social evolution." The family existed to provide a protected period of childhood, and one notable evolutionary trend had been to "prolong infancy and adolescence, and thus to launch upon society better individuals." The precise problem with modern industry was that it "reversed" that process. With the mechanization of industry, the father "should have found his earning capacity tremendously increased," but instead "the ignorant, the weak, the inefficient, the little children are profitably substituted for stalwart men." The presence of the wife and child in the wage-earning marketplace did "not assist the father in earning a livelihood" but rather "competed with him and dragged down his wages." More than that, children working led to "early mingling in promiscuous crowds" and gave the child a dangerous degree of economic independence. It threatened to "absolve the child from allegiance to the parent, by destroying at once his dependence and his respect." The premature toil of

[50] Alexander McKelway, "The Leadership of the Child," *Child Labor and Social Progress,* 27.
[51] McKelway, "The Leadership of the Child," 30.

children, Lovejoy concluded, would "condemn the family to inevitable disintegration." [52] The NCLC did not stand opposed to the male head of the family; instead one of the Committee's primary goals was to reinstate his rightful position by removing women and children from the marketplace.

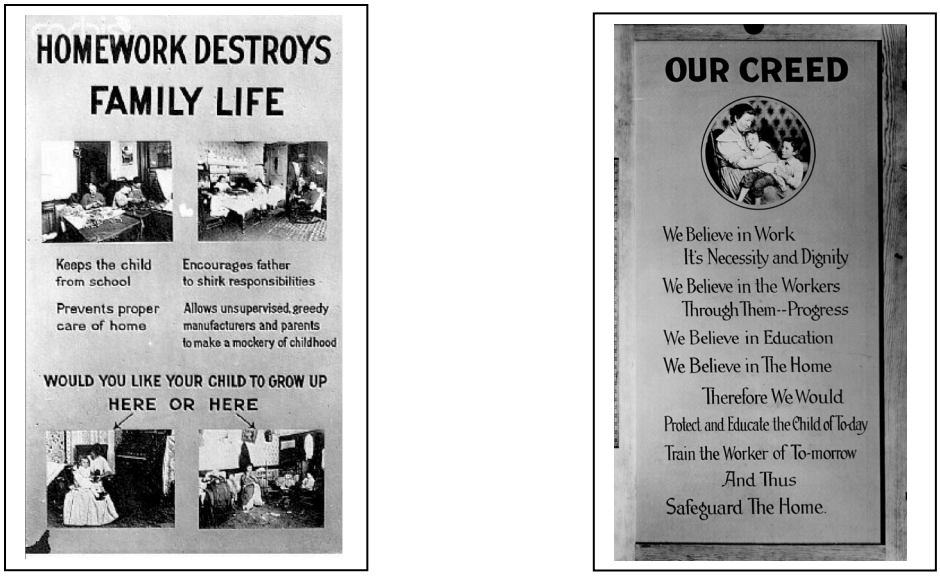

Image 4.2 Posters from the NCLC circa 1907 from the NCLC Library of Congress Collection. The poster, left, identified the problems with tenement labor and the creed, right, demonstrates the central importance of "safeguarding the home" to the NCLC's ideology.

The NCLC placed enormous faith in the ameliorative effects of ending child labor, claiming it would save the child, the family and the nation. In a speech in Atlanta in 1900, Alexander McKelway laid out the "deeper philosophy" that underlay the "whole movement for the rescue of the children than the mere duty to the individual child." "The child is the savior of the race," he explained, and the "harbinger of the golden age."[53] Industrial child labor stunted the physical, moral and mental development of not only the individual child but also the future citizen. In making that case, even before the NCLC itself agreed to support federal legislation, the Committee's campaign had laid the groundwork for the case for federal legislation to protect the nation's stock of children.

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[52] Owen Lovejoy, "Child Labor and Family Disintegration," *The Independent* 61 (1906): 749.
[53] Alexander McKelway, "Child Labor, its history, and its present? To the nation, Atlanta 1900," 18, Box 4, Alexander Jeffrey McKelway Papers, Manuscript Division, Library of Congress, Washington, D.C. [Hereafter: McKelway Papers].

As Florence Kelley put it, the "noblest duty of the Republic is that of self-preservation by so cherishing all its children so that they, in turn, may become enlightened self-governing citizens."[54] If the NCLC had successfully built a broad consensus that state labor interventions were justified on the grounds that removing children from the work place would save the child and reinstate natural domestic hierarchies, they had also left themselves open to an anti-regulatory agenda that would claim state intervention would undermine the autonomy of the white household. For a while, however, as we shall see in the next section, the broad based political support for the "new view of the child" gave rise to a new view of the state - - one that would ultimately call on the federal government to uphold the rights of the defenseless.[55] The same arguments that the state's interest in its future citizens that had paved the way for the introduction of compulsory education laws and child medical schemes during the past forty years would lead eventually to a bi-partisan consensus that the federal government had the right to protect the nations' children through federal child labor laws. [56]

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<u>"The emancipation of the nation's children:" the two federal child labor laws and the Supreme Court, 1912-1922</u>

By 1922, the consensus on the federal Child Labor Amendment seemed a fait accompli, but that consensus had been hard fought. It took a decade between 1906 and 191 6for bi-partisan political will to crystallize in favor of national legislation. This section traces the political developments that led to the adoption of the two federal child labor laws in the 1910s, and the subsequent challenges to those laws in the Supreme Court that ultimately led the NCLC and Congress to pursue a constitutional amendment. The broad bi-partisan support for federal child labor legislation reflected the success of the NCLC's arguments that the nation's interest in children should trump traditional

[54] Florence Kelley, *Some Ethical Gains Through Legislation* (New York: MacMillan, 1905).

concerns about states' rights. Ideas about paternal sovereignty, however, continued to animate opposition to the expansion of the federal government's role in children's lives. If the passage of the federal child labor laws represented the culmination of over forty years of advocacy for the rights of the child, then anti-statists had also been priming their arguments about the sovereignty of the home over that time in battles over state-level compulsory education laws, child labor laws, and school medical programs, many of which were still unfolding in the South. Moreover, the proposal to further centralize state control by granting power to the federal government over children only heightened the stakes in eyes of anti-statists. Thus, when federal legislation passed, and the terms of the debate shifted to ostensibly be about states' rights, arguments about paternal sovereignty were never far from the surface.

In 1906, Senator Albert Beveridge, an ambitious Progressive from Indiana, sought to capitalize on growing public sympathy for children in the labor force and proposed the first national child labor law. The proposal was applauded in the press. "The Bill marks an epoch in the history of Federal Legislation," *Outlook Magazine* trumpeted. "For the first time, the principle is embodied in a proposed law that the children in Georgia, Florida or Alabama have the same rights to childhood as the children in Oregon or Illinois…"[57] Beveridge failed to sway his colleagues, however, who thought the bill was an unconstitutional proposition despite his three-day takeover of the Senate floor.[58] Beveridge's push for national legislation also split the NCLC. Edgar Alan Murphy resigned in protest over the committee's support. He feared that the push for federal legislation would undermine efforts to improve and enforce existing laws in the

[57] "Child Labor a National Question," *Outlook*, January 26, 1907, 157.
[58] The Beveridge-Parsons Bill was introduced twice in 1907, but never came to vote in either house. Its successor, the Kenyon Bill, was introduced every year for the next seven years. Each time, it met indifference and inaction, sharing the unhappy fate of the Beveridge Bill.

South.[59] It would cause "almost incurable injury" to "mix up the cause of children with the bitter issues of coercion…," he warned. [60] Shaken by the rupture, the NCLC shelved the issue until the 1910s.[61]

After the setbacks with the Beveridge bill, the National Committee pressed on by pursuing a different tactic: the establishment of the Children's Bureau, a federal agency dedicated to researching the problems afflicting infants and children across the country.[62] The Children's Bureau was the brainchild of Florence Kelley and Lillian Wald, who both strongly disagreed with Murphy about whether the federal government had a role to play in children's lives. Kelley and Wald first suggested the idea to a receptive President Roosevelt in 1905, though it took eleven bills over the next seven years before it received congressional support. In 1912, Congress approved a bill for the establishment of a Children's Bureau. At Kelley and Wald's suggestion, the first chief of the Bureau was Julia Lathrop, a fellow Hull House resident who became the first woman to ever head a federal agency.[63] It reflected the broader aims of reformers like Kelley to protect children by forging a direct link between the nation's children and the national government. The

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[59] For a detailed description of the divisions and debates within the NCLC see Trattner, *Crusade for the Children*, 87-93 and Wood, "Emancipating the Child Laborer," 174-195. Around the time of the NCLC's founding, there had been a flurry of state activity with twelve states introducing child labor legislation between 1902 and 1903, seven of them for the first time. Wood, "Emancipating the Child Laborer," 171.
[60] Edgar Gardner Murphy to Felix Adler, May 27, 1907, Edgar Gardner Murphy Papers, the Southern Historical Project, University of North Carolina as quoted in Trattner, *Crusade for the Children,* 91.
[61] While individual committee members like McKelway and Kelley always favored national legislation, it was not until 1913 that the NCLC as a committee resolved to support national legislation again. See Trattner, *Crusade for the Children,* 123, Wood, "Emancipating the Child Laborer," 208-212.
[62] On the history of the Children's Bureau generally, see Kriste Lindenmeyer, *A Right to Childhood: The U.S. Children's Bureau and Child Welfare, 1912-46* (Urbana: University of Illinois Press, 1997). For an account that emphasizes how the support (and silence) of anti-suffragists was vital to its establishment, see Rebecca Ann Rix, "Gender and Reconstitution: The Individual and Family Basis of Republican Government Contested, 1868-1925" (PhD diss., Yale University, 2008), chapter three. During the same period, the NCLC enjoyed success in lobbying for state level child labor laws. By 1912, thirty-four states had age limits in place and thirty-two states had night work prohibitions. In the South, resistance to child labor laws remained salient, but weak laws had been introduced in some stated. Wood, "Emancipating the Child Laborer," 206-207.
[63] The Bureau's advocates argued that such a function within the federal government was not only benign but also long overdue. The mortality of "lobsters and young salmon," Florence Kelley charged, had long been a concern of the United States Fish Commission, established in 1871, while the continually rising rates of infant mortality was the concern of not one federal agency. Kelley, *Some Ethical Gains Through Legislation*, 101.

Bureau's stated purpose was to study "all matters pertaining to the welfare of children and child life among all our classes of people."[64]

At the time, however, the Children's Bureau represented a small step in advancing the role the federal government played in the lives of children, and yet the response the proposal provoked reflected the anxiety many felt, particularly Southern Democrats, about the rights of men and the place of the home in a new era of federal governance. The scope of the Bureau was modest; it was a purely information gathering agency with $25,640 set aside for the first year's operating budget. When the legislation for Children's Bureau reached the senate, Southern Democrats insisted that an amendment be attached to the bill defining where federal agents of the proposed Children's Bureau might legitimately tread. The amendment cordoned off the home, stating: "No official or representative of said bureau shall, over the objection of the head of the family, enter any private family residence." Much like the campaign of the National League of Medical Freedom (NLMF) against the proposed National Bureau of Health, for some the mere suggestion of a federal Children's Bureau raised the specter of federal agents invading the home. John Thornton, a Democrat from Louisiana, offered the amendment to "remove the most objectionable and very dangerous feature" of the proposed Children's Bureau Bill.[65] His amendment, he explained, sought to protect the head of the household from being "compelled, in order to maintain his own self-respect, to violate the law by ejecting the agent of this bureau out of his house." "Law, or no law, it is not going to be done in my house," Thornton declared, to the laughter of the chamber.[66]

As Southern Democrats joined the chorus in calling on Congress to adopt the

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[64] Trattner, *Crusade for The Children,* 120.
[65] *Congressional Record,* 62nd Cong., 3rd Sess. (1912), 1573.
[66] Moments earlier, Jacob H. Gallinger, a Republican from New Hampshire, had offered a substitution to ensure that the bill authorized the Bureau to "investigate and report on all matters pertaining to the welfare of children and child life *among all classes of our people*." *Congressional Record,* 62nd Cong., 3rd Sess. (1912), 1574.

amendment, they too invoked the tradition of Anglo-American liberty to argue that the Children's Bureau threatened the sovereignty of the home. William Stone, a Democratic senator from Kentucky, pronounced the proposed mandate of the Bureau "one of the most dangerous things, the most unregardful of the rights of American citizens" that Congress had ever proposed. Democrats invoked the common law maxim "a man's home is his castle," just as the NLMF had, to demonstrate the potential injury it could inflict upon the citizen and his rights. If the home could be "invaded at the pleasure of an official," Stone reasoned, "the home ceases to be the castle of the citizen." He expressed his "profound astonishment" that the Senate would "sanction a $900 clerk 'drest in a little brief authority' inflated with self-importance and puffed with impertinence" having the authority "to kick down the door and assemble the family *vi et armis* around the hearthstone." Such a proposal, one of his fellow party members ventured, not only violated the age-old principles of liberty but the U.S. Constitution itself. The Fourth Amendment to the United States Constitution that protected "the right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures," he argued, codified the maxim "a man's home is his castle," implying that any trespass onto the home of a citizen imperiled a fundamental liberty for which the nation had been founded.[67]

The supporters of the amendment offered the sovereignty of the home as a common right of all men, in the same vein as the NLMF had in opposing school medical exams. Stone waxed lyrical as the debate progressed, mocking the idea that this bill would ever affect men who lived in "statelier mansions" whose butlers could act as buffers between their families and the menace of state agents. He implored the Senate to

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[67] When the second vote for the amendment failed, Weldon Heyburn of Idaho rose to point out that the Senate had "just placed a stamp of disapproval" on the Fourth Amendment to the Constitution, established the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." *Congressional Record,* 62nd Cong., 3rd Sess. (1912), 1576. On the relationship between the common law maxim "a man's home is his castle" and the Fourth Amendment, see Leonard Williams Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 2001), 151–152.

protect the "fourth fifths" of Americans who came from "humble beginnings" that would be particularly vulnerable to the state invading their homes because of their economic circumstances. The right of men to have their home respected as their castle, he suggested, was the last liberty that common men could cling to when they had little else to show for their independence and freedom. Abraham Lincoln himself, he claimed, would have been taken from his parents by the Children's Bureau because he was raised on the earth floor of a log cabin.[68] Convinced by these appeals, Senator Smith of South Carolina pleaded for his colleagues to absolve the Senate from "acquiescing in outraging the sanctity of the home or forcing us to vote against the bill."[69] The amendment passed.[70]

The debate was a storm in a teacup. The senators who voted against the amendment to the bill noted that they would never approve a bill that enabled government agents to invade the home, but protested that there was nothing within the bill that authorized such an outrage.[71] What was striking about the debate was how little was at stake – the proposed Children's Bureau in no way threatened the economic interests of men, indeed the greatest injury the senators could muster was to suggest that Children's Bureau officers would make "entirely subjective" investigations as to whether children were adequately clothed. Nonetheless, those who rallied around the call to defend a man's right to his castle revealed that ideas about paternal sovereignty ran deep – in one senator's broad rendering there were such things as "individual rights" that Congress was bound to respect, including "the right of a home and things pertaining to

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[68] *Congressional Record,* 62nd Cong., 3rd Sess. (1912), 1576.
[69] *Congressional Record,* 62nd Cong., 3rd Sess. (1912), 1577.
[70] On the third vote, the amendment passed 39-34, securing the establishment of the Children's Bureau.
[71] Senator Smith retorted, in that case, that the senators ought to have "no objection to emphasizing the intent not to do it." *Congressional Record,* 62nd Cong., 3rd Sess. (1912), 1577.

the home."[72] A man's self-respect, they implied, the very measure of his liberty, was bound up in his control over the territory of his home.

The fear that affording new powers to the federal government would necessarily result in federal agents invading the home surfaced repeatedly in the 1910s – in the debates over the national bureau of health, the establishment of the children's bureau and indeed provided a limitation on the scope of the Volstead Act, the law that gave force to Prohibition.[73] Each of these instances revealed the existing anxiety among conservatives in Congress that granting the federal government more power would lead to federal agents invading the home, an anxiety that would be further inflamed by the anti-communist politics of the 1920s when the federal Child Labor Amendment came to be associated with a Soviet plot. In the 1920s, the idea that a man's home was his castle was a rousing fiction that would rally many to oppose the Child Labor Amendment, but at this point in time it formed the sole limitation on the first Congressional action to recognize that child welfare fell within the purview of federal government.[74]

In the end, the establishment of the Children's Bureau was a boon to the NCLC's renewed drive for federal child labor legislation because the Bureau extended the work of the NCLC by conducting extensive surveys into the conditions of child labor nationally. This freed the NCLC to focus on leveraging that data to raise public consciousness and lobby for reform. Perhaps confirming the fears of those who had questioned or opposed the jurisdiction of the Children's Bureau, its budget and mandate

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[72] *Congressional Record,* 62nd Cong., 3rd Sess. (1912), 1576.
[73] See Jonathan Hafetz, "A Man's Home is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries," *William & Mary Journal of Women and the Law*, 8, no.175 (2002): 200-201. Foreshadowing the decision of the Supreme Court in *Lochner,* the NY Supreme Court in *In Re Jacobs* (1885) invoked the fiction of "a man's home is his castle" to strike down protective labor laws in New York State that targeted sweatshop work in tenements, as Eileen Boris puts the decision "sought to save the cigarmaker from the paternalism of the state" by "affirming his paternalism within the family," finding that the law violated his right to contract, and implicitly, to contract the labor of his family. See Eileen Boris, "A Man's Dwelling House Is His Castle: Tenement House Cigarmaking and the Judicial Imperative," in *Work Engendered: Toward a New History of American Labor,* ed. Ava Baron (Ithaca: Cornell University Press, 1991), 115.
[74] Lindenmeyer, *A Right to Childhood.*

continued to grow, particularly as it assumed responsibility for administering the first national child labor law passed in 1916.[75]

By 1912, the Progressive Party put national child labor laws back on the national agenda by adding child labor to its party platform and by 1916, the Republican Party and the recalcitrant Democratic Party had followed suit. In 1915, Democratic President Woodrow Wilson jumped to the cause to buoy his chances of re-election. Reading the political mood, Wilson expediently reversed his long-standing opposition and that of his party to national child labor laws. He signed the first national child labor bill, the Keating-Owen Law, the day before he accepted the Democratic Party's re-nomination for President in September 1916.[76] Accepting the nomination, Wilson boasted that his record of achievement included "the emancipation of the children of the nation by releasing them from hurtful labor."[77] His conversion to the cause reflected support that had been built between 1906 when the first bill was proposed and 1916 when the first law was passed. Wilson, who had in 1908 declared that a federal child labor bill was an "obviously absurd" and "extravagant" interpretation of Congressional powers, put himself forward in the 1916 election as the poster boy for the cause.[78] "I want to say with what real emotion I sign this bill because I know how long the struggle has been to secure legislation of this sort and what it is going to mean for the health and vigor of the

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[75] Congress appropriated a $150, 000 budget for the Children's Bureau to administer the law in 1916. Grace Abbott was appointed head of the Child Labor Division, created to enacted the law, where she was in charge of an assistant director, a law clerk, eight inspectors and thirty-one assistant inspectors, seven clerks and a messenger. Lindemeyer, *A Right to Childhood,* 118-120.

[76] Owen Lovejoy, the General Secretary of the NCLC had authored the bill. It had failed the year before. Trattner, *Crusade for the Children,* 130.

[77] "Full Text of Mr. Wilson's Speech Accepting the Nomination For President," *New York Times,* September 3, 1916, 4. The NCLC credited Alexander McKelway for Wilson's conversion. McKelway was a long time friend of Wilson and a staunch Democrat. Over many conversations, McKelway apparently convinced the President that national legislation to protect future citizens did not encroach on the rights of states. See Trattner, *Crusade for the Children,* 130.

[78] Woodrow Wilson, *Constitutional Government* (New York: Columbia University Press, 1908), 179. In 1913, when the NCLC met with Wilson to plead for his support for an earlier iteration of the Keating-Own Bill, Wilson still viewed national legislation as unconstitutional but agreed to remain neutral on the issue publicly. Wood, "Emancipating the Child Laborer," 214.

country," Wilson stated upon signing the bill, humbling adding "I congratulate the country and felicitate myself."[79]

The celebrations, and self-congratulations, over the first federal law regulating child labor, however, did not last long. A challenge to the constitutionality of Keating-Owen law soon found its way through the courts and the final obstacle to national child labor regulation was the U.S. Supreme Court. Its obstinacy, in striking down two federal child labor laws between 1916 and 1919, prompted the push for a federal constitutional that would grant Congress the power to regulate child labor. The NCLC and Congress had been confident that the Court would look favorably on the constitutionality of the two federal child labor laws. While the Supreme Court had not considered the question, state courts had consistently upheld the constitutionality of child labor law. Moreover, the Supreme Court decisions over the preceding sixteen years suggested that the Court increasingly looked favorably on extending powers to the federal government that matters that had traditionally fallen within the purview of the states. The question, then, was why federal child labor laws met a different fate.[80] While the rulings of the Supreme Court struck down both laws as an unconstitutional encroachment on the rights of the states, by tracing the legal challenges through the courts, we can see how arguments about paternal sovereignty lurked not far beneath the surface. As the battle over child labor moved from the state to the federal level, ideas about family government that had long been used to argue against state laws would become enveloped within states' rights arguments to argue against federal regulation.

The first national child labor law, the Keating-Owen law, prohibited the interstate transportation of any goods produced in factories or workshops that employed children under fourteen. It had sailed through Congress 343 votes to 46. In 1918, however, in the case of *Hammer v. Dagenhart*, a divided Supreme Court struck down the

[79] *New York Times,* September 2, 1916, 2.
[80] Novkov, "Historicizing the Figure of the Child."

law in a 5-4 decision as an unconstitutional encroachment on the rights of states.[81] With the Court clearly divided, President Wilson, Congress and NCLC all believed that it was worth a second effort to pass national legislation. The Court's decision was widely condemned in the press, suggesting public opinion still favored national legislation. The *New York Evening Post,* for instance, predicted the decision "would not long stay the merciful and protecting arm of national power."[82] Additionally, by 1918, the war had amplified nationalistic concerns about the quality of the nation's next crop of male soldier-citizens.[83] Thus, in 1918, Congress approved the second national child labor, the Child Labor Tax Acts by another large margin of 310-11 votes. But in 1922, in an 8-1 decision, the Supreme Court struck down that law too as an unconstitutional exercise of the taxing power, finding it used a tax for a prohibitory or regulatory function.[84]

The NCLC and Congress had been optimistic about the constitutionality of the national child labor laws and not without reason. In 1905, the Supreme Court had used an expansive interpretation of the substantive due process clause of the Fourteenth Amendment to strike down a New York labor law that sought to protect bakers in the decision *Lochner v. New York*. In that decision, the court held that the "freedom to contract" was a fundamental liberty protected by the Fourteenth Amendment.[85] But a decade on, several subsequent decisions suggested that the Court would look favorably

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[81] *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Both Congress and the NCLC had been confident about the constitutionality of the Keating-Owen Law. The Supreme Court had approved the Mann Act (the White Slavery) Act as a constitutional exercise of the interstate commerce clause in 1913. The law made it a felony to engage in international or interstate transportation of women and girls for "immoral purposes," and the attorneys for the U.S. government argued the same rationale applied to the good produced by the evil of child labor. *Hoke v. United States,* 227 U.S. 308 (1913). Moreover, the Court had similarly upheld the power of Congress to remove immoral or harmful products from the interstate trade stream, namely lottery tickets and adulterated foods in *Champion v. Ames, 188 U.S.* (1903) and *Hipolite Egg Co. v. United States, 220 U.S. 45* (1911).

[82] Quoted in the *Literary Digest,* June 15, 1918, 16

[83] For example, in the closing arguments in the second child labor, the lawyer for the government argued that the "danger to the country" was high because in the "neighboring county of Davidson, an old factory district, 75 percent of the young men registered for the National Army were rejected after examination because of physical defects." Letter from Alexander McKelway to the Attorney General Thomas Gregory, September 3, 1917, Box 2, McKelway Papers.

[84] *Bailey v. Drexel Furniture Co.,* 259 U.S. 34 (1922).

[85] *Lochner v. New York,* 198 U.S. 45 (1905).

on the power of Congress to pass protective labor legislation for children. In particular, the Court had approved state-level protective labor laws for women and children as a constitutional exercise of their police powers.[86] Such laws, the Court had held, did not violate the "liberty to contract" because states had a justifiable interest in protecting women's procreative functions and children as future citizens.[87] While the Court had never considered the constitutionality of federal labor laws, the Court had taken a favorable view on the use of the federal powers that the national child labor laws rested, the interstate commerce clause and the taxing power, to protect the public and end "immoral" conduct.

The first national child labor law, the Keating-Owen law, relied on the interstate commerce clause in prohibiting the interstate transportation of any goods produced in workplaces that employed children under fourteen. Congress and the NCLC were confident of its constitutionality based on the precedent of three Supreme Court decisions over the past decade which had affirmed Congress's power to remove immoral and harmful products from the interstate trade stream, including lottery tickets, adulterated foods and most recently interstate transportation of women and girls for any "immoral purpose.'[88]

The second national child labor law relied on the taxing power by placing a ten percent excise tax on the profits of workplaces that produced goods with child labor.

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[86] A New York Court of Appeal Decision approved of a New York law that limited children's participation on the stage by reasoning that the "the state, or sovereign, *as parens patriae"* had the power to determine whether law protected the safety of children and was more important that then child's right to personal liberty. See *People v. Ewer* 141 N.Y. 129 (1894) at 134-135. Likewise, the Oregon Supreme Court offered an expansive interpretation of the states powers under *parens patriae,* finding that the state could exercise "unlimited supervision and control" of children's employment. *State v. Shorey,* 48 Ore. 396 (1906). On these two cases and a general review of state level court cases concerning child labor, see Novkov, "Historicizing the Figure of the Child," *The American Journal of Legal History* 44, no. 4 (2000): 383-389.

[87] *Muller v. Oregon,* 208 U.S. 412 (1908); *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320 (1913). For a discussion of the way *Muller* furthered gendered tiers of citizenship, see Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (Oxford: Oxford University Press, 2001), 29-34.

[88] The moral panic over the trafficking and prostitution of white women reached its peak in 1910, culminating in Congress passing a law to make it a felony to engage in international or interstate transportation of women and girls for any "immoral purpose." *Hoke v. United States* 227 U.S. 308 (1913); *Champion v. Ames* 188 U.S. 321 (1903); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

Though the NCLC was less confident about the prospects of the second law, there was still a strong precedent for such a use of the taxing power. The year the Child Labor Tax Law passed, the Supreme Court found in *United States v. Doremus* (1919) that a federal tax on narcotics was constitutional notwithstanding the fact that states regulated the same business through their police powers.[89] Between 1906 and 1916, there had been a sea change in opinion from the NCLC itself to the Democratic Party about whether federal child labor legislation was constitutional. It was a change that reflected broader social and political trends that looked approvingly upon the expansion of the powers of federal governments in matters traditionally reserved for the states. The Supreme Court decisions discussed above reflected that trend, giving the NCLC and Congress what transpired to be misplaced optimism about the constitutionality of the national child labor laws.[90]

Both challenges to the national child labor laws emanated from the same place, presaging the role that the manufacturing industry would continue to play in fueling opposition to the federal Child Labor Amendment. At the helm of both challenges stood one man, a "crusty, uncompromising conservative" by the name of David Clark who came from a distinguished North Carolina family.[91] Clark had founded an industrial journal, *Southern Textile Bulletin* in 1911, which he used for over forty years as a platform to promote the interests of the cotton textile industry of the South. Clark took an expansive view of what constituted the "interests" of the textile industry, what could broadly be classified as an unrelenting defense of white southern manhood. His weekly industrial journal railed against anti-lynching bills, miscegenation, unionism, communism

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[89] David Brady, "A Forecast of the Supreme Court Decision On the Child Labor Tax Law," *The American Child,* 1, (May 1919): 115-117; Wood, *Constitutional Politics in the Progressive Era,* 140.

[90] On this point, see also Novkov, "Historicizing the Figure of the Child in Legal Discourse," 369–404 who argues that an insufficient effort has been made to reconcile the different fate of the success of state level child labor regulations and failure of federal level reforms, paying particular attention to the Supreme Court cases which she also emphasizes were out of step with the Court's decisions on other social policy matters.

[91] This denomination which I am partial to comes from Wood, *Constitutional Politics in the Progressive Era,* 78.

and displayed a generally "morbid obsession with racial violence."[92] The federal child labor laws were the first cause to raise his ire, propelling him into a lifelong career as a conservative activist.

To challenge the Keating-Owen Law, Clark in his own words put "considerable work" into concocting a case that would have the ideal plaintiff and be heard by the most sympathetic judge possible.[93] He felt he was swimming upstream. As he later reported in his *Southern Textile Bulletin,* "it was the opinion of 75 percent of cotton manufacturers and fully that percent of the lawyers that it was useless to contest the constitutionality of the laws."[94] Clark selected Roland Dagenhart, and his sons Reuben and John, who all worked at Fidelity Manufacturing Company in Charlotte, North Carolina, as the plaintiffs to challenge the Keating-Owen law because they represented the "perfect combination of factors."[95] Their family circumstances illustrated the difference between the existing labor laws of North Carolina and the standards prescribed by the Keating-Owen law. Roland Dagenhart was unable to support his family without his sons' wages and his sons would not be able to work under the impending federal law, whereas both his sons were able to labor for a certain number of hours under North Carolina law.[96] Though Clark was representing the interests of cotton manufactures, his decision to use an employee as a figurehead for the case was deft. Not only did it enlarge the number of men whose interests were threatened by the Keating-Owen law, but it also tapped into long-standing opposition to state-level child labor laws that had argued they were invalid because they

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[92] Bart Dredge, "Defending White Supremacy: David Clark and the 'Southern Textile Bulletin,' 1911 to 1955," *The North Carolina Historical Review* 89, 1 (2012): 59-91.
[93] *Southern Textile Bulletin,* October 16, 1924, 54.
[94] *Southern Textile Bulletin,* May 18, 1922, 18.
[95] *Southern Textile Bulletin,* October 16, 1924, 54.
[96] Reuben, aged fifteen, under North Carolina's laws could work for up to eleven hours a day and up to sixty hours a week, but under the impending federal law would be restricted to working eight hours a day. The younger son, John, aged thirteen, would not be permitted to work at all while under North Carolina law he was able to labor for the same hours as his brother.

invaded parental rights. [97] It was a strategy that paid dividends with Justice Boyd, the seventy-two-year-old conservative who heard the case.

The legal challenge to the Keating-Owen law orchestrated by David Clark, and backed by the National Association of Manufacturers, required a significant pivot in the arguments offered by industry against child labor legislation. Before 1916, challengers to state level labor laws argued that states did not possess the power to regulate child labor because child labor laws violated the liberty of contract of the individual, of parent and child alike. After 1916, the manufacturing industry (with parents and children like the Dagenharts as figureheads) would argue instead that states possessed the exclusive right to regulate child labor.[98] As advocates of child labor laws pointed out, as soon Congress passed federal legislation, the opposition became sudden apologists for the very state laws they had consistently argued were invalid for the past four decades.[99] By looking at how Clark crafted the two cases before his legal team made that pivot, however, and the judgments of the lower court, we can see how the same arguments that state level child labor laws were invalid because they invading family government still continued to carry weight. While arguments about family government might have been seen as "extralegal" before the Supreme Court, they would soon become enveloped within states' rights arguments in the political campaign mounted by the Sentinels of the Republic against the ratification of the federal Child Labor Amendment.[100]

In the first case, Justice Boyd granted an injunction against the Keating-Owen law on the grounds that it exceeded the powers of Congress, and it violated Roland

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[97] Clark fully acknowledged, even boasted, that the case was his ideas and not Dagenhart's who he admitted was "only a figurehead." *Southern Textile Bulletin,* October 16, 1924, 54.

[98] This pivot was particularly pronounced when the matter came before the Supreme Court. The lawyers for the Dagenhart forcefully, and successfully, argued that power to regulate child labor rested solely and exclusively with the states who were uniquely positioned to tailor labor laws to the needs and local conditions of their citizens. See Novkov, "Historicizing the Figure of the Child" 369–404

[99] Lumpkin and Douglas, *Child Workers in America,* 234.

[100] On this point, see Novkov, "Historicizing the Figure of the Child." Indeed, at the time, there were no constitutional grounds on which the Supreme Court could consider the place of the family. Martha Minow, "We, the Family: Constitutional Rights and American Families," *The Journal of American History* 74, no. 3 (1987): 959–83.

Dagenhart's property rights to his sons' labor under the Fifth Amendment. First, Boyd held the "Congress could not do that indirectly which it cannot do directly,'" specifically, it could not regulate internal conditions of labor within states.[101] Next, as the NCLC reported it, Justice Boyd then "dwelt upon" the rights of Mr. Dagenhart as a father. Boyd broadly invoked the right of the individual to life, liberty and the pursuit of happiness, arguing that the family was the "nucleus around which the blessing of life, liberty and the pursuit of happiness gathers." He noted "the right of the progenitor to regulate and control the habits of his progeny" was "beyond dispute in this case," reflecting the widely held belief, in his words, that "in the family government the father has a right to the control, with due regard of decency and morals, of his children and the right of support by the service of his children."[102] It was not a right found in the constitution, but rather an enduring, natural right: "In tribal days parents enjoyed the right of rearing and governing offspring and now that civilization is world-wide the parent still has this right."[103] This line of reasoning particularly irked the NCLC. Alexander McKelway, who was present for the full hearings, pointed out that if the Keating-Owen law violated the rights and liberty of men under the Fifth Amendment then every state child labor law already held to be constitutional by the Supreme Court would be invalidated under the Fourteenth Amendment.[104] The NCLC was confident that Boyd's decision was a "severe breach of judicial canons" and would not stand.[105]

The Supreme Court, however, struck down the law. It held that it was "repugnant to the Constitution" because it "exerts a power to a purely local matter to

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[101] Owen Lovejoy, *Thirteenth Annual Report of the General Secretary of the National Child Labor Committee 1916-1917* (New York: National Child Labor Committee, 1918), 5.
[102] Lovejoy, *Thirteenth Annual Report*, 5.
[103] "VOIDS CHILD LABOR LAW: Judge Boyd Holds Federal Act Unconstitutional," *The Washington Post*, September 1, 1917, 5.
[104] Letter from Alexander McKelway to the Attorney General Thomas Gregory, September 3, 1917, Box 2, McKelway Papers.
[105] *Child Labor Bulletin* 6, no.2 (November 1917): 144-146.

which the federal authority does not extend."[106] When Congress passed the second national child labor law, Clark mounted another challenge in North Carolina encouraged by his success in challenging the first national child labor law. He found another father to act as figurehead. Eugene J. Johnston who worked at Atherton Mills in Charlotte, North Carolina, filed an injunction to prevent the mill refusing to employ his fifteen and a half year old son for more than eight hours a day when the Child Labor Tax law came into effect in 1919.[107] Justice Boyd again heard the initial case, reportedly interrupting the attorney's oral submissions to announce he had already made up his mind, declaring the law unconstitutional and granting the injunction.[108] The case reached the Supreme Court in 1922 before Chief Justice William Howard Taft, who had served as president of the United States between 1908 and 1912, and was appointed to the court by President Warren Harding in 1921.[109] The make-up of the Court otherwise remained the same as the Court that had struck down the Keating-Owen Law in 1918.

Delivering the decision, Taft held the law unconstitutional because it was clearly a penalty designed to regulate conditions of labor within a state disguised as a tax. Taft's ruminations hinted at the arguments that would soon be mounted against the federal Child Labor Amendment. He acknowledged that the authors of the law had admirable aims in seeking to end child labor. But therein lay the most "insidious" feature of the unconstitutional law: because their aim was noble, reformers were wont to be blind to the damage the federal regulation would do to the decentralized system of self-government, the "serious breach it will make" as Taft put "in the ark of our covenant." Such a breach, anti-statist activists would soon argue, was a greater evil and more dangerous to the nation than child labor itself. Alluding to what the "ark of our

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106 *Hammer v. Dagenhart,* 247 U.S. 268 (1918) at 211-212.
107 *Southern Textile Bulletin,* April 17, 1919, 11.
108 Drexel Furniture Company, a company operating in the foothills of the Appalachian Mountains, which had received a tax bill for $6, 312.79 for employing one boy under fourteen years of age. Wood, *Constitutional Politics in the Progressive Era,* 140, *Southern Textile Bulletin,* May 8, 1919, 54.
109 *Bailey v. Drexel Furniture Co.,* 259 U.S. 34 (1922) at 37.

covenant" meant, Taft concluded: "In the maintenance of local self-government, on the one hand, and national power, on the other, our country has been able to endure and prosper for a near century and half."[110] In what was at once a biblical illusion and an allegory for federalism, Taft suggested that the system of federalism rested on separate and shared zones of sovereignty between family government, state government and federal powers, a view the Sentinels of the Republic would also soon articulate.[111]

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"Every Home a Sentry Box!" The anti-ratification campaign in Massachusetts, 1924

Despite the decisions of the Supreme Court, numerous developments between 1915 and 1924 still gave reformers hope that the ratification of a federal Child Labor Amendment would easily achieved. By 1916, after Wilson adopted the cause and signed the Keating-Owen bill, the movement to reform child labor laws consistently received bi-partisan support. The NCLC argued child labor was a moral issue that rose above politics itself.[112] The case for federal action was further consolidated with the entry of the United States into World War I in 1917. Nationalist sentiment gave the cause momentum independent of the NCLC's advocacy as signaled when a Democratic Congressman from Ohio took the NCLC by surprise, independently proposing what came to be known as the Child Labor Tax Acts.[113] Another measure of the broad-base of support for federal regulation was the number of groups that came together to support the proposal for a

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[110] *Bailey v. Drexel Furniture Co.,* 259 U.S. 34 (1922) at 37.

[111] Though he does not interrogate the biblical origins of the phrase, Steven Macias similarly argues that there was more to Taft's ark than "pure political science," contending that the real breach to which Taft refers is the attempted interference with personal and family law. Macias argues that the "language of the opinion is clear: the Court was not striking down an improper tax; it was striking down a regulation of child labor – an interference with the covenant that permits families to operate within their own sphere." See Steven J. Macias, "Huck Finn Syndrome in History and Theory: The Origins of Family Privacy," *Journal of Law and Family Studies* 12 (2010): 99.

[112] On the NCLC drawing from the Social Gospel movement to criticize the immorality of capitalism, see Wood, "Emancipating the Child Laborer,' chapter four.

[113] There was also an unsuccessful push to draft a child labor law that proscribed the same standards as the Keating-Owen Act but would be based on the emergency war time powers of Congress. Trattner, *Crusade for The Children,* 138-139. While the war lent a nationalist case to the cause, the demand for wartime mobilization also led to a push to suspend child labor and compulsory education laws at the state level (as it had during the Civil War), and an unsuccessful move to repeal the Keating-Owen Law. Wood, "Emancipating the Child Laborer," 236-244.

constitutional amendment. After the Supreme Court struck down the Child Labor Tax Acts, in 1922, more than twenty-five organizations, mostly labor unions and national women's organizations, came together to form a committee to draft the proposed federal child labor amendment. Samuel Gompers, the president of the American Federation of Labor, chaired the committee and was joined by members of the NCLC, the National Consumers League, the National League for Women's Voters and prominent religious leaders including Father John A. Ryan. Leading progressive lawyers, including Roscoe Pound and Ernst Freund, advised on the construction of the Amendment.[114] Two days after the Supreme Court decision striking down the child labor tax law in 1922, the proposal for a constitutional amendment was first made in Congress.[115]

The broad construction of the Amendment reflected the optimism of its backers. After considerable discussion, the proposed amendment granted Congress the "power to limit, regulate and prohibit the labor of persons under eighteen years of age."[116] Florence Kelley successfully pushed for the age limit to be set at eighteen, not sixteen, which at the time generally marked the end of childhood as defined in the census, so that seventeen year olds in hazardous industrial occupations would not be beyond Congress's reach. The word "labor" as opposed to "employment" was adopted at the insistence of the Committee who feared problems with enforcement related to parents concealing the work their children performed in farms, homes and tenements as "chores."[117] Though the process of amending the U.S. Constitution first required two-thirds majority support

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[114] National Child Labor Committee, "Handbook on the Federal Child Labor Amendment," prepared by the Department of Research and Publicity, no. 368, revised May 1936, 12-13, Box 42, Samuel Lindsay McCune Papers, Columbia University, New York City, N.Y.

[115] *The New York Times* opined that the decision in *Bailey* was a blessing in disguise because the Amendment could be more broadly constructed and give Congress more powers than the narrow child tax labor law. "Editorial Comment On the Child Labor Decision," *The American Child,* 6. no. 1 (May 1921), 91 as cited in Wood, "Emancipating the Child Laborer," 269.

[116] It took two years from when the NCLC first voted to pursue a constitutional amendment in June 1922, shortly after the *Bailey* decision, to when the final version of the Amendment was adopted. Congress first referred the matter to the Judiciary Committee in the fall of 1922. Trattner, *Crusade for the Children,* 163-166.

[117] For a summary of the debates on these two decisions, and the recommendations of House and Senate Committees, see NCLC, "Handbook on the Federal Child Labor Amendment," 13-15.

in the House and Senate, then ratification by three quarters of the States, the backers of this Amendment in 1924 were not too daunted by the prospect. Within the past ten years, four amendments had been adopted to alter the Constitution to meet the governing needs of the day. The conservative President Harding urged Congress to adopt it, arguing that the Constitution ought to be amended "to meet public demand when sanctioned by deliberate public opinion."[118] The would-be Twentieth Amendment easily secured the necessary two-thirds majority in both houses, the House of Representatives passed the Amendment by a vote of 297 to 69 with the Senate approving the vote shortly thereafter (61 to 23) on June 2, 1924. It was submitted to the states for ratification.

At the same time, however, there were several developments between 1916 and 1924 that would also sow the seeds of the Amendment's ultimate defeat. First, the rates of child labor appeared to be falling. The 1920 census showed that the participation of children in the workforce had apparently been "cut in half" since 1910, dropping to one million. While industrial rates of child labor were declining, the census masked the full extent of child labor for two reasons: it was conducted in January when agricultural labor was at standstill and it was also taken in the brief window when the second child labor law was in effect.[119] Nonetheless, opponents seized upon the census data to argue that it showed that states were more than capable of addressing the issue of child labor alone. In early the 1920s, the NCLC began to focus its campaigns on the problem of agricultural child labor as well, which goaded Southern states and gave opponents of the

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[118] "President Harding: Message to Congress," December 8, 1922 as reported in *American Child,* 4, no.4 (December 1922): 1.

[119] In addition to these specific factors, as the NCLC often pointed out the census never captured the full extent of child labor as it did not measure the labor of children under ten or over fifteen, or children who worked in the home. The plight of children in agriculture, particularly in commercial agriculture, had become the final frontier of concern for the Committee as the rates of industrial labor declined. "Child labor on the farm is child labor nevertheless – it interferes with the educational rights of the child," the Committee explained justifying its more expansive take on the problem, for "it is no man's prerogative to exploit a child, even if it is his own." *The American Child,* 4, no.4 (November 1922): 1-2.

federal Child Labor Amendment the ammunition to argue that the Amendment allow the federal government to place a federal agent on every farm in the country.

Opponents were also able to capitalize on the backlash to the growing powers of the federal government, amplified by the anti-communist politics that took hold in the 1920s. The two most recent constitutional amendments, prohibition and women's suffrage, had provoked a significant backlash.[120] The Eighteenth Amendment granting Congress the power to prohibit alcohol, which came into force in 1920, was seen by many as a frightful and fanciful effort of the federal government to regulate citizens' lives. A broad range of Americans, including prominent anti-vaccinationists from Lora Little to Chas Higgins, resisted prohibition. The Nineteenth Amendment, which formally granted women suffrage, was also adopted in 1920.[121] Women's suffrage had been a divisive political issue for decades, and the ratification campaign for Nineteenth Amendment had led to the development of organized networks of anti-suffragists who argued that the women's suffrage was a threat to the unity of family government. [122] In this context, the Red Scare contributed to an intensification of debates over the role of the federal government. After the Bolshevik Revolution in 1917, a series of bombings by radicals within the United States in 1919 sparked a widespread panic of creeping red menace on American soil. In light of that, opponents to the would-be Twentieth Amendment cast it as the apogee of the ever-aggrandizing powers of the federal government, one that would enable a Bolshevik-style plan to nationalize the youth.

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[120] Sheppard-Towner Infant and Maternity Act and the Smith-Towner proposal for a federal bureau of education were also victims of this backlash. The demise of Sheppard-Towner has received the most attention in the existing scholarship, see, among others: Stanley Lemons, "The Sheppard-Towner Act: Progressivism in the 1920s," *The Journal of American History* 55, no. 4 (1969): 776-86**,** Robyn Muncy, *Creating a Female Dominion in American Reform, 1890-1935* (New York: Oxford University Press, 1991), chapter five, Delegard, *Battling Miss Bolsheviki,* chapter four, Nielsen, *Un-American Womanhood,* 104-111, especially 110 where Nielsen argues that the opponents of Sheppard-Towner rested on a *"politicization of patriarchal fatherhood,"* and that "male power in the home was threatened by a subversive female arm of the federal government staffed by unnatural and childless women,' and Rix, "Gender and Reconstitution." On the defeat Smith-Towner, see Lynn Dunemil, "The insatiable maw of bureaucracy": Antistatism and education reform in the 1920s," *The Journal of American History* 77, no.2 (Sept. 1990): 499-524.

[121] Native American women did not get the vote until 1924, and many African American men and women until 1964.

[122] Rix, "Gender and Reconstitution."

Though the proposal for a federal Child Labor Amendment ostensibly changed the terms of the debate from whether the states had the right to regulate child labor to whether the states had the sole right to regulate child labor to the exclusion of the federal government, opponents of the Amendment continue to argued that it threatened "individual rights" and "parental rights" as well.

Paternal sovereignty figured prominently in successful campaigns against the federal Child Labor Amendment because it was the glue that bound all of the counter-arguments together. While the Red Scare was not immediately fatal to the federal Child Labor Amendment, the specter of socialism played a small but vociferous role in the congressional debate over its adoption. Senator James Reed of Missouri proclaimed that the proposed amendment would "revolutionize our form of government" by creating a power in Washington that could "override parental authority, trample on the institution of the home; and establish an offensive and tyrannical socialism on the soil that… has been consecrated to individual liberty."[123] The long standing association between socialism and the end of the family, first popularized by Frederick Engels in the 1880s would ultimately come to undermine support for the Amendment when anti-statists mobilized against its adoption in a campaign where the NCLC would pay a heavy price for Florence Kelley's well known friendship with Engels.

In the early 1920s, the Sentinels of the Republic, for example, joined the dots between socialism, the spate of constitutional amendments, the enlargement of the federal government, and the threat to state's rights and family government that would likely follow from the impending "nationalization" of youth. Casting federal government intervention on behalf of the child as a threat to family government and to federalism itself, the Sentinels of the Republic reversed a central premise upon which the campaign against child labor had rested – the argument that removing the child from the labor

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[123] *Congressional Record,* 68th Cong., 1st Sess. (1924), 10091.

place would restore the rightful role of the male-headed family. In so doing, they swiftly turned public opinion against the Amendment and the NCLC's decades' long campaign about the need for state action to uphold the rights of the child. Resting on the same broad cultural consensus about the importance of the male-headed family, the Sentinels were able to galvanize opposition to the expansion of federal power across class, faith and partisan lines in a matter of months by touting the sovereignty of the home.[124]

The Sentinels of the Republic came together in the summer of 1922 as plans for the federal Child Labor Amendment were brewing. During a meeting held at the New York City home of Charles S. Fairchild, a man who had served as Grover Cleveland's Secretary of the Treasury, a group of well-connected Americans, Democrats and Republicans, came together to share their concerns about "federal paternalism" and resolved to found the Sentinels of the Republic. "Federal paternalism," the Sentinels felt was the "third crisis" to confront the nation. Accordingly, they sought to "sound the call to arms" among the people to "rise up against the encroachment of a new tyranny threatening their liberties and welfare." The Sentinels self-consciously fashioned themselves as the direct descendants of the American Revolutionary tradition, holding their first event to coincide with the 200th birthday of Samuel Adams, the proto-libertarian founding father whom the Sentinels heralded as the "progenitor of American Independence." Their debut, on September 27, 1922, took place at Faneuil Hall in Boston in the same hallowed halls where the plot known as the Boston Tea party had been hatched one hundred and forty-nine years earlier. Those gathered chinked their

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[124] As Elizabeth Marjorie Wood argues, the conservative campaign against the CLA also reflected a transformative moment in understandings of American capitalism and freedom where the moral case for regulated capitalism that marked the Progressive Era came under assault from a "powerful, conservative alliance that linked unregulated capitalism to the sanctity of American way of life, the "fundamentals" of the Bible and the Constitution, and the inviolability of the family." 274. Wood argues conception of freedom that tied Biblical ideas about parental authority, the home to an anti-regulation agenda had won out against a "progressive vision of freedom that has once found powerful expression in the campaign to emancipate the child laborer." 330-331. To that end, I would stress that ideas about paternal sovereignty were not merely the product of the religious fundamentalism of the 1920s, but had far broader and deeper cultural resonance.

glasses and raised a toast to the founding of the Sentinels of the Republic. With this new crisis facing the nation, it behooved the "patriots of America" to rise up again "to battle for the preservation of constitutional government, the cornerstone of American liberty" that the patriots of 1776 and 1861 "built and cemented with their blood."[125]

As the federal Child Labor Amendment made its way through Congress, the insurgent citizens' group that boasted cozy relations with politicians and industry, had a very clear target for their first battle. In their minds, the Amendment epitomized the dangers of the growing centralization of government powers. The title of the Amendment, the Sentinels claimed, was deliberately calculated to "lull the mind to sleep in the arms of the heart."[126] They charged that far from a mere "amendment" to the constitutional order of the United States, it was "the most revolutionary change in our form of government ever to be proposed."[127] The effect of the "so-called child labor amendment" would be to "nationalize the youth of the country, to place them under the domination of a bureaucracy and to open their homes to invasion by Federal agents."[128] The defense of the "constitutional government" would require a vigorous defense of individual rights, the home, state's rights and the principles of federalism. It threatened to upend and reverse a system of statecraft rooted in local self-government that had stood since the American Revolution. The "'so-called' Child Labor Amendment," the Sentinels warned, would "destroy local self-government" by subjecting "your children and your

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[125] William Whitehead, "The Story of the Sentinels of the Republic,"(1936) A-109, Box 1, Folder 4; 2-3. Alexander Lincoln Papers, 1919-1940, Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, MA. [Hereafter: Lincoln Papers]; "To Arms! To Arms! The New Crisis," n.d., A-109, Box 1, Folder 5, Lincoln Papers. Sentinels of the Republic Records 1922-1924, Williams College, Williamstown, MA, [Hereafter: Sentinels Papers].

[126] Mrs. Elizabeth Lowell Putnam, "Why the Amendment is Dangerous," *The Woman's Journal,* December 27, 1924, 12.

[127] Louis Coolidge, "Letter to the Sentinels of the Republic," September 15, 1924, Vol.5, Series II, Sentinels Papers.

[128] Louis Coolidge, "Letter to the Committees of Correspondence" (N.D. 1924), A 109, Box 1, Folder 6, Lincoln Papers.

home to inspection of a federal agent."[129] The assumption at the heart of their campaign about the nexus between individual liberty and the freedom of the home was articulated in their slogan, a war cry: "Every citizen a Sentinel! Every home a sentry box!"

The Sentinels had built a standing army by the time that the Child Labor Amendment was proposed in 1924, and were ready for war. By 1923, the Sentinels claimed to have branches in more than 43 states and 480 cities and towns. In each town, the "most available man was asked to serve as Chief Sentinel" and encouraged to hold the first meeting on Constitution Day, September 17. With monthly meetings to be held thereafter it would "be inspiring to know that in cities, towns and villages across the land, Sentinels were gathering on the same night every month for a concerted effort to Restore our Republic."[130] The leadership of the organization remained rooted in Boston and New York, but the Sentinels' chief strategy was to distribute one article per week that could be reproduced by local newspapers, boasting to reach "hundreds of newspapers of all shades of political opinion in every section of the United States."[131]

The Sentinels, however, rapidly found themselves at the frontline of the battle in Boston when the Massachusetts legislature voted on June 5, 1924, to refer the Amendment to the people in an advisory referendum to be held in conjunction with the states election in November.[132] The Sentinels responded with a vigorous campaign. In line with the state campaign laws, they set up a campaign committee named the "Citizen's Committee To Protect Our Homes and Children" with the Massachusetts Public Interest League and began inundating voters with their materials.[133] From the

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[129] Herbert Packer, Pamphlet for the Citizens Committee to Protect Our Homes and Children, September 1924, MC-360, Box 16, Folder 294, Mrs. William Lowell Putnam Papers, 1862-1935, Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, MA. [Hereafter: Lowell-Putnam Papers].
[130] Mrs. Katherine T. Balch, "Plan for the Organization of the Sentinels of the Republic," June 1923, A-109, Box 1, Folder 2, Lincoln Papers, Mrs. Katherine T. Balch "Report on the Sentinels of the Republic," 1924, Vol. 5, Series II, Sentinels Papers.
[131] Raymond Pitcairn, "Letter To Members," 1933?, Vol. 5, Series II, Sentinels Papers.
[132]Only the
[133] The Massachusetts Public Interest League was a reformulation of the Massachusetts Association Opposed to the Further Extension of Suffrage.

outset, the carefully chosen name of the campaign committee signaled their intentions to change the terms of public discussion. For decades, the NLCL had called for government intervention to uphold the rights of the defenseless child who was debilitated by the burdens of industrial labor, exploited by greedy industrialists and shiftless fathers alike. The Citizen's Committee to Protect Our Homes and Children would instead cast paternalistic government as a threat to the sovereignty of the home, arguing that the natural solicitude of parents best protected the interests of the child.

The Sentinels knew that the task of defeating the Amendment would be a "formidable one." "Public opinion, at the outset, moved by the appealing nature of the subject, was almost uniformly for the Amendment," the Sentinels admitted. "The Press, with few exceptions, favored it," and large national organizations, like the NCLC, had "sent representatives to Massachusetts to sway the vote."[134] The supporters of the Amendment were in fact slower to assemble than its opponents. As the NCLC conceded, they were "lulled to sleep, or at least into a state of semi-slumber" because they "blundered in presuming" that because all of the politicians from Massachusetts had supported it "the people would too."[135] Indeed, President Coolidge (a former Governor of Massachusetts), Massachusetts' Senators Henry Cabot Lodge and David Walsh, despite their small-government leanings, all stood behind the Amendment.

At the heart of the Sentinel's vision of "constitutional government" sat the so-called "sentry-box." The organization vowed to maintain the "fundamental principles" of the American Constitution by opposing "further Federal encroachment on the reserved rights of the States and of the individual citizen." By preserving a "free republican form of government in the United States" the Sentinels declared they would "stop the spread of communism." The liberty of the "individual," in their view, constituted the

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[134] "Partial Record of Accomplishments," The Sentinels of the Republic, 1931, A-109, Box 1, Folder 2, Lincoln Papers.

[135] Wiley Swift, "Massachusetts Referendum Votes Disapproves Amendment," *The American Child* 6, no.12, (December 1924): 1.

"fundamental principles" of the American constitution. A close reading of their campaign materials and correspondence demonstrates that the "individual" upon whose rights the Amendment was believed to encroach was the white male head of household, and the liberty at stake was his right to govern his own home.

John Gall, a Sentinel and lawyer from the District of Columbia, explained that the Amendment would transform the country by undermining parental responsibility. "A fundamental concept underlying the American system of government is that the state shall not undertake to do for the individual what he can do for himself, nor the federal government for the state what the state can effectively do for itself," Gall reasoned, before declaring the "reverse" had found "concrete expression" in the proposed Amendment: "The logic of this amendment is that the duty of rearing the youth of the nation rests primarily upon the government and secondarily upon the parents."[136] Another Sentinel explained that it was his "fundamental individual right" that was at stake, the "right to decide if my 17 year-old should work or not, or whether he should go to school..." The home figured as the first station of self-government within the federalist structure of the Republic, and federal paternalism threatened the patriarch's control over his sovereign home. The Sentinels' voter cards urged: "if you would defend your hearthstone from centralized bureaucratic control… if you believe in local self-government, if you would preserve the foundation stones of democracy – vote NO on Referendum No.7"[137]

Supporters of the Amendment believed that the rhetoric of the Sentinels about individual rights and the home was mere chicanery, designed to deflect their true interest

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[136] John C. Gall, of the Bar of the District of Columbia, "The Proposed Twentieth Amendment," A-109, Box 2, Folder 14, Lincoln Papers.
[137] Henry Shattuck, "A Letter from Henry Shattuck to his constituents: Vote NO on Referendum 7" October 31, 1924, Carton 3, Henry Lee Shattuck Papers, Massachusetts Historical Society, Boston, MA. [Hereafter: Shattuck Papers].

as a smokescreen for the manufacturing industry. [138] As the *New Republic,* a bastion of Progressivism and loyal friend of the Amendment explained, "in the current propaganda against the Child Labor Amendment, the economics of the issue are strangely subordinated. We are gravely assured… that what is at stake is our scared liberty, the sanctity of our homes."[139] Florence Kelley exclaimed that no matter what groups like the Sentinels "publicly alleged, and harped upon *ad nauseum*" as the basis of their opposition, "the real fundamental underlying objection," she charged, "is *the threatened loss of their privilege to continue to exploit"*[140] Certainly, there was more than a grain of truth to the charge. Louis Coolidge, the president, was an archetypal Sentinel and his links to industry ran deep.

Coolidge, a Brahmin whom the Sentinels boasted could trace his lineage back to Mary Chilton, the first person said to have to set foot on Plymouth Rock, graduated from Harvard in 1883.[141] In the 1920s, he was the president of the United Shoe Machinery Company in Lynn, Massachusetts. Moreover, his reputation for forestalling unionization amongst his employees led to his appointment as chairman of the Welfare Work Department within the conservative, pro-business National Civic Federation.[142] Coolidge, however, also had a long-standing interest in politics and public affairs. Before moving into industry, Coolidge had first cut his teeth in politics, working from 1888-1891 as private secretary to Henry Cabot Lodge, a Republican Senator. In the 1890s, Coolidge then tried his hand at journalism, working as a political correspondent for newspapers in New York, Boston and in Washington, D.C, before taking an

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[138] After the election, the NCLC would report that $15, 522 was spent in Massachusetts to defeat the Amendment and that most of the contributions came from manufacturing interests and businesses. "Massachusetts Spent $15, 522 to Defeat the Child Labor Amendment," *The American Child* 8, no. 1 (January 1925): 5.
[139] "Child Labor, The Home and Liberty," *The New Republic,* December 3, 1924, 32.
[140] Florence Kelley, "Objections, Secret and Public To the Amendment," *Woman Citizen,* December 27, 1924, 12. [Italics in original].
[141] William Whitehead, "The Story of the Sentinels of the Republic,"(1936), 3-5 A-109, Box 1, Folder 4, Lincoln Papers.
[142] Sheldon M. Stern, "American Nationalism vs. The League of Nations: The Correspondence of Albert J. Beveridge and Louis A. Coolidge, 1918-1920," *Indiana Magazine of History* 72, no. 2 (1976): 140–141.

appointment as Assistant Secretary Treasurer in Roosevelt's administration.[143] With his strong connections with Republican heavyweights, experience in journalism, and credentials as an anti-union business leader in Boston, Coolidge had the skills, networks and convictions necessary to make the Sentinels a successful lobbying organization. While he undoubtedly had a vested interest in the manufacturing industry, his interest in politics was also not sudden or contrived.

Nonetheless, the Sentinels were sensitive to accusations that the organization was merely a front for business interests. They spent considerable energy trying to distance their cause from the manufacturing industry, presenting themselves as an organization of distinguished and disinterested citizens. In March 1925, after the Massachusetts election, *The World's Work* published an article alleging that the National Association of Manufacturers was behind the opposition in Massachusetts. Alexander Lincoln, who assumed the presidency of the Sentinels after Louis Coolidge died, wrote to the editor to protest the "misinformation" being disseminated. He vigorously denied the association's involvement, claiming the victory belonged to the citizens of Massachusetts whose consciousness had been aroused by the campaign. He forwarded a letterhead of the "Citizen's Committee To Protect Our Homes and Children" to the editor so he could see for himself the caliber of men and women who comprised its leadership, and took the liberty of highlighting a few notables. The committee president, Herbert Parker, was a former Attorney General of the State. Other members included the presidents of Harvard, Massachusetts Institute of Technology and Boston College, the Episcopal Bishop of Massachusetts, Cardinal O'Connell, leading lawyers, including a former Massachusetts Supreme Court justice, a Juvenile Court judge and Mrs. Elizabeth Lowell Putnam, matriarch of Boston's Brahmin families. Lincoln claimed that The Committee

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143 William Whitehead, "The Story of the Sentinels of the Republic,"(1936) A-109, Box 1, Folder 4, 3-5, Lincoln Papers, Sheldon M. Stern, "American Nationalism vs. The League of Nations: The Correspondence of Albert J. Beveridge and Louis A. Coolidge, 1918-1920," *Indiana Magazine of History* 72, no. 2 (1976): 140–141.

spent $15, 000 on the campaign, all of which was raised by donations from citizens, with no individual donation exceeding $200.[144]

In truth, the prominent members of Boston's high society whom Lincoln held up as examples of the Sentinels impartiality, for example, Elizabeth Lowell Putnam, were far from free from manufacturing money. Lowell Putnam, whom Lincoln felt needed no introduction, was a formidable anti-suffragist and expert on maternal and infant health. She was also an heir to the Lowell fortune, made by her father and grandfather in the textile industry in Lawrence, Massachusetts. Her father, Augustus Lowell, owned the Pacific Mills, the largest textile combine of its era. Her brother was Abbott Lawrence Lowell, the President of Harvard University – the same president whose title the Sentinels routinely invoked as a testament to the informed, independent citizenry who made up its ranks.[145]

The broader lobbying platform of the Sentinels of the Republic in the 1920s, however, suggested local control of domestic relations was the centerpiece of their opposition to growing state power because the Sentinels also opposed a range of legislative reforms that affected the family in which they had no clear pecuniary interest. The organization relied on the same logic about paternal sovereignty to oppose a set of legislative reforms in the 1920s, including opposing the federalization of marriage and divorce laws, the Equal Rights Amendment, the establishment of a Federal Education Bureau, and calling for the repeal of the Sheppard-Towner Act that provided federal funds for maternal and infant health care. In that respect, Elizabeth Lowell Powell personified the politics of the Sentinels. She had spent the 1910s waging a formidable

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144 Alexander Lincoln, "Letter to Arthur W. Page, Editor the *World's Work,"* March 10, 1925, A-109, Box 2, Folder 13, Lincoln Papers. The Sentinels never disclosed their financial records, nor the records of the "Citizen's Committee To Protect Our Homes and Children." Five weeks before the election, the Citizen's Committee sent an appeal for contributions to its members, and given the mixture of high profile public figures and industry sympathizers who made up the committee, it is likely that few members gave a sizeable donations. Citizen's Committee To Protect Our Homes and Children, "Appeal for Contributions," (n.d.), Carton 3, Shattuck Papers.

145 Ferris Greenslet, *The Lowells and their Seven Worlds* (Boston: Houghton Mifflin Company, 1946).

fight against the adoption of women's suffrage on the grounds that the male-headed family, and not the individual, constituted the unit of the political system. After the suffrage amendment was ratified by the states in 1920, she turned her attention to defeating the Child Labor Amendment and the Sheppard-Towner Act. She dedicated her life to improving maternal health and infant care, but vociferously opposed the federal government supporting that cause. It was the "duty of the husbands and fathers of the country" to ensure mothers received "proper care," she avowed, and "not the federal government."[146] Local control of domestic relations was the unifying theme for the various Sentinels' causes. A firm belief in the natural, gendered hierarchy of family government as the primary unit of the state was at the core of an emerging conservative ideology opposed to the liberal state.

Reformers were frustrated by the specious argument that the Amendment would invade individual rights and the home. The Sentinels repeatedly warned that the Amendment threatened to encroach "on the reserved rights of the States and of the individual citizen." In its most explicit form, the argument omitted "states' rights" from the equation altogether. In an oft-quoted statement, Reverend Warren Candler, a prominent Bishop of the Methodist Episcopal Church in Georgia who helped found Emory University, drew a direct line between the expansion of Congress's powers and the corresponding diminishment of family government: "This 'Child Labor' amendment precedes on the absurd assumption that Congress will be more tenderly concerned for children than their own parents…" It was a troublesome assumption in the Bishop's mind because "this assumption appraises congress government far above its worth and puts home government far below its value."[147] In this rendering, the Amendment was not

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[146] as quoted in Nielsen, *Un-American Womanhood*, 105.

[147] National Industrial Council, "The Proposed Twentieth Amendment to the Federal Constitution: A Cross-Section of American Sentiment in Opposition to the Revolutionary Grant of Power Sought by Congress from the Several States", 2, Box 16, Folder 294, Lowell-Putnam Papers.

a threat to the sovereign rights of the states, per se, but a direct threat to the sovereignty of family government itself.

Yet, the Amendment did not grant Congress any powers that states had not already relied upon. Its supporters struck back at this misrepresentation. "Does the parent in the United States now enjoy discretion beyond possibility of legislative invasion, in disposing of his children's time and labor that is assumed is the Child Labor Amendment would destroy?" asked the editor of the *New Republic.* His answer to his own rhetorical question was an emphatic "No. The states now can do everything that is proposed to empower the federal government to do. If liberty and the home are destroyed when a government is in a position to step in between parent and child, they were destroyed upon the adoption of the Constitution, which did not establish *patria potestas* in a bill of rights."[148] This evidence-based protest by advocates of the Amendment largely fell on deaf ears. As the Massachusetts Public Interest League wantonly charged in the lead up to states referendum, "In the opinion of eminent constitutional lawyers, the amendment would destroy all constitutional rights of parents and minors."[149]

It mattered little that the constitutional argument was spurious; what mattered were the rights that citizens imagined they had and these included the "natural rights" of parents. The Sentinels rightly perceived that by painting the Amendment as a threat to the rights of parents, and the sanctity of the home, they would be able to motivate diverse sectors of the community to go to the polls to vote it down. Portraying the Amendment as a threat to both state and individual rights deftly entwined the causes of federalism and parental rights, linking the interests of mill owners with economic interests of farming families and working-class families. Further broadening its popular appeal, the cause of parental rights was rarely framed as a question of economic rights –

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[148] "Child Labor, The Home and Liberty," *The New Republic,* December 3, 1924, 32.
[149] Massachusetts Child Labor Committee, "Statement on the Proposed Child Labor Amendment to the Federal Constitution," MC-360, Box 16, Folder 294, Lowell-Putnam Papers.

it was painted as a threat to the 'fundamental' rights of parents. From this frame of reference, the Amendment appeared to threaten the political and cultural interests of both middle class families and religious minorities. In the Massachusetts referendum, the Sentinels succeeded in uniting broad opposition across class, faith and partisan lines by asserting the sovereignty of the family was at stake.

Moreover, while the NCLC vociferously protested that the Sentinels were a smokescreen for the interests of the manufacturing industry, the counter-charge leveled by the Sentinels, that the Amendment's supporters were engaged in a socialist plot against the United States, proved to be more persuasive to voters. In the context of the Red Scare, the Sentinels made much of the fact that key players in the NCLC, for example Owen Lovejoy, were known to have socialist politics, and they particularly exploited Florence Kelley's known friendship with Frederick Engels to cast the Amendment as a communist plot declaring the Amendment the "FLORENCE KELLEY AMENDMENT."[150] In doing so, the Sentinels leveraged the backlash against the Nineteenth Amendment to argue that the current state of politics had been brought about because of women's involvement in politics and their maternal sympathies. At every opportunity, the Sentinels explained that there was an international Bolshevik plot at play to "organize a revolution through women and children."[151]

The Sentinels warned that the Sovietized women behind the Amendment would exploit the maternal sympathies and political naivety of newly enfranchised female voters. There was nothing that appealed to the average woman "more instinctively, more intuitively, than the family." Women, politically inexperienced as they were, nonetheless did not need to be well educated in civics and history to understand that the "family is the cornerstone institution in this country" and it was her "very interest in the family that

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[150] On the backlash against the women behind the Children's Bureau more generally, see Muncy, *A Female Dominion,* chapter five.
[151] *Woman's Patriot*, June 1, 1924, 1.

so often leads to her betrayal." Women were so blinded by their maternal instincts, that as Herbert Spencer suggested in the 1890s they were wont to make the mistake of "injecting the ethics of the family" into the "ethics of the state."[152] In the 1920s, the Sentinels warned that women had been duped into thinking the only way to protect children was to amend the constitution, when giving Washington that grant of power would in fact imperil the family and the autonomy of the home.[153] Using gendered appeals, the Sentinels proposed that the Amendment was a Soviet proposal: the aim was to "bring about the nationalization of children and make the child a ward of the Nation." And in so doing, the Sentinels turned on its head a central argument that had long underpinned the NCLC campaign to end child labor – that government intervention to remove children from the marketplace would restore the autonomy and natural hierarchy of the family. Instead, the Sentinels mobilized a broad coalition by casting the Amendment as a proposal that would nationalize the child and spell the ruin of family government. Thus, the Sentinels were able to quickly forge important coalitions with existing organizations and institutions with significant clout within the state, leveraging their resources to mobilize opposition against the proposed Amendment in a matter of months, starting with the Catholic Church.

The Sentinels, whose own leadership ranks read like a roll call card for the Boston Brahmins, enlisted the support of Cardinal O'Connell, the Archbishop of Boston.[154] In the 1920s, in the midst of a Ku Klux Klan revival that signaled the ascendancy of strong anti-Catholic sentiment across America, long-standing tensions

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[152] Herbert Spencer, *Principles of Sociology* (New York: D. Appleton & Company, 1898), 719-720.
[153] President Warren, Transcript of Address given at meeting of the Sentinels of the Republic at Willard Hotel, Washington D.C., January 31st, 1926, Vol. 2, Series I, 31, Sentinels Papers.
[154] The Catholic Church was divided on the issue, with the National Catholic Welfare Conference strongly backing the Amendment. The Church hierarchy, led by Cardinal O'Connell was firmly opposed. O'Connell issued statements in the press and through the *Pilot* to the effect "Let there be no mistake that the Frank P. Walsh Committee (a lay committee associated with the Welfare Conference) does not represent the Catholic Church and is committing an act of treachery against their faith and their Church." Cardinal O'Connell, "Statement on the Church and the Child Labor Amendment," A-109, Box 2, Folder 14, Lincoln Papers.

over the state and parochial schooling were reaching a boiling point. A proposal for a Federal Education Bureau reached the floor of Congress, with the NCLC and the National Education Association joining forces to lobby for its adoption.[155] As we shall see in the next chapter, numerous states across the Midwest considered proposals to make public schooling compulsory and this would have effectively outlawed parochial schooling. In that context, it did not take much to convince the Catholic clergy that the proposed Amendment would grant Congress sweeping powers over the youth that could extend far beyond child labor, constituting an "unprecedented threat to the natural rights of parents."[156]

Cardinal O'Connell made use of the Catholic Church's extensive institutional reach within Boston to motivate voter turnout against the Amendment. O'Connell invited over 600 Catholic women, representing Boston's three hundred parishes, to meet with him at Fenway Hall at the Notre Dame Academy on October 6, 1924, one month prior to the referendum to incite their interest with a host of speakers. The women present organized to coordinate their opposition to the Amendment. Throughout the month of October, every page of the diocesan paper, *The Pilot*, was dedicated to discussing the Amendment. And at the Cardinal's urging, on three successive Sundays the clergy of Boston dedicated sermons to warning the parishioners of the dangers of the Amendment.[157] Aligned with the Catholic Church, the Sentinels were able to use the Church's significant institutional reach among Boston's large working and middle class Irish Catholic population to turn out the vote against the Amendment.

At the same time, the prominent position of numerous Protestant leaders in the ranks of the Sentinels allowed them to avoid the appearance they were waging war for a

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[155] Dumenil,"'The insatiable maw of bureaucracy,'" 499-524.
[156] Cardinal O'Connell, "Letter to Louis Coolidge," October 2, 1924; A-109, Box 3, Folder 18, Lincoln Papers.
[157] Cardinal O'Connell, "Letter to Louis Coolidge," October 2, 1924; A-109, Box 3, Folder 18, Lincoln Papers.

sectarian cause. J. Gresham Machen, an eminent Presbyterian theologian who led a conservative revolt against modernist theology, was an active Sentinel, serving as the Executive Director of the organization and regularly speaking in Congress on its behalf.[158] William Lawrence, the Episcopal Bishop of Massachusetts, was often cited as supporting the Sentinels' cause.[159] The Methodist Reverend Candler acted as an emissary between North and South. Beyond prominent Protestant ministers, the Sentinels regularly used well-known public figures such as the President of Columbia University, Nicholas Murray Butler, a Protestant who was a respected educator, diplomat and active Republican, to make their case. Aligning their cause with standard bearers of patriotic Protestant nationalism, the Sentinels' campaign revealed that the defense of paternal sovereignty resonated strongly with both Catholic and Protestant beliefs about the natural family.

Anti-feminists also sprang to action in aid of the cause defending family government. The women behind the Massachusetts Association Opposed to the Further Extension of Suffrage to Women marshalled their former membership base in a newly reconstituted organization, the Massachusetts Public Interest League. They redirected their bi-weekly newsletter, *The Women's Patriot,* launched in 1918 to oppose women's suffrage, to this new purpose, updating the by-line: "Dedicated to the Defence of the Family and the State AGAINST Feminism and Socialism."[160] Boston had been a hotbed for anti-suffrage activism, as prominent men and women railed against the adoption of the Nineteenth Amendment because it threatened family government by ending the principle of virtual representation that had hitherto structured the Republican basis of

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158 For a biography of Machen, see D.G. Hart, *Defending the Faith: J. Gresham Machen and the Crisis of Conservative Protestantism in Modern America* (Baltimore: The Johns Hopkins University Press, 1994), especially 137-141 for his involvement with the Sentinels.

159 The Bishop also happened to be the son of Amos Adams Lawrence, a prominent industrialist and owner of Ipswich Mills, who was credited with converting many of his fellow Boston Brahmins to his Episcopalian faith.

160 Before 1920, the byline had read: For Home and National Defense Against Woman Suffrage, Feminism and Socialism.

American democracy. As one Congressmen put it in 1915: "Faithful to the doctrine of the old Bible and true to the teaching of the new, our fathers founded this Government upon the family as the unit of political power, with the husband as the recognized and responsible head."[161] The anti-suffragists may have lost the war, but they were determined to win the peace. They viewed the Child Lab or Amendment as another measure that threatened to rip the child from the government of the family and place it in the hands of the federal government.[162] Many of the Sentinels had been anti-suffragists, and the links between the two organizations continued to be close – Mary Kilbreth, for instance, the leading force behind *The Women's Patriot* was on the executive committee of the Sentinels.

The Women's Patriot painted the home as the foundational cornerstone of American liberty. In an article published in June 1924, the editors charged that the Child Labor Amendment would mean the "invasion of the homes of the poor" and the "nullification of the Fourth Amendment" which declared "the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures, shall not be violated." The Amendment codified the Anglo-American common law maxim "a man's house is his castle," and the article laid out the long history of the home as a bulwark of liberty against tyranny. "This 'Right of Castle,' the editors alleged was "sacred for a thousand years before Magna Carta was signed in 1215" and was affirmed "no less than thirty times by British Kings." It was a right, the *Women's Patriot* proclaimed, that belonged to all men as the measure of his independence and liberty

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161 Representative Heflin, *Congressional Record,* 52nd Cong. 1st Sess. (1915), 1465 as cited in Reva Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115, no. 4(2002): 981. Siegel makes a parallel argument that the conception about the family being part of the federalist system underlay the opposition to the Nineteenth Amendment. On this point, see also Rix, "Gender and Reconstitution," chapter two.

162 On the involvement and ideology of anti-feminists in opposing the Child Labor Amendment see also Nielsen*, Un-American Womanhood,* 55-61; Delegard, *Battling Miss Bolsheviki*, 115-130; Rix, "Gender and Reconstitution," epilogue.

regardless of his economic circumstance. The article quoted William Pitt's famous speech against the Excise Bill delivered in 1763:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storms may enter, the rain may enter, - but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement."[163]

Without detailing how the Child Labor Amendment would nullify the Fourth Amendment, the article suggested that the defense of men's "right of castle" was the catalyst for American Independence and the cornerstone of American liberty. Much like the NLMF and the Southern Democrats in the debate over the Children's Bureau, anti-suffragists argued that the Amendment would tread about the sovereign turf of a man's home, invading his castle.

The final weapon in the Sentinels' arsenal was to claim that Amendment would place a federal agent on every farm in the country, an appeal that both goaded farmers and middle-class urbanites who held romantic ideas about the white farm child. By the 1920s, most Americans and even most mill owners would concede industrial labor was injurious to the health and development of young children. But, in a moment when the United States population became predominantly urban instead of rural, the value of farm work was seen in precisely the opposite terms – the fresh air of the farm was the perfect laboratory for developing healthy bodies and healthy minds, instilling children with valuable skills and a sense of responsibility to the family economy of farmers. The popular idea of strong teenage sons of helping out independent white farmers was among the most pernicious, and powerful, myths of the campaign against ratification, as it concealed the reality of the constitution of agricultural child labor, which was disproportionately comprised of black children at work on the farms whose parents were

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[163] Lincoln Papers; "Invasion of the Home and Nullification of the Fourth Amendment", *The Woman Patriot,* vol.8, no.12, June 15th 1924, 3-4. A1-09, Box 2, Folder 14.

not independent farmers, but sharecroppers.[164]

The NCLC had left itself open to this attack. The Committee had pushed for the broadest possible construction of the Amendment because of their experiences in the difficulties enforcing state laws and the changing constitution of child labor. In 1920, sixty-one percent of employed children captured by the census the worked in agricultural pursuits, but the number might have been closer to the seventy-two percent registered in the census of 1910 if the census had been held in the summer when agricultural labor was at its height. [165] The plight of children in agriculture had become the final frontier of concern for the NCLC as the rates of industrial labor declined. "Child labor on the farm is child labor nevertheless – it interferes with the educational rights of the child," the NCLC explained justifying its more expansive take on the problem, for "it is no man's prerogative to exploit a child, even if it is his own."[166] Rural children were largely exempt from existing child labor and compulsory education laws, but the NCLC hoped Congress could reach them if the federal Child Labor Amendment was ratified.

In the end, the broad construction of the Child Labor Amendment proved a propaganda gift for its opponents, and the NCLC was a victim of its own success. Pointing to the already declining rates of industrial child labor, the Sentinels claimed that the Amendment would result in federal bureaucrats invading the respectable homes of all Bay state residents. In particular, they mocked the idea that Congress would intervene with the use of older youth laboring on the farm and in the house. Another argument played to gendered ideas about the breadwinning responsibilities of boys, depicting a widowed mother laboring in a factory as her healthy son stood idly by. With newspapers

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[164] Lumpkin and Douglas, *Child Workers in America,* 101. In this volume, Lumpkin and Douglas were particularly critical of the silence of the NCLC on black child labor from its inception.
[165] Eighty-eight percent of children were employed on home farms. Census enumerators were instructed not to count children helping their parents around the house or doing irregular farm work as "employed." "The Child Labor Amendment," *Editorial Research Reports 1924* 2, no. 524 (Washington, DC: CQ Press), 192.
[166] *The American Child* 4, no.4 (November 1922): 2.

like the *New England Homestead* becoming a steady mouthpiece for their stories, the Sentinels charged that the Child Labor Amendment would give undisputed power to Congress to control the labor of children "in the home, on the farm and in the school!"

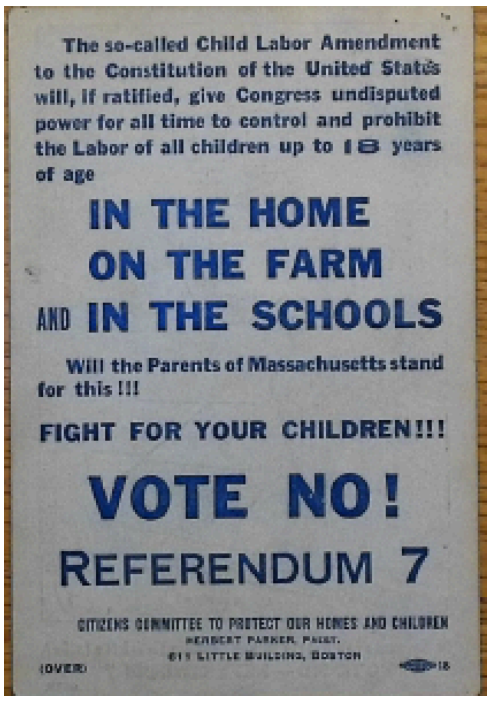

Image 4.3 Voter cards from the "Citizens Committee to Protect our Homes and Children" campaign in Massachusetts in 1924.

Sensing how that propaganda was playing out, the National Committee suspended its investigations into the conditions of child labor in agriculture in 1924 and argued that the broad scope of the Amendment did not necessarily mean that federal legislation would extend to all forms of child labor.[167]

This walk back confirmed that the pendulum was swinging against the Amendment. The Sentinels had gained momentum by focusing public debate on the perceived threat to the family, forging common ground among unlikely allies. For Catholics, the Amendment represented another instance in which the Protestant majority threatened their control over the education, labor and upbringing of their children. For middle-class and upper-class Protestant families who cherished the bourgeois conception of the innocent child, promoting the child's rights suddenly seemed to undermine the all the important values regarding the sanctity of the home.[168] The sweeping scale of the Child Labor Amendment made the boundary between "fit" and "unfit" parents appear porous and fragile. It crossed an invisible but powerful line in proposing to extend power of the State into the homes of "legitimate," white, male headed families, prompting a vehement defense of family government

It was precisely because of the broad consensus about the fundamental role the family played in structuring the state that the Sentinels were so successful in exploiting that assumption, casting the Amendment as a threat to the fundamental rights of parents. In the context of the Red Scare, the virtue of maternal solicitude that had been at the heart of the anti-child labor campaign became a liability as public sentiment rallied around a traditional conception of paternal sovereignty. The cumulative effect of this multi-flanked attack was captured in the headline of the Ohio State Grange Monthly: "Shall Your Child Become A Chattel of the State? Advocates of proposed Bolshevik

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[167] Jeremy P. Felt, *Hostages of Fortune: Child Labor Reform in New York State* (Syracuse: Syracuse University Press, 1965), 208.
[168] Zelizer, *Pricing the Priceless Child.*

Amendment would prohibit rural child labor, destroy home and family government and make a "mother" of Congress." [169] While the evil of child labor had tugged at the heartstrings, in the conservative moment of the 1920s, the Child Labor Amendment appeared to threaten something more fundamental, more sacred than the rights of the child. In the anti-communist politics of the 1920s, the home was more than a moral haven; it was seen as bulwark for liberty and defense of a system of democratic statecraft rooted in local self-governance. Tapping into that, industrialists found a most effective way to fight an expansive state that appeared to threaten the right of men to govern their homes.

On November 4, 1924, the voters of Massachusetts rejected the proposed Twentieth Amendment to the Constitution 697,563 votes to 241,461. The defeat in Massachusetts precipitated a swift and sharp turn in public opinion and political will. In New York, another state considered a reliable stalwart by Amendment advocates, Governor Al Smith who had supported the Amendment immediately flinched, suggesting that an advisory referendum should be held there as well.[170] Like dominoes, the support of Northeast, Midwest and Western states fell. By the summer of 1925, only three more states had ratified, Arizona, California and Wisconsin, while a total of thirty-four states in quick succession voted against its adoption. The propaganda of the Sentinels and like organizations made a mockery of the cause that had long been championed by the National Child Labor Committee: the universal rights of the defenseless child. As the *New York Times* summarized "It was the apprehension of Federal agents invading the farm for the purpose of the protecting the boy with the milk

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[169] *Ohio State Grange Monthly* 17, no. 8, September, 1924 in MC-360, Box 16, Folder 294, Lowell-Putnam Papers.

[170] Felt, *Hostages of Fortune*, 207. In New York, a Sentinel of the Republic, William "Daddy" George, set up a parallel New York "Committee for the Protections of our Home and Children" to campaign against ratification there, see *Hostages of Fortune,* 203-204.

pail and water bucket against his own father that accounts for the failure." [171] The debates over the Amendment revealed that the presumed right of that father to govern his own home was a politically powerful force in mobilizing a broad coalition in opposition to the state.

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Conclusion

Between 1904 and 1924, the NCLC had made great strides in prosecuting the case that white industrial child labor was a national problem that could only be met by the full powers of the federal government itself. Their campaign based on a "new view of the child" slowly gave rise to new view of the state as well. In 1906, most of Congress, as well as numerous members of the NCLC, had viewed federal legislation for child labor an entirely unconstitutional encroachment on the rights of states. By 1916, the Democratic Party, once staunchest advocate of that view, celebrated the fact that its President had passed the first federal child labor law by distributing placards that read "Abraham Lincoln freed the slaves; Woodrow Wilson freed the children."[172] But the broad political consensus that the NCLC had produced had always rested on the idea that removing children the workforce would restore the rightful place of the white male head of the household. If concern for the white child, and anxiety about the autonomy of the white family in industrializing world had been key to building that broad support for federal action to end child labor, it was also key to the undoing it in the 1920s.

After the federal Child Labor Amendment was submitted to the states for ratification in 1924, the Sentinels of the Republic were able to swiftly turn public opinion against the cause precisely because they tapped into deeply held ideas about paternal sovereignty, ideas that had surfaced in the NCLC campaign as well, albeit in a different

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[171] "Children Gainfully Employed", *New York Times,* September 5, 1925, 12.
[172] Lindemeyer, *A Right to Childhood,* 118.

form. The Sentinels, of course, were aided by broad changes in the political climate, the backlash against Prohibition and women's suffrage, and particularly the fears of communism and socialism. All of those factors served to heighten the stakes, and compound the fear that moves towards the centralization of state power would spell the end of the paternal family. Thus, the Sentinels built their broad-based coalition in their campaign against ratification, leveraging the Catholic Church, anti-feminist networks, and farmers to great effect. While the Sentinels' were no doubt interested in protecting the interests of manufacturers, and preserving state competition, their campaign was effective because it tapped into the broad interests of its coalition by casting the Amendment as a dual threat to two principles of local-self government: the family and the states. It was for that reason that arguments about family government would similarly enfeeble the Sheppard-Towner Maternity Act in the 1920s, and contribute to the defeat of the proposed Federal Bureau of Education. Indeed, the resonance of ideas about paternal sovereignty was revealed in the fact that the Supreme Court would rely upon to limit the police powers of the states as well, as we shall see in the next chapter.

Chapter Five

"A strange perversion of the meaning of the word 'liberty:'" The Movement for Compulsory Public Education in Oregon and the Invention of "Fundamental" Parental Rights in *Pierce v. Society of Sisters,* 1922-1925

On March 16, 1925, William Dameron Guthrie appeared before the Supreme Court of the United States in the matter of *Pierce v. Society of Sisters* to challenge the constitutionality of the Oregon School Law. The Oregon School Law made attendance at public schools compulsory. Passed by a citizen's initiative referendum in 1922, the law would have in effect closed all private and parochial schools. Guthrie, a devout Catholic, an ardent Republican and legend in legal circles as a chief architect of *laissez-faire* constitutionalism, outlined the destructive consequences he believed would follow if the Supreme Court upheld the Oregon School Law. "In this day and under our civilization, the child of man is his parent's child and not the state's. Gone would be the most potent reason for women to be chaste and men to be continent, if it were otherwise." Referencing Socrates' hypothetical society in *Plato's Republi*c, Guthrie implied that the true purpose of the Oregon School Law was to make children the property of the state. "The state-bred monster could then mean little to his parents and such a creature could readily be turned to whatever use a tyrannical government might conceive to be its own interest." The law, he submitted, violated a fundamental liberty, and thus the State of Oregon was abridging the individual rights guaranteed by the Fourteenth Amendment. Parents had an inalienable right to control the upbringing of their children: "What right," he put to the Court, "could be more truly and completely the essence of liberty?" [1]

If the soaring rhetorical heights of Guthrie's arguments before the Supreme Court represented the peak of over fifty years of arguments that the principle of paternal sovereignty should be a limit on the state's powers over children, the Oregon School

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[1] William Dameron Guthrie, Brief of the Appellant in *Pierce,* reprinted in *Oregon School Cases: Complete Record* (Baltimore: The Belvedere Press, 1925), 274-275.

Law also represented the peak of over fifty years of statist movements that sought to extend the states powers over children. It proposed to extend the police powers of the states' over children and education to compel all children to attend public schools, in effect shutting down all private and parochial schools in the state of Oregon. After World War I, a resurgent tide of nativist nationalism, signaled by the rise of the second Ku Klux Klan, gripped the nation. Combined with the anti-communist politics triggered by the Red Scare of 1919, the political climate of the early 1920s was infused with a broad suspicion of outsiders and unassimilated immigrant communities, especially Catholics.

In the 1920s, Protestant fraternal organizations, including the Masonic Lodge and the second Ku Klux Klan, looked to the public school as a vital institution to assimilate immigrants and forge a common citizenship that would save the nation, just as native-born Protestants had in the late nineteenth century. The proposal to make education compulsory at public schools was debated by ten states in the West, Midwest and South in the early 1920s. When the measure passed at the polls in the Oregon state election in 1922, its supporters viewed it as the culmination of a movement one hundred years in the making – as the realization of Horace Mann's vision for universal public education. Between 1870 and the 1920s, a diverse array of reformers continually pushed to expand the boundaries of state power by extending the jurisdiction of the state over education. As a result, the state's role in schooling continued to be highly contested political terrain in which Americans divided over the proper role that parents and the state should play in the governance of children's lives.

The National Catholic Welfare Council (NCWC), a national organization of the American Catholic hierarchy that formed during World War I, believed it was important that the Oregon School Law be struck down to stem the tide of nativist movements and to delimit the authority of the state and federal government in education. In the context

of virulent anti-Catholicism in the 1920s, Catholics made a strategic choice to downplay the religious aspect of the controversy in its campaign in Oregon and subsequent legal challenge before the Supreme Court. Just as the manufacturers opposed to the federal Child Labor Amendment downplayed arguments about the freedom of industry to instead mount an anti-ratification campaign based on parental rights, in the battle over the Oregon School Law Catholics downplayed issues of religious freedom, and instead mounted a campaign that argued that the Oregon School Law threatened the fundamental rights of all parents. Thus, as previous historians have done, I emphasize the role that nativism, especially anti-Catholicism, played in the movement for compulsory public education, but I extend upon their interpretations by pointing out the role that nativism played in shaping the response of Catholics as well, leading them to cast themselves as the defender of a fundamentally American liberty – parental rights.[2]

By the mid-1920s, the NCWC was adept at using paternal sovereignty to build alliances against state regulation because the organization was fighting against the enlargement of the state and federal powers over the regulation of children's schooling and labor on multiple fronts. In the 1920s, the push for compulsory public education in the states led to a renewed alliance between the Catholic and Lutheran Churches. Parental rights again constituted the cornerstone of both churches campaigns, just as it had in the fight over the Bennett and Edwards laws in Wisconsin and Illinois in the 1890s. In the 1920s, the Catholic Church was also fighting against the federal Child

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[2] The leading work of nativism in the 1920s remains John Higham, *Strangers In the Land: Patterns of American Nativism, 1860-1925* (New Brunswick: Rutgers University Press, 2002), who defined nativism as a "intense opposition to an internal minority based on the grounds of its foreign (i.e. "un-American) connections" and describes the Oregon School law as the "zenith" of the Americanization movement of the teens and twenties, see 4, 260-262. See also Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle over Compulsory Public Education* (University of Michigan Press, 2009); Lawrence J. Saalfeld, *Forces of Prejudice in Oregon 1920-1925* (Portland: University of Portland Press for the Archdiocesan Historical Commission, 1984); William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927* (Lincoln: University of Nebraska Press, 1994); Raymond Tatalovich, *Nativism Reborn?: The Official English Language Movement and the American States* (Lexington: University of Kentucky Press, 1995); and CF Robert D. Johnston who downplays the role of anti-Catholicism in *The Radical Middle Class: Populist Democracy and the Question of Capitalism in Progressive Era Portland, Oregon* (Princeton: Princeton University Press, 2003).

Labor Amendment and a push for a federal Department of Education.[3] Between 1919 and 1925, the National Education Association with support from the National Child Labor Committee made multiple efforts to establish a federal Department of Education. The proposed department would have distributed funding to the states on a matching basis, with the goal of equalizing educational standards among the states by providing supplements to teachers' salaries. It was also proposed that the department would fund health programs in schools and require that states make education compulsory for children with an English language instruction requirement for both private and public schools.[4] The same coalition between the Catholic Church and the Sentinels of the Republic that united to defeat the federal Child Labor Amendment in Massachusetts joined forces to defeat the proposed department in Congress.[5]

Put in that context, the NCWC viewed the constitutional challenge to the Oregon School Law as critical opportunity to buttress all of their campaigns against the centralization of state power over children by establishing once and for all that parental rights constituted a fundamental liberty that could not be encroached upon by the state. Politically, of course, that was not a new argument – it had formed the cornerstone of campaigns against the expansion of public schooling in the late nineteenth century,

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[3] The Smith-Towner bill was first proposed in Congress in 1919, and subsequent bills were introduced in 1921, 1924, and 1925 but none passed.

[4] One of the political bargains adopted in the pursuit of federal funding bill for education and a federal department of education was the promise, built into the bill, to allow Southern states to continue to oversee their own educational policies and therefore continue segregation and the underfunding of black public schools. The bill secured the support of many Southern Democrats because it promised substantial funds to Southern states to boost their literacy rates, but enabled continuing discrimination. On those grounds, Florence Kelley became an outspoken critic of the movement for a federal education bureau in the form it was being proposed see Florence Kelley, "The Sterling Discrimination Bill," *The Crisis,* 26, no.6 (October 1923): 252-255.

[5] For an overview of the battle over the department of education, see Douglas J. Slawson, *The Department of Education Battle 1918-1932: Public Schools, Catholic Schools and the Social Order* (Notre Dame: University of Notre Dame Press, 2005) and specifically on the anti-statist campaign launched against its adoption, see Lynn Dunemil, "The insatiable maw of bureaucracy": Antistatism and education reform in the 1920s" *The Journal of American History* 77 (Sept. 1990): 499-524 who notes as I do in chapter four and this chapter that the cause aligned "such unlikely allies the Catholic Church, state's rights politicians, former Progressives and the elitist, conservative Sentinels of the Republic." Dunemil's account emphasizes the "shared rhetoric of hostility to an expanding bureaucratic presence," but does not account the gendered ideology that fuelled that hostility. For example, the full version of the quote from Senator Borah that makes the title of her piece reads "the insatiable maw of bureaucracy, [which] are depriving more and more the people of all voice, all rights touching home and hearthstone, of family and neighbor," as quoted on 519.

against school vaccination and medical inspection schemes in the early twentieth century, and the campaign against the ratification of the federal Child Labor Amendment that was unfolding at the same time. However, it would require the NCWC to break new ground legally. The broad, seemingly unlimited, grant of power that states held over children had been critical to the establishment of compulsory education laws, vaccination laws and child labor laws. It was a major reason why the earlier anti-statist movements based on paternal sovereignty had failed: courts had consistently held that compulsory education, child labor and vaccination laws were a constitutional exercise of police powers and did not unduly infringe on parental rights. Furthermore, under the Tenth Amendment of the United States Constitution, education was a matter exclusively been reserved to the states. The Supreme Court had recently struck down the two federal child labor laws on those grounds, holding that they encroached on the sovereign rights of the states.

To break ground at the Supreme Court, then, the NCWC had to convince the Supreme Court that parental rights constituted a fundamental liberty guaranteed by the Fourteenth Amendment that protected the rights of individual citizens against the states. At the time, the Court took a very narrow view of the liberties protected by the Fourteenth Amendment, and before *Pierce v. Society of Sisters* (1925), the Supreme Court had only extended substantive due process clause of the Fourteenth Amendment to protect economic liberties, namely the right to contract first established in *Lochner v. New York* (1905).

In extending that protection to civil liberties for the first time, William Dameron Guthrie was the perfect lawyer to make that case. A radical renegade living in a Progressive Era, Guthrie had made a career for himself over the past thirty years by attacking Progressive reforms that he perceived to abridge private property rights and states' rights from challenging the federal income tax in 1895 to Prohibition in the 1920s. The defense of parental rights as a fundamental liberty akin to economic liberty was

entirely consistent with Guthrie's worldview. Guthrie had long argued against federal legislation that impinged on the rights of states. In *Pierce v. Society of Sisters,* Guthrie extended upon the logic of "dual federalism" that ascribed state and federal government separate spheres of power to argue that the decentralized structure of American statecraft also rested on the recognition of parental rights as the most local sphere of self-government, a sphere upon which neither the state or federal government could impinge.[6]

On June 1, 1925, Justice McReynolds handed down the decision of a unanimous Supreme Court, striking down the Oregon School Law. The Court held that the Oregon School Law was an unconstitutional exercise of the state's police powers because it violated the fundamental liberty of parents, extending the protections of the substantive due process clause of the Fourteenth Amendment to a civil right for the first time. In effect, the decision gave constitutional protection to rights of parents that had been increasingly defined and defended in the campaigns against state regulation of children. The victory of the NCWC revealed what an effective strategy it was for the Catholic Church in the 1920s to align itself with elitist anti-statist politics that supported minimal government and free market politics in order to fight for the freedom of the family. In Massachusetts, that alliance had been formed with the Protestant dominated Sentinels of the Republic in the campaign against the Child Labor Amendment. In Oregon, William Dameron Guthrie personified that alliance based on his own politics that prized property rights and religious freedom. In many ways, the decision constituted a culminating victory for the causes of paternal rights and localism, two principles that had drawn close over the previous five decades and fused in the mid-1920s.

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[6] Barbara Woodhouse, "'Who Owns the Child?': Meyer and Pierce and the Child as Property," *William & Mary Law Review* 33, no. 4 (1992): 1068-1070. As Woodhouse points out, while the use of the substantive due process clause was widely discredited after the 1930s, "the family liberty strain of substantive due process lived on in cases like *Skinner v. Oklahoma* (1942), *Moore v. East Cleveland* (1977) and *Roe v. Wade* (1973)." Woodhouse, *Who Owns The Child?,* 1109.

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The Movement for Compulsory Public Education in Oregon, 1921-1922

The movement for compulsory education in the 1920s was the culmination of populist and nativist movements that had surfaced in debates over schooling since the nineteenth century. Since the 1840s, when the Know Nothing Party took up the cause of common schooling, nativism, populism and drives to expand the state's jurisdiction in schooling had often gone hand in hand, leading in the 1890s, for instance, to the proposal for English language requirements for schools in the Midwest. The rise of the second Ku Klux Klan in the 1920s signaled a resurgent tide of anti-Catholicism and nativist nationalism that was compounded by the anti-communist politics triggered by the Red Scare of 1919. The resurgence of nativism in the 1920s led to a renewed drive to extend the state's authority over schooling, one that took that movement to new lengths in not merely proposing that the state should compel attendance at schools, or require all schools teach in English, but rather that all students should be compelled to attend public schools. Religious minorities, especially the Catholic and Lutheran Churches responded, just as they had in the nineteenth century, by arguing that the expansion of the state's authority violated parental rights. While the Oregon School Law threatened the religious rights of Catholics more than any previous schooling proposal, the Catholic Church avoided the religious aspect of the controversy because anti-Catholic sentiment ran so high, and asserted with more vigor than the Church ever had, not just parental rights constituted part of natural law, but specifically that the defense of parental rights was a defense of fundamentally American principles of liberty. In the fight over the Oregon School law, then, each side claimed to defend a fundamental institution of American freedom – the public school and parental rights.

The proposal to make education at public schools compulsory first came to the fore in Michigan in 1920. Earlier that year, the Scottish Rite Masons of the Southern

Jurisdiction, a body encompassing thirty-five Southern states, passed a resolution to make compulsory public education a goal of the fraternal organization. The proclamation not only affirmed the commitment of the Masons to free and compulsory education of all children at tax-funded public schools, but also further pledged to oppose "the efforts of any or all" that sought to "limit, curtail, hinder or destroy the public system."[7] Through Masonic organizations, the proposal quickly took hold throughout states in the South, Midwest and West. In Michigan, a proposed constitutional amendment to make education compulsory at public schools was put to the people in a referendum in 1920.[8] The Lutheran Church—Missouri Synod leapt swiftly into action to campaign against the measure.

The Synod, which represented Churches across the Midwest including Ohio, Missouri, Illinois and Michigan, had experience campaigning against similar populist proposals, dating back to its efforts to defeat the Bennett and Edwards Laws in the early 1890s. It ran a centralized, well-funded campaign under the banner "Whose Is The Child?" The Synod charged that the question before the people was not a Catholic or a Lutheran question. "It is an American question," as the proposal rested on the assumption "that to the State, and not to the parent, belongs the right to control the child."[9] The proposed constitutional amendment in Michigan was defeated by sixty percent of the vote.

But the proposal was far from buried. Over the next few years, the same proposal would surface in Washington, California, Idaho, Nebraska, Texas, Wyoming and Arkansas. In Michigan, James Hamilton, the leader of the compulsory public

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[7] As quoted in David B. Tyack, "The Perils of Pluralism: The Background of the Pierce Case," *The American Historical Review* 74, no. 1 (1968): 77.
[8] For more background on the issue in Michigan, see Ross, *Forging New Freedoms*, chapter seven.
[9] Theo Graebener, "An impossible Amendment and An Anti-Social Petition," pamphlet published by the Lutheran Schools Committee, Detroit Michigan, 4; 8. MSS 646, Box 3, Folder 42, Lutheran Schools Committee Records, Oregon Historical Society, Portland, OR. [Hereafter: Lutheran Schools Committee Records].

education campaign and future King Kleagle of the Michigan Ku Klux Klan, made several attempts to revive it. The Synod had exhausted significant resources in the 1920 campaign. Facing the prospect of another costly effort, church members thoroughly debated whether they should let "the enemy win by default at the polls" so that the matter might be disposed of with finality by the courts instead. In the end, the Synod decided that a legal challenge was too much of a "gamble." In a hyper-nativist moment after World War I, with both anti-German and anti-Catholic animus running high, the Synod worried that such sentiments might color the opinion of the courts as well. "Public opinion, which is after all the 'Supremest' court in the land might win the day also in the courts." The School Defense Committee explained that "the situation might be different if parental rights were clearly outlined and guaranteed in the several Bills of Rights." But in the early 1920s, that was far from the case. Parental rights were not defined "clearly and specifically, but only impliedly safeguarded." Moreover, the legal challenge would pit parental rights against the Goliath of the police powers of the states. Calling the "so-called police powers" of the states the "'Dark Continent of American jurisprudence," the Synod judged that it would have little chance of any court holding that compulsory public education violated parental rights "so long as this power is apparently practically unlimited."[10] To the Synod's relief, Hamilton failed to secure enough signatures to get the petition back on the ballot in 1922.

In the end, the compulsory public schooling proposal nearly passed in numerous states but it only succeeded in Oregon. The measure appeared on the ballot in Oregon's 1922 state election as a citizen's initiated referenda. Despite the collective, concerted and often coordinated efforts of multiple opposition groups, the measure passed at the polls. Shortly thereafter, the NCWC took over the issue. Mindful that the measure was likely to

[10] School Defense Committee, letter to the Pastors and Teachers of the Michigan District RE: Michigan Petition, September 26, 1921, MSS 646, Box 1, Folder 1, Lutheran Schools Committee Records. The Committee resolved that it was "well worth the trouble and expense" to continue the campaign, particularly as the "publicity" aimed to "reawaken a consciousness of a fundamental American principle."

resurface in other states after it passed in Oregon, and fearful that taken together the Oregon School Law, the proposal for a federal Department of Education and the federal Child Labor Amendment represented a powerful movement towards strong state control over education, the NCWC sought to settle the matter once and for all. It lodged a constitutional challenge in the Supreme Court on behalf of a Catholic school in Oregon and secured the services of William Dameron Guthrie to argue the case. In 1925, the NCWC prevailed in achieving what the Lutheran—Missouri Synod had appraised had only a faint chance of success in 1920; the Supreme Court declared that parental rights constituted a fundamental liberty and therefore the Oregon School Law went beyond the bounds of the police powers of the state.

Oregon was both a likely and an unlikely state in which the compulsory school proposal might succeed. As was the case in other states, the push for compulsory public education was closely tied to the political popularity of the Ku Klux Klan.[11] The Klan arrived in Oregon via California in early 1921, and by mid-1922 had staged an effective, if short-lived, take-over of Oregon politics.[12] After the incumbent Republican Governor Ben Olcott publicly condemned the Klan and its use of extrajudicial violence, the Klan backed a primary challenger in the Republican race who was the first candidate to adopt compulsory public education as part of his platform.[13] Olcott narrowly stayed off the challenge by 500 votes, but would ultimately lose out in the general election to the

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[11] Higham, *Strangers in the Land,* 264-294.

[12] Janet W. Bryant, "The Ku Klux Klan and the Oregon Compulsory School Bill" (MA thesis, Reed College 1970), Abrams, *Cross Purposes,* Saalfeld, *Forces of Prejudice.* CF: Johnston, *The Radical Middle Class,* who acknowledges the Klan's brief surge but downplays their role in Oregonian politics, including in the school bill, which he argues was the result of a complicated "liberal populism," stressing the egalitarian and class-leveling arguments in favor of it over anti-Catholicism*,* see 227-230.

[13] "Proclamation of the Governor," May 13th 1922, Benjamin Wilson Olcott Papers. MSS 308. Olcott's proclamation declared: "dangerous forces are insidiously gaining foothold in Oregon. In the guise of a secret society, parading under the name of the Ku Klux Klan, these forces are attempting to usurp the reins of government, are stirring up fanaticism, racial hatred, religious prejudice and all of those evil influences which tend toward factional strife and civil terror."

Democratic candidate Walter Pierce, who picked up the school proposal as part of his platform to pull off an unlikely victory in the reliably Republican state.[14]

While nativism fueled the drive for compulsory public education in various parts of the nation, in Oregon it was in fact the homogeneity of the population that helped the measure pass. Nationally, native-born white Protestants feared the flood of immigration, a creeping red-menace and a Papal plot to take over American politics. While such fears might have been rooted in shifting demographic realities elsewhere in the country that was not the case in Oregon. In the 1920s, eighty-five percent of Oregon's population was native-born with most immigrants arriving from Canada and Northern Europe. The majority of Oregon's population, which doubled between 1880 and 1900, had in fact settled there as part of the overland migrations from the Midwest in the generations prior. The state was ninety-seven percent Caucasian, "without enough negroes to man a Pullman car," as *Outlook* magazine reported in 1923.[15] The overwhelmingly white population was no historical accident; Oregon was the only free state admitted to the Union with black exclusion acts and maintained restrictions on Chinese migration as well.[16]

Catholics comprised between six and eight percent of Oregon's population, but eighty percent of the total attendance at private schools was comprised of children attending Catholic schools.[17] Small populations of Jewish, Lutheran, Seventh Day Adventist and Episcopalian students patronized the other private schools. Catholic

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[14] After holding out for weeks, in mid-September, the Democratic candidate Walter Pierce endorsed the School Bill. The announcement was made by Frank Gifford, the Exalted Cyclops of the Ku Klux Klan, soon to be the Grand Dragon of the Oregon Realm, who had recently staged a successful take over of the Federation of Patriotic Societies, suggesting a deal had been struck: "Smoked Out" *Capital Journal*, September 13, 1922, 4, "Pierce Comes out for School Bill. Lowering of Taxes Declared All-Important Issue," *Oregonian,* September 13, 1922, 11, "Hall Not Pleased By Pierce Course: Failure to Back School Bill Strongly Resented," *The Sunday Oregonian*, November 05, 1922, 12. Charles Hall, who the Klan had backed as a challenger to Olcott in the Republican Primary, stayed in the race as a third party until Pierce adopted the School Bill as part of his platform.

[15] Waldo Roberts, "The Ku Klux Klanning of Oregon," *Outlook,* March 14, 1923, 490.

[16] Kristofer Allerfeldt, *Race, Radicalism, Religion and Restriction: Immigration in the Pacific: Immigration in the Pacific Northwest, 1890-1924* (Westport: Praeger, 2003), 4-7.

[17] Saalfeld, *Forces of Prejudice.*

parochial schools, then, clearly stood to be disproportionately affected by the proposed bill. But at the same time Catholics were sufficiently small in number that they did not wield much as political clout as they had Michigan, and nor could they build as powerful an alliance with German Lutherans as they had done across the Midwest. It was for that reason that the Scottish Rite thought Oregon was the perfect site to begin the movement for compulsory public education. In early 1922, a national leader of the Scottish rite recommended they shift the battle from Michigan to Oregon "because she has no foreign element to contend with and is, more than any other state, purely and fundamentally American."[18] In Oregon, the Masons would find ready support for the measure within Klan members as well. Given the overwhelming number of white native-born Protestants in the state, numerically speaking, the Catholics and their allies were numerically up against it from the start in their campaign to oppose compulsory public education.

Finally, Oregon was also famous in the early twentieth century for its experiments in direct democracy. Populist William U'Ren inaugurated a system of direct initiative legislation in Oregon in the 1890s, which would become known as the "Oregon System" nationally. The Oregon System allowed citizens to initiate state legislation and vote on such initiatives directly. In the early twentieth century, this meant Oregon was the first state in the nation to popularly elect senators and hold a presidential primary. In 1912, a citizen's initiative led to the introduction of women's suffrage, while later initiatives banned the death penalty and introduced prohibition. Under the Oregon System, anti-vaccination activist Lora Little had campaigned for a ban on compulsory vaccination and compulsory sterilization, both of which failed by a narrow margin.[19] Chief Justice Taft famously remarked upon visiting the state that its isolation made it a

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[18] William MacDougall, a national representative of the Scottish Rite, quoted in *Oregonian*, November 5, 1922, 4 as cited in, Saalfeld, *Forces of Prejudice*, 11.
[19] Johnston, *The Radical Middle Class,* chapter nine.

useful laboratory for dangerous political and social experimentations.[20] The Oregon system did spread to other Western states, but it was perhaps fitting that it was in Oregon itself that the Scottish Rite Masons, with backing of the Klan, would use the Oregon System to put the compulsory public school initiative on the ballot.

To put the proposal on the ballot, the Scottish Rite Masons circulated a petition beginning at 8am on June 14th, 1922, and claimed to have collected 50,000 signatures in support by 5pm that day. In actuality, 29,000 signatures were submitted to the Secretary of State and 13,000 were rejected as illegal duplications. Still, the remaining 16,000 signatures easily cleared the bar of the 13,000 signatures required to put the measure on the ballot for the November election.[21] That summer, multiple opposition groups formed to campaign against the proposal, including the Catholic Civil Rights Committee, the Lutheran Schools Committee, the Non-Sectarian and Protestant Schools Committee, The Portland Committee of Citizens and Taxpayers, and a group of twenty-five Presbyterian ministers who broke rank to make their opposition known. By all accounts, it was a bitterly fought campaign. "The temperature of the campaign is rising and its pulse is beating feverishly fast," the Lutheran Committee reported in October, while the Catholics complained of the "poison" in the air. From afar, the *New York Times* reported that the "School Bill was the most upsetting factor in the history of Oregon since the agitation over slavery."[22]

From the outset, it was also a heavily imbalanced campaign. The Official Voter's

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[20] As one of the leading opponents of the School Bill complained that the "Oregon System," "curiously compounded socialistic paternalism, altruistic democracy and the worst form of state absolutism… borrowed from the communism of Australasia and the democratic canons of Switzerland." Dudley Wooten, *Remember Oregon* (Brooklyn: International Catholic Truth Society, 1923), 3. On Taft, see also Abrams, *Cross Purposes,* FN 21.

[21] Dudley Wooten, "Twenty Four Reasons Why You Should Vote Official Ballot 315, "NO," (The Columban Press: Catholic Civic Rights Association), 1, MSS 646, Box 1, Folder 14, Lutheran Schools Committee records. Carl F. Nitz, "The Compulsory Education Bill," March, 8, 1947, 21. Unpublished manuscript, Personal Papers of Reverend Lawrence Saalfeld, Record Group RG510, folder 1, Archdiocesan Archives of Portland, OR.

[22] Letter from Rev. Messerli to Rev. Baur, October 3, 1922, MSS 646, Box 2, Folder 29, Lutheran School Committee records. "Oregon Democrats Sweep the State; Pierce Gets Big Majority for Governor – Compulsory School Law Adopted," *New York Times,* November 9, 1922, 3.

Pamphlet, a brochure that included all of the proposed initiatives that would appear on the November ballot, included one argument in favor of the School Bill and seven arguments against. The argument in favor of the bill drew upon the long tradition of common schooling in the United States. It put forward a broad case for public schooling as an indispensable instrument for Americanization and the defense of the nation, opening by posing the questions: "Do you believe in our public schools? Do you believe they should have our full, complete and loyal support?" [23] The public school was presented as the sole institution that could resolve the differences and distinctions that threatened to divide the nation and proposed as the key place to teach the foreign born about the principles of American government. Reminiscent of the arguments marshaled for common school and compulsory schooling in the nineteenth century, the official argument insisted that attendance had to be universal for the mission of the public school to succeed.

The official argument in favor of the school bill blended egalitarian ideas about class leveling with abstractly expressed xenophobia. "Mix the children of the foreign born with the native born, and the rich and the poor… in the public school melting pot for a few years while their minds are plastic" and the product, it promised, would be a "true American." Compulsory public school attendance was offered as a safeguard against future, unspecified threats to American values and institutions. It was framed in the future tense: "We must halt those coming into our country" from setting up separate schools where children would be schooled "in an environment often antagonistic to the principles of our government." The official argument traded in coded references that broadly invoked the specter of Catholicism and communism alike. As if foreboding a conflict that was yet to come, the official argument warned that if the school population

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[23] *Proposed Constitutional Amendments and Measures (with Arguments) to Be Submitted to the Voters at the General Election, Tuesday, November 7, 1922,* compiled by Sam A. Kozer, Secretary of State (Salem, Oregon, 1922), 23, Box 1, Folder 15, MSS 646, Lutheran School Committee records.

was divided into different school systems, "we will find our citizenship composed and made up cliques, cults and factions." It concluded: "a divided school can no more succeed than a divided nation." [24]

The official argument read as if it were the existence of the public school, not the private school, which was under threat. In so doing, it tapped into fears propagated around the nation that there was a Catholic plot to take down the public school. In 1921, the Grand Lecturer of the Ku Klux Klan had warned an assembly of 6,000 Portland residents that the Catholic fraternity the Knights of Columbus "was on a foreign mission to shut down public schools." [25] The rumor was so widespread that in 1919 Cardinal Gibbons had issued a statement on behalf of all American Bishops, denying the rumor and affirming Catholic support for general compulsory education laws and the state's role in public education. While the threat of Catholic schooling to the project of public education was generally cloaked in oblique references to "divisions," the Ku Klux Klan made such undertones explicit in its own materials. Its pamphlet argued that public schools represented "democratic education," and Catholic parochial schools were the "essence of monarchy." [26] The choice, therefore, was as follows: propagate American democracy by insisting all children attend public schools or permit a foreign papal autocracy to spread through parochial schools.

The context of anti-Catholicism also shaped the campaign against the school bill, and it did so in one very significant respect: it led all parties involved to play down the religious aspects of the controversy and to frame the question as one of parental rights. For Oregonian Catholics, this was a deliberate, if difficult, decision. The Archbishop of

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[24] *Proposed Constitutional Amendments and Measures (with Arguments) to Be Submitted to the Voters at the General Election, Tuesday, November 7, 1922,* compiled by Sam A. Kozer, Secretary of State (Salem, Oregon, 1922), 23. Box 1, Folder 15, MSS 646 Lutheran School Committee records.

[25] "A lecture delivered at the Municipal Auditorium in Portland, Oregon on September 22, 1921 to six thousand people by R.H. Sawyer, Grand Lecturer of the Pacific Northwest Domain," Reuben H. Sawyer Papers, Coll. 488, Box 1, Folder 2, Oregon Historical Society, Portland, OR.

[26] "The Ku Klux Klan Presents Its View of the Public Free School," n.d. (ca. 1925), Ku Klux Klan Records 1921, MSS 22, Folder 1, Oregon Historical Society, Portland, OR.

Oregon, Alexander Christie, recruited Dudley Wooten to head the Catholic campaign. It was a calculated choice. Wooten was a Southerner who had been raised Baptist, and educated at Princeton, Johns Hopkins University and the University of Virginia Law School. Wooten was a seasoned campaigner with a judicious mind, having served as a Democratic congressman for Texas and as a judge. But it was the fact that he had converted to Catholicism that made him the best man for the job. Orgeonian Catholics hoped that Wooten would be able to connect with the majority Protestant population in a way that "hereditary" Catholics could not.[27] Christie convinced Wooten to take leave from his legal practice in Seattle to head up the Catholic Civic Rights Association and its campaign.

Wooten arrived in Portland to find a committee deeply divided about what role the defence of Catholicism ought to play in the campaign. One camp, as Wooten reported it, favored a "passive and complaisant campaign" and thought it best to pursue a "camouflaged attitude" on the question. "It was even protested that the use of the name 'Catholic' should be avoided." The other camp favored an "aggressive and militant assertion of Catholicism." The second camp felt that the religious issue should be pushed as the "paramount subject of discussion." According to this view, the committee should not shy away from calling out the bigotry and misinformation that marked the attacks on parochial schools nor back down from a full-throttled defense of Catholic dogmas, discipline and institutions. In the end, the subtler "camouflage" campaign won out. Wary of inflaming a sectarian conflict that might cloud everybody's capacity to reason, the

[27] Dudley G. Wooten, *Remember Oregon* (Brooklyn: International Catholic Truth Society, 1923), 13. On Wooten's background as a judge in Texas and Democrat in Congress see Ben R. Guttery, *Representing Texas: A Comprehensive History of U.S. and Confederate Senators and Representatives from Texas* (Published by the author: BookSurge Publishing, 2008), 160 and Lewis E. Daniell, *Types of Successful Men of Texas* (Austin: E. Von Boeckmann, 1890), 465-473.

Committee decided to foreground the "true issue" at stake, which was the "natural and inalienable rights of parents."[28]

The strategic choice to downplay religion in the campaign would continue to haunt Catholics. After they lost the campaign against the School Bill, Archbishop Christie founded a Catholic Truth Society that sent speakers around the state to dispel myths about Catholicism and dampen the anti-Catholic animus that he believed had cost them the campaign.[29] William Dameron Guthrie ultimately crafted an entire legal challenge around parental rights, but on the eve of the Supreme Court case, Father John Burke, the head of the NCWC was beset with worry that they had made a fatal strategic misstep in not making the case about religious freedom instead.[30] But from the very beginning of the battle over the School Bill, prominent Catholic clergy within Oregon foresaw that electoral defeat was likely and looked ahead to a possible Supreme Court challenge, using the campaign in Oregon to figure out how to meld the question of parental rights with American principles of liberty. Father O'Hara, a rising star within the Church, fired the first shots in the campaign from his rural outpost in Eugene two days before the petition was formally filed. At an address at Marylhurst College, the oldest Catholic University within the state, he proclaimed that the family was a "more ancient and a more fundamental institution than the state." Pre-empting arguments that parochial schools imported foreign principles into the United States, he declared: "[T]he exercise by the state of its police powers to drag children from the home of parents who are capable and willing to perform their full duty would be an important of tyrannous principles heretofore foreign to American traditions."[31]

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[28] Wooten, *Remember Oregon,* 11-12.
[29] "Catholic Truth Society of Oregon Begins Work," *Catholic Sentinel,* November 23, 1922, 1.
[30] Abrams, *Cross Purposes,* 179-180.
[31] *Catholic Sentinel,* July 13, 1922, 1, 6. For background on O'Hara's role in the Church and the Oregon campaign see J. G. Shaw, *Edwin Vincent O'Hara: American Prelate* (New York: Farrar, Straus and Cudahy, 1957), 99-101. Perceiving that the electoral campaign was a lost cause except as an occasion to prime a legal strategy, O'Hara was not greatly involved with the Catholic Civic Rights Association that was mostly made up of lay Catholics.

The campaign that played out in Oregon in the summer of 1922, then, was very similar to the campaign that the Sentinels mounted in Massachusetts against the Child Labor Amendment in 1924 in its focus on parental rights. The opponents attempted to build a broad base of opposition to the School Bill on the basis that it threatened parental rights and the autonomy of the family. The Catholic Civil Rights Association launched a campaign that put forward parental rights as the cornerstone of American freedom. Their main advertisement, "God Gave Parents Their Children – Governments Cannot Rightfully Take Them Away," opened by claiming that Americans had "always stood for the protection of natural and inalienable rights" and no right was "so sacred as that of parents over their children." As evidence, Abraham Lincoln was placed at the front and center of the advertisement. Holding up Lincoln as the standard-bearer of American principles, the advertisement quoted (in bold) from a speech Lincoln gave in Quincy, Illinois, in 1859: "The family is the corner-stone of the social order and the guarantee of public safety. No government can take the place of the Parent, and should never be permitted to usurp it."[32] The rest of the advertisement was flanked with quotes from other denominations emphasizing the same ideas. Throughout the campaign, the Catholic Civic Rights Association never tired of pointing to establishment Protestants who had spoken out against the school bill including Theodore Roosevelt, Henry Cabot Lodge and Nicholas Murray Butler.

The Non-Sectarian and Protestant Schools Committee also attempted to downplay the sectarian aspects of the conflict, and similarly argued that the Oregon School Law threatened the fundamental rights of all parents. The Committee coordinated a roster of forty-four speakers who toured the state and spoke out against the bill. They were predominantly Presbyterians and Methodists, along with a handful of

[32] See for example "God Gave Parents Their Children – Governments Cannot Rightfully Take Them Away," *Oregon Eagle,* November 3, 1922, 2 in MSS 646, Box 1, Folder 8 ("Advertisements Against the Bill"), Lutheran Schools Committee records.

Jewish, Unitarian, Congregationalist and Baptist speakers. The Committee hoped that the cumulative effect of its cross-denominational speaker list would be to give the appearance that a broad swath of Protestants agreed that the School bill was a "grave attack on fundamental American ideals." "Because of the nature of the campaign," the committee explained in early November, "the speakers who have been sent to various gatherings on our part have been exclusively non-Catholic."[33]

The appeals of the Committee's speakers followed a certain formula that began by presenting the Protestant credentials of the speaker before insisting that paternal sovereignty was a fundamental American right. The addresses of Mrs. Alexander Thompson, a Democratic State Congresswoman and President of the Federated Women's Clubs of Portland, exemplified the approach. Thompson opened her addresses by laying bare her credentials – first as a friend of public education and second as a Protestant. Her voting record in support of public schools spoke for itself, she asserted, before declaring she was "so Protestant" that she "leans backwards." Her speeches then stated that the religious question was beside the point. The key issue was that an "underlying American principle at stake… whether the child belongs to the parent or the state." "The family is the unit of the state," she would offer, arguing that when the state "seeks to abrogate the rights of parents and usurps their authority both the family and state are weakened." [34] Compulsory public education, in her view, was a dangerous path towards autocracy.

Each and every opposition organization similarly emphasized that the School Bill threatened the autonomy of the family and therefore threatened to undermine entire system of American statecraft. The twenty-five Presbyterian Ministers declared that the

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[33] Letter to Mr. Baur from the Speakers Bureau, Non-Sectarian and Protestant Committee of Freedom in Education, dated November 3, 1922, MSS 646, Box 2, Folder 34, Lutheran Schools Committee records.
[34] "Speakers Oppose School Measure At Mass Meeting," *Oregon Journal,* November 6, 1922. MSS 646, Box 2, Folder 10, Lutheran Schools Committee. "Mrs. Alexander Thompson Discusses the Education Bill," *Oregon Review,* October 23, 1922. This letter was widely published. For other examples, see clippings in this folder, MSS 646, Box 2, Folders 3-4, Lutheran Schools Committee records.

School Bill was "based on the philosophy of autocracy – that the child belongs primarily to the State." As an "unjustifiable invasion of family authority," the bill threatened "the ultimate guarantee of American liberty."[35] The Lutheran Schools Committee drew heavily from its successful campaign materials from Michigan. It argued that the state did not give or license parents their rights, and therefore it could not take them away. The Lutheran argument in the Official Voter's booklet opened with an appeal designed to incite a defensive sense of possessive pride in one's children. "Who owns your child? The State? Do you not? Who feeds and clothes your child? The State?" ending with the rhetorical provocation, "if you don't own your child what in the world do you own?"[36] The homilies of Catholic clergy encouraged parishioners to take similar proprietary pride in their children. At a Sunday mass St Mary's Church in Eugene, Father O'Hara asked "Are we to have government ownership of children?" In a cascading set of questions centered on "who owns children?" O'Hara evoked the imagery of police "invading the home" to tell men where children shall be schooled. "The family is more important than the State," O'Hara concluded. There was "no one who shall step into their home and deprive them of their inalienable rights" for "a man's home is his castle, and he shall have authority over his own children."[37]

The argument that children were the private property of their parents was the central argument of a campaign that advanced several other anti-statist arguments about property rights. The claim that moving children from private schools to public schools

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[35] "Statement Adopted by 25 Presbyterian Ministers, July 12, 1922, Official Argument Against the School Bill," *Proposed Constitutional Amendments and Measures (with Arguments) to Be Submitted to the Voters at the General Election, Tuesday, November 7, 1922,* compiled by Sam A. Kozer, Secretary of State (Salem, Oregon, 1922), 22, MSS 646, Box 1, Folder 15, Lutheran School Committee records.

[36] "Official Negative Argument submitted by Oregon and Washington District of Evangelical Lutheran Synod of Missouri, Ohio and other states," *Proposed Constitutional Amendments and Measures (with Arguments) to Be Submitted to the Voters at the General Election, Tuesday, November 7, 1922,* compiled by Sam A. Kozer, Secretary of State (Salem, Oregon, 1922), 24. Lutheran School Committee records, MSS 646, Box 1, Folder 15, OHS.

[37] "The School Bill As Presented at Catholic Church: Rev. Father O'Hara Talks to Large Crowd at a St. Mary's Sunday Evening Mass," *Cornwall Gazette Times,* October 11, 1922 in, MSS 646, Box 2, Folder 32, Lutheran Schools Committee records.

would lead to a large increase in taxes, estimated to be "more than 100,000" to "millions of dollars" was also heavily foregrounded. [38] Opponents repeatedly suggested it was more accurate to call the "so-called Compulsory Education Bill" the "School Monopoly Bill." Not only did the bill propose a government monopoly over children, but over the business of education as well. The Portland Committee of Citizens and Taxpayers warned that "socialism is in the air… it has conquered the ranks of labor and permeated the schools of learning and now it marches on the erstwhile citadel of individualism." The School Bill would destroy competition, violating the rights of freedom of contract and dooming the standards of education. [39] The Oregon School Bill typified the move towards state "paternalism," the Seventh Day Adventists complained that it turned "citizens in to subjects," and in what became an oft-repeated claim in the campaign, made them "mere cogs in the wheel" of the machine of the state.[40] The campaign against making the child a "ward of the state" fell under the same umbrella of argument. Each relied on the same ideological expression – freedom from government interference rooted in a defense of private property rights and individual liberty.

As the campaign played out, the supporters of the School Bill were less organized, less vocal and certainly less coherent. Prominent members of the community, such as William Woodward, a small businessman who was popular among laborers for his role on the state arbitration board, made an impassioned case for the class-leveling aspects of the bill. In public debates, Woodward made the case for a common basis for

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[38] "Education Bill Will Raise Taxes: Thousands of Pupils Now In Private Schools Would Raise General Levy," *The Dalles Oregon Chronicle,* October 20, 1922 in MSS 646, Box 1, Folder 8, Lutheran School Committee records, Portland Committee of Citizens and Taxpayers, "$1, 000, 000 More Taxes: More Than A Million A Year To Be Added To Oregon's Tax Burden If School Bill Passes," MSS 646, Box 1, Folder 5, Lutheran Schools Committee records.

[39] American Constitutional Rights League of Clatsop County, "Harvey Scott on Competition," (paid advertisement), MSS 646, Box 1, Folder 5, Lutheran Schools Committee records. Catholic Civic Rights Association, "Reasons," *Labor Press,* October 12, 1922, MSS 646, Box 1, Folder 14, Lutheran Schools Committee records.

[40] "Official Negative Argument submitted by Oregon and Washington District of Evangelical Lutheran Synod of Missouri, Ohio and other states," *Proposed Constitutional Amendments and Measures (with Arguments) to Be Submitted to the Voters at the General Election, Tuesday, November 7, 1922,* compiled by Sam A. Kozer, Secretary of State (Salem, Oregon, 1922), 25. MSS 646, Box 1, Folder 15, Lutheran School Committee records.

citizenship, celebrating the public school as "the only pure democracy under the sun" and chastising men who, like himself, "accumulate a little," but then sent their children to private schools "where the sons of the wealthy and well to do go" to be "separated from the common herd."[41] The private school could never fulfill or complement the function of the public school that epitomized the creed of the nation, for it "draws unto itself every child without regard to birth, creed, race or affiliation."[42]

Other supporters of the Bill took aim at how the opposition campaign characterized the relationship between the child, family and the state and willingly defended the supremacy of the state. In doing so, they revived arguments common among public school advocates in the late nineteenth century that likened the defense of parental rights to barbaric principles of Ancient Roman law. One letter writer to the *Oregon Journal* hit back at the proprietary suggestion that parents "owned" their children: "[t]his is the doctrine of old barbarism" he wrote, based on Ancient Roman law that gave a father "absolute control over his family with the power and death." The modern United States recognized that the "child is not the property of their parents" but rather parents were "trustees" for the benefit of the child" and the state supervised the exercise of that trusteeship.[43] Another letter writer argued the proprietary attitude was foreign to American ideas. Perhaps the Chinese would endorse the view that the parent "owned" the child, but he hoped that "austere, patriarchal American parent" would not. In the United States, he insisted, the rights of citizenship inhered at birth. The full rights and liberties of children were not abridged by their infancy, and therefore their right to religious freedom should be preserved by the state by preventing parents from forcing

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[41] *Oregon Voter,* October 7, 1922, 14-22 as cited in Johnston, *The Radical Middle Class,* 231. For a profile of how Woodward reflected the values of the "radical middle class," see Johnston, *The Radical Middle Class,* 231.

[42] *Oregon Voter,* October 7, 1922, 14-22 as cited in Johnston, *The Radical Middle Class,* 231. Abrams, *Cross Purposes,* 41.

[43] "The State and the Child: This Writer Lists Those Acts in Which the State Functions in Precedence over the Parent," *Portland Oregon Journal*, October 15, 1922, MSS 646, Box 2, Folder 25, Lutheran Schools Committee records.

religious schooling upon them.[44] Pastor W.A. Gressman in Pendleton, Oregon, argued the state did own the child. Further, he argued that such a claim was not sinister as it was in autocracies, for the democratic nature of the United States meant that the welfare of the child and the needs of the state were common and harmonious. Public policies that centered on the child were the true expression of the common good. [45]

While arguments about class-leveling and children's rights were present in the campaign, much of the momentum for the bill came from seemingly unrelated stories that sought to inflame anti-Catholic sentiment and exploit the low levels of information among the population about what the proposed bill entailed. The Lutheran Schools Committee complained privately in October that the "two outstanding obstacles" to defeating the bill included "the general ignorance of the fact that we already have a compulsory education law," which included state inspection of private schools and required instruction in English, and "the bitterness against the Catholic Church being brought forward."[46] The generality of the arguments in favor of the School Bill led an unknown number of voters to assume the proposed bill was a general compulsory education law. At the same time, an ex-nun by the name of "Sister Lucretia" spread sordid stories about the "enslavement" of nuns and abuses she apparently witnessed at St Vincent's Hospital. The Lutheran Schools Committee joined with the Catholic Civic Rights Association in attempting to rebuke her allegations, claiming that she was a mentally ill women being exploited by the Klan. So too did more than 50 non-Catholic physicians employed at St. Vincent's Hospital.

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[44] "WHO OWNS THE CHILD? Here is Denial of "Ownership" Insisted Upon By Many – Religious Liberty Child's As Well As Parent's Asserted," *Portland Oregon Journal,* October 19 1922, MSS 646, Box 2, Folder 25, Lutheran Schools Committee records.
[45] "Local Pastor Upholds Educational Measure: Synopsis of Remarks by W. A Gressman," *East Oregonian,* October 24, 1922, MSS 646, Box 2, Folder 32, Lutheran Schools Committee records.
[46] Letter to Rev W. M Case, Central Presbyterian Church from the Lutheran Executive Secretary, October 11, 1922, MSS 646, Box 3, Folder 46, Lutheran Schools Committee Records.

This sideshow demonstrated how high tensions ran. A representative of the hospital turned up at one of Sister Lucretia's salacious "men-only" lectures in Gresham, just outside of Portland, to circulate the physicians' petition. The messenger was met by a mob, which beat him unconscious while demanding he leave town.[47] Governor Olcott himself claimed his political career was a casualty of anti-Catholic sentiment, unable to shake the Klan's persistent false rumors that he or his wife were Catholic and their children attended Catholic school.[48] Despite the pained efforts of the Catholic Civic Rights Association to claim that it was defending the rights of all parents, the sectarian aspect of the controversy played a dominant and decisive role at the polls.

When Election Day dawned in November, the School Bill drove people to the polls. The *Morning Oregonian* reported that the "big feature of the election" beyond the turnout was the "unusual number of citizens who swore in their vote." (Under Oregon law, unregistered voters could be "sworn in at the polls on the day of the election by having six freeholders swear that he/she was eligible to vote.") According to the paper, women voters, who had been enfranchised in the state since 1912, particularly made their presence felt "due to the religious and parental issues" involved. "They flocked to the

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[47] The incident is recounted in full in Saalfeld, "Forces of Prejudice," 25.

[48] Ben W. Olcott, "America Adrift," *Proceedings of the Fourteenth Conference of Governors of the States of the Union*, 14 December, 1922, 141-142. Olcott complained that during the campaign it was "circulated very assiduously and very industriously all throughout Oregon" that he or his wife were Catholic and that their three children attended Catholic school in Salem. "It was one of the hardest things I had to combat in the campaign." At his request, all of the Republican speakers in the state were asked by the county executive committee to "make it plain" Olcott was Protestant, that his wife was an Episcopalian and his children attended public school in Salem. "I believe two thirds of the people of Oregon, despite all we could do to set off the malicious lies told by the Klan, believed I was Catholic," Olcott later reflected. Although undoubtedly other factors contributed to Olcott's political fall, he was made a target of the Klan early in the primary after he spoke out against them in an Official Governor's proclamation. In retaliation, the Klan circulated a doctored version of his campaign card that read "Cardinal Olcott" with an image of him in cardinal hat and beads, circulated with the caption "Koons, Kikes and Katholics". Bryant, "The Ku Klux Klan and the Oregon Compulsory School Bill," 69. His rival, Walter Pierce, opportunistically adopted the school bill as part of his platform in mid-September, which Dudley Wotton attributed to his ability convince many Republican voters to cross party lines to vote for him. If Oloctt "had received the solid support of his party in the election, he ought to have won by a 130, 000 majority," Wooten reflected. Pierce, he pointed out, "beat him by 31, 000." Wooten, *Remember Oregon,* 6. Another issue in the campaign that inflamed anti-Catholic tensions around schooling not fully explored here was the issue of nuns teaching in public schools in rural parts of Oregon, which led to a simultaneous proposal to ban religious garbs in schools. For a full discussion of the anti-garb bill and its intersections with the School Law, see Abrams, *Cross Purposes.*

polls in platoons, battalions and regiments," the paper described. Proponents for the bill were "preparing to force the issue two years hence." They did not apparently "dream that so much money would be spent to defeat the measure," and apprehended certain defeat. "Dollars have been spent against the bill to cents in favor of it. The result is that thousands upon thousands have heard arguments against the measure and are unfamiliar with the facts in its favor," one supporter explained.[49]

Yet, despite the best efforts of the opponents of the School Law, the measure passed at the polls. All parties involved were shocked by the result, except the Catholics. "This defeat was entirely unexpected by all who were watching the campaign closely," wrote Reverend Messerli, the head of the Lutheran Schools Committee.[50] Dudley Wooten publicly stated that while the result of the "misnamed compulsory school bill is of course disappointing," it was not surprising "to those who knew the exact situation in Oregon." "The ramifications and intrigues of the Ku Klux Klan and its near ally the Scottish Rite Masons," Wooten stated, "exerted an intimidating influence. The injection of the religious question which mainly turned upon a bigoted hatred of the Catholic church completely obliterated all sanctity of judgment and subordinated reason to passion and prejudice as was contrived and intended by the proponents of the bill."[51] The Lutherans concurred. "It was impossible for us to overcome the ruthless activities of the Masons, minor lodges, the Ku Klux Klan, the Federated Patriotic Societies, The Royal Riders of the Red Robe, etc. etc.," remarked Messerli, but "all are agreed that if we would not have waged the campaign of education which we did our defeat would have been an overwhelming one."

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[49] "The School Bill," *The Observer,* November 2, 1922, 2.
[50] Letter from Rev. Messerli to Rev. Baur, November 10, 1922, 646, Box 2, Folder 29, Lutheran School Committee records, MSS. "We had confidently expected victory although we did not say, or at anytime dare to hope for a victory by more than a small majority."
[51] "School Bill Carries by 14, 000," *Catholic Sentinel,* November 9, 1922, 1.

Even members of the Ku Klux Klan were surprised by their own success. "We never realized the school bill wuld pass (sic)," noted the La Grande chapter in the far north east of the State, though they had "three Klansman who had nerve enough to bet that it would." Though they had celebrated by burning a Roman cross as a "signal of victory," the Klan cautioned its members to be mindful that the battle had only just begun. "It is indeed true that we have tasted the first fruits of Victory at the last election; but that fact is but a small part of the great fundamental plan." "We must consider ourselves in battle until we; or those to follow behold the downfall of Catholicism buried; In the ruins of its own iniquity." [52] Even the victors were bracing themselves for further battle.

Despite the different result, the campaign mounted against the School Bill in Oregon in 1922 was similar to the anti-ratification mounted by the Sentinels of the Republic in Massachusetts in 1924. In both campaigns, groups who stood to lose out if the measure passed used ideas about paternal sovereignty to build broad coalitions, particularly across religious lines, against the expansion of state power. The campaigns, however, also differed in two important respects. First of all, in Oregon, unlike in Massachusetts, the charge of communism and socialism cut both ways. Proponents of the Oregon School Law would blend the threats of a papal plot and the spectre of socialism in arguing that private schools were breeding grounds for disloyalty. Their opponents would argue that a state monopoly over education and children was foreign to American ideals of self-government, and represented an importation of socialist and autocratic statecraft. The Red Scare, then, was not a trigger for a resurgence of conservative patriarchal ideals, but rather worked to give long-standing arguments about paternal sovereignty increased salience in certain circumstances.

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[52] "Klansman and their work during the last two weeks," n.d., Ku Klux Klan La Grande, Oregon Chapter records, 1922-1923, MSS 2604, OHS.

Second, while opponents viewed the Oregon School Law as connected to movements to grant the federal government power over education, the key issue at stake was how far the police powers of the states extended over the education of children. In that sense, the Oregon School Law represented the culmination of the common school and compulsory school movements of the nineteenth century. It further showed that the battles in the 1920s over the purview of the federal government over the states were intimately connected to longer running battles over the power of the states over family government. As we shall see in the next section, that was precisely the parallel that William Dameron Guthrie sought to make when the NCWC appointed him to challenge the Oregon School Law before the Supreme Court of the United States.

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Crafting a Constitutional Challenge: William Dameron Guthrie and the prelude to *Pierce*

William Dameron Guthrie was not officially appointed to act on behalf of the NCWC until the end of 1923, but as soon as the Oregon School Law passed at the polls, he began crafting a novel legal argument that the substantive due process clause extended to civil rights as well, and particularly that parental rights constituted a fundamental liberty. In the 1920s, the Supreme Court had not recognized that the federal Constitution afforded protections to either religious liberty or parental rights. The NCWC and Guthrie resolved to craft a case around parental rights, and unlike in Oregon, nationally that strategy played greater dividends in aligning the Catholic cause with American ideas about liberty and paternal sovereignty. Guthrie's carefully crafted case not only represented the capstone of his career, but it also represented the culmination of thirty years of legal work that had sought to strike down Progressive legislation as a violation of private property rights. Guthrie started laying the groundwork for that novel constitutional challenging by intervening in a case before the Supreme Court in 1923, *Meyer v. Nebraska,* which considered the constitutionality of an English language law.

Filing an *amicus curiae* ("friend of the court") brief in *Meyer,* Guthrie attempt to direct the attention of the Court to the question of parental rights and prime them for the argument he was developing for *Pierce*. But first, that story starts with how the NCWC came to take over the case from Oregonian Catholics.

The NCWC were concerned about what the victory in Oregon might portend for other nativist movements. The national leaders of the Scottish Rite Masons had correctly assessed that Oregon was the perfect state from which to launch a national movement for compulsory public education. It was a plan that encompassed a state-by-state strategy, but the more zealous supporters hoped it might be written in to funding-matching programs for the proposed national Department of Education as well. Certainly, the Catholic Church feared that national control over education was the end goal of the movement and worried that compulsory public education in Oregon was just the start.[53] The Lutheran Church shared this assessment.[54]

The joint campaigns of the Catholic and Lutheran Churches had been at best cordial, but never closely coordinated, a fact that reflect how movements for the expansion of state power over children would frequently make strange bedfellows out of its opponents. In 1890, when a Catholic-Lutheran alliance had sunk the Bennett Law in Wisconsin, a local Lutheran leader had commented that it was the "only time since the Reformation that Catholics and Lutherans had joined hands."[55] The Catholic Civil Rights Association had largely acted alone during the campaign in Oregon, and afterward, while it no doubt represented the interest other private and parochial schools nationwide, it

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53 Slawson*, The Department of Education Battle.*

54 Reverend Messerli wrote to Reverend Titus in Nebraska on October 12, 1922: "Failing in one state they will try in another… they will attack more than one at the same time. It is for this reason I look upon our various state campaigns, Michigan, Oregon and Oklahoma, as more than a local issue. It is a national danger." Executive Secretary of Lutheran Schools Committee to Rev. Titus Lang, Nebraska October 12, 1922., MSS 646 Box 2, Folder 28, Lutheran Schools Committee.

55 Rasmus B. Anderson, with the assistance of Albert D. Barton, Life Story of Rasmus B. Anderson, Madison, WI: n.p., 1917, 595 as cited in James C. Carper and Thomas C. Hunt, *The Dissenting Tradition in American Education* (New York: Peter Lang Publisher, 2007), 102.

would take the lead in challenging the Oregon School Law.[56] (Reflecting the lack of coordination, a second challenge was also filed by on behalf of Hill Military Academy, and the Supreme Court heard the two cases together). The failure of the campaign in Oregon to defeat the compulsory public education initiative, the NCWC believed, nonetheless presented a great opportunity to prove that the Catholics of the United States would not "stand for any infringement upon their rights."[57] The NCWC sought to nip the compulsory public school movement in the bud by having the law declared unconstitutional. The Oregon School Law was not scheduled to come into effect until 1926, providing an ample window for a legal challenge.

The legal challenge would require the NCWC to break new ground at the Supreme Court. Education was a matter exclusively reserved for the states under the Tenth Amendment, and, as had long been recognized, the states had a broad grant of power under their police powers in matters of education. The Oregon School Law clearly had the stamp of democratic approval, having been initiated by the people and voted overwhelmingly by them into law.[58] By the 1920s, general compulsory education laws were established as an entirely constitutional exercise of the police powers. In short, states were not answerable to the U.S. Supreme Court in terms of how they administered

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[56] Few clues exist about what happened with the Lutheran involvement after the election. A letter dated November 10, 1922 by Reverend Messerli reported that immediately following the election "In order that ways and means for putting this law to a test in the federal courts may be devised, a committee of representatives of all interested groups, Lutherans, Catholics, Adventists, Episcopalians, private schools, is being formed, and as soon as a course has been outline the local school board will get in touch with you for advice." Evidently, the Catholics and Hill Military Academy decided to file their own suits, though it is not apparent whether the Oregon local committee favored that strategy. The NCWC offered to the Lutheran Church to make them party to the case free of charge if they would use one of their schools in the case, but the Lutherans declined. Letter from Rev. Messerli to Rev. Baur, November 10, 1922, MSS 646, Box 2, Folder 29, Lutheran Schools Committee.

[57] Letter from Michael Slattery to John Burke, November 8, 1922 (Church: Church and State 1920-1923), Box 15, Folder 10, Records of the Office of the General Secretary, National Catholic Welfare Council, Catholic University of America, Washington D.C. [hereafter: OGS, NCWC]

[58] On this point, see chapter two. The two key cases included *Commonwealth v. Edsall*, 13 Pa. D.R., 509 (1903) where a mother in Pennsylvania mounted a constitutional challenge to the state's compulsory education law. One of the grounds that her challenged rested on was that the law violated the Fourteenth Amendment. The Supreme Court of Pennsylvania held that legitimate exercises of the state police powers were exempt from the prohibitions of the Fourteenth Amendment. *In State v. Bailey,* 157 Ind. 324 (1901), the Indiana Supreme Court not only held that compulsory education laws were constitutional, but also "necessary to carry out the express purposes of the Constitution itself."

their educational policies unless it could be shown that the policy unduly infringed on the individual rights of citizens as protected by the Fourteenth Amendment. In the 1920s, after the *Slaughterhouse Cases*, the scope of the Fourteenth Amendment to protect civil liberties was extraordinarily circumscribed. In the case of *Berea College v. Kentucky* in 1908, for instance, the Supreme Court had found that the State of Kentucky possessed power to legislate that private educational institutions, namely Berea College – the only racially integrated college in the state – must be segregated.[59] Since *Lochner v. New York* (1905) the Supreme Court, however, had used the substantive due process clause under the Fourteenth Amendment to strike down laws that infringed on economic rights protected by the Fourteenth Amendment, namely the right to contract. It was on that basis that the NCWC and Guthrie would seek to build upon, by arguing that the Fourteenth Amendment protected parental rights as well.

"The question of constitutional law presented by this enactment is both novel and difficult," Guthrie himself advised the NCWC in 1922. It was an "indisputable proposition" that States could compel parents to send their children to school and courts had uniformly and universally approved the power of the states to compel attendance, set standards, license teachers, and to enforce vaccination requirements. Seeking to define the point at which such power ended because it invaded parental rights, "presents a very close and very delicate question of constitutional law." Given the delicacy of the matter, Guthrie advised the NCWC in 1922 that they should only proceed with their legal challenge if equipped with "competent and experienced counsel thoroughly imbued with the importance of the principle involved, both to the Nation and Church…" It was a hubristic, if indirect, way to put himself forward as the attorney to argue the case.[60] Fortunately for Guthrie, the key players at the NCWC agreed. Immediately after the

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[59] *Berea College v. Kentucky*, 211 U.S. 45 (1908).
[60] Letter from Guthrie to Burke, January 5 1923 (Church: Church and State: Oregon School Case, January-April 1925), Box 14, Folder 10, OGS, NCWC.

electoral defeat in Oregon, the NCWC determined that a matter that was "so important" that it could not "be left in the hands of the Catholic people of Oregon." Wresting control from the local committee in Oregon, Father John Jay Burke, the General Secretary of the NCWC, made up his mind immediately at Guthrie was the only man for the job. After six-months of infighting, he prevailed in appointing Guthrie as the lead attorney with John Kavanaugh, the original Oregon attorney, retained as local counsel for the case. [61]

Guthrie brought considerable stature and experience to the case. Born in San Francisco in 1859, he had established roots in the United States on his paternal side but his mother's family had recently migrated from Ireland. A devout Catholic herself, Guthrie's mother raised him in the Catholic faith. He completed much of his schooling abroad in France, but a reversal in family fortunes in the 1870s brought him back to the United States where he completed his schooling in a public school in New York City. On graduation, Guthrie supported himself as a stenographer at a law firm while studying law and was admitted to the bar in 1880. Stubborn, surly, and pedantic, Guthrie won few friends, but he gained the grudging respect of his legal colleagues through his dogged commitment to the law. "Guthrie does not have opinions; he only has principles," a close associate once remarked.[62] He was a lifelong Republican, but his commitment to his faith and principles trumped all, and he would not hold back from attacking anyone, Republican or Democrat, whem he felt betrayed his views on economic regulation and the rule of law. Guthrie reviled the rising tide of legal realism and considered himself a "constitutional proselytizer" for the cause of limited government and economic freedom. [63] By the 1920s, Guthrie was the Ruggles Professor of Constitutional Law at Columbia (where he shared a close friendship and ideological outlook with the University's

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[61] For details on the internal turf politics surrounding the case see Abrams, *Cross Purposes*, 99-112.
[62] John Davis, "William D. Guthrie," *United States Law Review*, 70, no. 192 (1936): 195.
[63] Douglas Clouatre, "William Dameron Guthrie" in John R. Vile, ed., *Great American Lawyers: An Encyclopedia, vol. 1* (Santa Barbara: ABC Clio, 2001) 314, 317.

President, Nicholas Murray Butler) and the President of the New York City Bar Association.[64]

A strong ideological constancy characterized the arc of Guthrie's legal career. Guthrie first rose to prominence on the national stage in 1895, appearing before the Supreme Court in *Pollock v. Farmers Loan and Trust Co.* It was a case he had personally crafted with the objective of challenging the national income tax, a central project of the Progressive political agenda.[65] While Guthrie's challenge to the income tax was successful, his other legal strategies took longer to bear fruit. In 1903 and 1904, Guthrie developed his concept of "dual federalism" to challenge the federal ban on lottery tickets and the federal tax on oleomargarine. Both challenges were unsuccessful at the time, but the Supreme Court in striking down the federal child labor law in *Drexel v. Bailey* in 1922 would later adopt the principles Guthrie espoused. As Stephen Wood noted, Chief Justice Taft's decision in *Bailey* quoted almost verbatim from Guthrie's brief in the oleomargarine case. By the 1920s, Guthrie had marked out a name for himself as a *laissez-faire* warrior, challenging the Prohibition Amendment directly before he was appointed as counsel for the Oregon School Law case.

At the heart of Guthrie's worldview was a reverence for hierarchy, order and the strict respect for boundaries. As his friend John Davis, the 1924 Democratic presidential candidate, noted in a eulogy for Guthrie, he was "authoritarian in his philosophy, believing in authority as the guardian of order." The authority he "worshipped" was one "whose powers and duties were strictly marked and faithfully observed." In his twilight years, Guthrie took aim at state and federal initiatives that in his view strayed beyond the

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[64] This biographical portrait has been compiled from Davis, "William D. Guthrie,"192-198; "W.D. Guthrie Dies Suddenly at 76," *New York Times*, December 9, 1935, 21; Clouatre, "William Dameron Guthrie", 311-317; Robert Taylor Swaine, *The Cravath Firm and Its Predecessors, 1819-1947, vol. 1,* (Clark: The Lawbook Exchange, Ltd., 2006), 359-362; and "Young Men of New York: William D. Guthrie," *Harper's Weekly,* August 28, 1891, 662.

[65] Guthrie arranged the litigant to challenge the law, worked with the federal government and even suggested a lawyer for opposing counsel to expedite the matter (though such collusion was common practice at the time), see Clouatre, "William Dameron Guthrie," 315.

bounds of government power by invading the sphere of the family: first against the Oregon School Law and then in the fight against the Child Labor Amendment, which he described as a "distinct menace to the family, to the home and to self-government."[66] Building on the principle of dual federalism that he had developed, a constitutional principle that ascribed state and federal governments separate and equal sovereign powers, the crowning and lasting achievements of Guthrie's forty year legal career was a complementary argument that ascribed the family its own zone of sovereign power.

In that respect, the legal strategy of William Dameron Guthrie reflected the evolution of *laissez-faire* constitutionalism on the question of the rights of children and their parents over the previous thirty years. In 1886, the *laissez-faire* constitutional scholar Christopher Tiedeman, who also took an exceptionally narrow view of police powers, had determined that parents did not possess fundamental rights over their children, and that more specifically, children's own inherent claim to liberty demanded that the state act as their guardian. This treatise served as the source for many state courts that found that child labor laws were a constitutional exercise of the police powers. For three decades, the exercise of state powers over children, specifically over their education and their labor had been the impetus for a large expansion of state power and a key source of conflict for many of the battles of the Progressive Era. Guthrie argued not only that parents did possess rights over their children, but that such rights constituted a fundamental liberty. While Guthrie departed from Tiedeman on the question of parental rights, there was nonetheless an ideological coherence in Guthrie's *laissez-faire* constitutional strategy.[67] Over his long career, he had consistently crafted legal cases to strike down legislation, especially federal legislation that infringed on private property rights.

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[66] John Davis, "William D. Guthrie," *United States Law Review* 70, no. 192 (1936): 192-198.
[67] For a discussion of Guthrie and laissez-faire constitutionalism see Woodhouse, "'Who Owns the Child?', 1068-1070.

Extending that logic to the case of parental rights in challenging the Oregon School Law, however, would require one final and ironic twist. Guthrie was famed for having developed the framework of "dual federalism."[68] The concept of dual federalism had been critical to the Supreme Court's reasoning in *Hammer vs. Dagenhart* and *Drexel v. Bailey,* which struck down the two national child labor laws in the 1910s on the grounds that the power to regulate the labor of children fell exclusively to the states. The opposing counsel in *Pierce v. Society of Sisters* would rely on those two cases as precedent to argue that the responsibility for education also fell exclusively to the states. But in a sense, Guthrie was not arguing against the principle of dual federalism, rather he was extending its logic to protect the principle of family government. Just as there was a sphere of power reserved to the states upon which the federal government could not tread, Guthrie would argue there was a sphere of power reserved to parents upon which state governments could not tread.

Guthrie was not officially appointed to the Oregon School Law case until September, 1923, but in February of that year he apprehended that an impending case before the Supreme Court would play a determinative role in the Oregon case and he moved quickly to try to sway the direction of the Court. During World War I, and in its immediate aftermath, a set of Midwestern states passed laws prohibiting school instruction in any language other than English. Five cases arose to challenge these laws in 1923. The lead case to appear before the Supreme Court resulted from the arrest of Robert Meyer, an instructor in Zion Parochial School in Hampton, Nebraska, who was caught and convicted under the Siman Act in 1920 for reading the bible in German to a student during a recess break. Guthrie filed an *amicus curiae* ("friend of the court") brief to plead that the Court show the "greatest caution" in its judgment. He was alarmed by two lines of argument that the state of Nebraska had put forward in defense of the Siman law

[68] Benjamin Twiss credits Guthrie for developing dual federalism in this respect in *Lawyers and the Constitution: How Laissez-Faire Came To The Supreme Court* (Princeton: Princeton University Press, 1962), 217-220.

concerning the powers of states over education. The first was that "police powers of the state over the education of minors is virtually unlimited" and the second was that "the state may make such education its own monopoly."

In his *amicus curiae* brief, Guthrie urged that these two issues were not necessary to resolve the question presently before the Court. If the Court accepted those two contentions in reaching its decision in *Meyer v. Nebraska*, however, it might "hereafter work serious injury to the individual liberty… and prejudge without hearing or due consideration the controversy in respect to the statute of Oregon."[69] Two years before the Court would hear the case concerning the Oregon law; Guthrie took the opportunity to characterize the Oregon School law as "an extraordinary and revolutionary piece of legislation that adopted the "favorite device of Communistic Russia – the destruction of parental authority." Playing to the same nativist fears that had led to the adoption of the Siman Law in Nebraska in 1919, Guthrie argued that "anything more un-American and more in conflict with the fundamental principles of our institutions would be difficult to imagine" since the Oregon School Law "condemns as an evil the love and interest of the parent for *his child."*[70] The law was reminiscent, he suggested, of Plato's Republic where the state assumed the sole and exclusive responsibility for rearing children. Guthrie claimed he had no particular vested interest in the language law before the Court, rather his goal was to ensure the Court's decision was mindful of the broader question about what powers the states possessed over education. And if his intervention was necessary on that point, it was also successful.

In June 1923 the Court handed down a 5-2 decision, striking down the Siman Law as unconstitutional. Justice James McReynolds authored the majority's decision. In many respects, Justice McReynolds was an unlikely ally for Guthrie. A fundamentalist

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[69] William Dameron Guthrie, Amicus Curiae Brief at 3-4, *Meyer v. State of Nebraska,* 262 U.S. 390 (1923)(co-authored by William D. Guthrie and Bernard Hershkopf and filed Feb. 20, 1923).
[70] William Dameron Guthrie, Amicus Curiae Brief at 3-4, *Meyer v. State of Nebraska,* 262 U.S. 390 (1923)(co-authored by William D. Guthrie and Bernard Hershkopf and filed Feb. 20, 1923).

from Elkton, Kentucky, he was not by any means known for his religious tolerance. Indeed, he was infamous in the Court because of his open anti-Semitism, and reportedly refused for three years to speak to Louis Brandeis, a Jewish appointee to the Court. He openly displayed his intolerance for minorities, most notably in his treatment of his black servants and women, both of whom he endeavored to keep in their "place."[71] McReynolds was subsumed by fears of "un-American" influences creeping into the nation, bursting into tirades about "political subversives" entering from abroad.[72] He was, in short, an irascible and open bigot. In many ways, he reflected the ways of the old Southern gentry of his childhood. He fought vociferously to keep alive an increasingly outmoded sectional culture and social order and this may have made him sympathetic to Nebraska's case that the Siman law 'Americanized' immigrants and was necessary for the self-defense of the nation.

Yet, as he led the Court in questioning the attorneys before the bench, it was clear that his Southern upbringing was pulling him in another direction on the question of the state's authority over the family and schooling. His father, an iron-willed and ardent secessionist, was among the class of Southerners who had hated the very idea of public schooling.[73] He believed that the education of children was the private concern of fathers and insisted no public authority could legitimately sap men of this responsibility.[74] In regards to his own son's education, Dr. McReynolds enrolled the future Supreme Court Justice at Green River Academy, a military academy not that dissimilar from Hill

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[71] James E. Bond, *I Dissent: The Legacy of Justice James McReynolds* (Fairfax: George Mason University Press, 1992), 10. If a female lawyer entered his court, McReynolds would exclaim "I see the female is here, " before walking away from the bench in protest.

[72] John M. Scheb II, "James Clark McReynolds," in Kermit Hall, James Ely, Joel Grossman , eds., *The Oxford Companion of the Supreme Court of the United States* (Oxford: Oxford University Press, 2005), 630. For a complete profile of McReynold's bigotry and his role in *Meyer* and *Pierce* based on the previously unpublished diary of one his law clerks, see Steven J. Macias, "The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy," *Journal of Law & Family Studies,* 12, (2010): 87-150

[73] Bond, *I Dissent,* 7.

[74] Stephen Tyree Early, "James McReynolds and the Judicial Process" (PhD diss, University of Virginia, 1954), 30. The senior McReynolds felt strongly that the establishment of free public schools was "casting pearls upon swine," supposing that those who had the initiative to seek out an education would be able to find one.

Military Academy that launched the non-sectarian challenge to the Oregon School Law. After school he ordered his son to attend Vanderbilt.[75] Justice McReynolds was not only partial to private military schools, but was also raised to be suspicious of the states' role in public education.[76]

In the *Nebraska* case, Justice McReynolds focused on the issue of state monopoly of education that Guthrie had raised in his brief. It reflected how Guthrie had successfully reoriented the case from questions of religious liberty to parental rights. During the oral arguments, McReynolds asked the lawyer for Meyer, Arthur Mullen, persistent questions about where counsel stood on the issue. In response, Mullen adapted his arguments to emphasize the same themes as Guthrie's *amicus curiae* brief. In his written submission, Mullen had conceded that the state could compel attendance at public schools under its police powers, but after several interpositions from McReynolds he foreswore the opposite, answering "I do not believe the state has the power to take complete control of education, and give it a complete monopoly of education." Mullen cast the innovation of common schools as a relatively recent one that broke with the long tradition in the United States where education had "always been a private matter." Improvising in line with Guthrie's arguments, he expounded that a legislative majority had no right to "change the entire history of the human race, and by its mere fiat take my children and require me to send them to the public school…" It was, he concluded in

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[75] Bond, *I Dissent*, 3, 12.

[76] McReynolds appointment to the Court in 1914 proved decisive in numerous Supreme Court cases regarding the police powers and children. He cast the decisive ballot in a 5-4 decision striking down the first federal child labor laws in *Hammer v. Dagenhart* (1918), as Grace Abbott complained "President Wilson was impatient with Mr. McReynolds as a cabinet member and made the fatal mistake of getting rid of him by promoting him to the Supreme Court." As she recounts it, the Secretary for the Interior, Franklin K. Lance, was otherwise slated for the vacancy and his liberal views would have reversed the outcome in *Dagenhart*. Grace Abbott, *The Child and the State: Legal Status in the Family, Apprenticeship and Child Labor, Vol. 1* (New York: Greenwood Press, 1938), 463.

his lengthy response, "one of the most important questions that has been presented for a generation because it deals with the principle of the Soviet."[77]

By the conclusion of his oral argument, Mullen stated that the very problem with the Siman Act was that it interfered with parental rights. "It reaches in and deprives a citizen of this liberty, of controlling his own family."[78] As Barbara Woodhouse has commented, this end point reflected the "strange metamorphosis" of the *Meyer* case as it made its way to the Supreme Court. At trial, the challenge to the Siman Law rested entirely on the grounds of religious liberty. In his brief for the Supreme Court, however, Mullen had emphasized the economic contract rights of teachers.[79] By the time Mullen concluded his oral arguments, his case rested firmly on equal rights of all men as parents. Submitting that the United States was made up of a "cosmopolitan people," rather than an "Anglo-Saxon blend," Mullen insisted that immigrants from continental Europe held the same rights over their children as native born men, imploring the Court to recognize that a "man has the same rights to his family as the most cultured man in my state; because we do not measure rights by what a man knows or what he has in this country."[80] The common marker of manhood was the right to control one's own child. It was a pivot that boded well for the NCWC's challenge to the Oregon School Law and the legal strategy that Guthrie was developing.

The Supreme Court struck down the Siman Law. McReynolds read the decision on behalf of the Court and began to articulate a more expansive interpretation of the liberties protected by the Fourteenth Amendment beyond economic liberties. "While this Court has not attempted to define with the exactness the liberty thus guaranteed," McReynolds noted, it "without doubt," included "the right of the individual to contract,

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[77] Oral Transcript of Arguments of Arthur Mullen for the Appellees in *Meyer* as quoted in Abrams, *Cross Purposes* 120.
[78] Oral Arguments of Arthur Mullen in *Meyer* as quoted in Abrams, *Cross Purposes,* 120.
[79] On this point see Barbara Woodhouse, "Who Owns The Child?," 1014 - 1015.
[80] Oral Arguments of Arthur Mullen in *Meyer* as quoted in Abrams, *Cross Purposes* 120.

to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[81] On those long-established common-law rights, McReynolds' singled out parents' rights and duties in education, quoting Blackstone as follows, "corresponding to the right of control, is the natural duty of the parent to give his children education suitable to their station in life." Just as Guthrie had in his brief, McReynolds used the analogy to Plato's Republic to reject the contention that states possessed unlimited powers over education. Plato's law that children were "to be common, and no parent is to know his own child" was "wholly different" from the principles upon which present government rests.[82] Among these broader ruminations on the relationship of the state to parents and education, the Court struck down the Siman Law for violating the right of parents to contract teachers of their choice.

In June 1923, as the Supreme Court handed down its decision in *Meyer v. Nebraska,* the legal challenge to the Oregon School Law was initiated when Kavanaugh filed a complaint with the federal court requesting an interlocutory injunction.[83] Oregonian Catholics and the NCWC had been engaged in lengthy discussion regarding who should be put forward as the plaintiff for the case.[84] Archbishop Christie felt that the Society of Sisters of the Holy Names of Jesus and Mary was the obvious choice. The Sisters owned and maintained twelve schools across the state, with a combined enrollment of over 1,865 students. The Sisters' oldest school, St Mary's Academy in

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[81] *Meyer v. State of Nebraska,* 262 U.S. 390 (1923) at 399.
[82] *Meyer v. State of Nebraska,* 262 U.S. 390 (1923) at 402. McReynolds opined it would do "violence to both the letter and spirit of the Constitution."
[83] His hand had been forced when the Hill Military Academy filed their complaint at a moment when the Catholics were not altogether ready to do the same. The Catholics were still weighing who should be put forward as a plaintiff. Abrams, *Cross Purposes,* 125-127.
[84] Another concern was how broach the fact that the law was not due to come into effect until 1926, but Guthrie assuaged this concern by having Kavanaugh collate all the data he could to point to the economic injury that private schools had already incurred as parents withdrew their children from their schools in anticipation. Abrams, *Cross Purposes,* 125-127.

Portland, had opened its doors in 1859, taking in a group of six students that included three Catholics, two Jewish students and an Episcopalian, many of whom were frontier orphans. The NCWC felt it therefore exemplifying the long tradition of Catholic schools in the state, and their charitable mission. Kavanaugh felt it was a safe legal strategy as the Order was registered with the State as a corporation, making it easy to argue the State was in violation of its contractual obligations.[85]

The initial complaint was filed on behalf of the Sisters, and immediately the NCWC worried about whether that choice of plaintiff would jeopardize the arguments about parental rights. Burke wrote to Guthrie to ask whether it might be safer to file a complaint on behalf of a parent, "a human person, made by God," rather than a corporation if the goal was to get the Court to uphold parental rights.[86] The opposing counsel also shared this concern. After Kavanaugh filed the brief for the Sisters alone, the attorney wrote to the Attorney General explaining that he thought he understood their "strategy." "They will probably file a bill in the name of some school teacher in the near future and also a bill in the name of some parent who desires to send his children to a parochial school," he speculated in order to both delay proceedings and ensure they had enough "suits as are required to present their contentions in court." [87] The suit on behalf of the Society of Sisters, however, remained the lone suit. The legal team in Oregon reportedly struggled to find a suitable parent for a test case. Guthrie backed the decision of Kavanaugh, and suggested that filing multiple complaints could make it look like they were scrambling for legal grounds on which to stand. Besides, the Sisters were the safe legal bet given established precedent and the fact they had suffered clear economic harm.

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[85] Abrams, *Cross Purposes,* 125-127.
[86] Letter from Burke to Guthrie, January 3, 1924, (Church: Church and State: Oregon School Case, January-June 1924), box 14, folder 8, OGS, NCWC.
[87] Letter from McCamant to Van Winkle, August 24, 1923, Folder One, Department of Justice Records, Case Files, *Pierce v. Society of Sisters,* Oregon State Archives, Salem, OR.

As the case reached the federal court, Guthrie directed Kavanuagh from afar. Kavanuagh should use the term "monopolization" Guthrie advised to describe the law, and he should bring to the Courts attention the argument that "no government, however radical or revolutionary has ever attempted to monopolize education except Soviet Russia." He encouraged Kavanaugh to suggest that the School Law was the tip of the iceberg, laying the path for state control of revered private colleges like Columbia, Yale and Princeton. The "more we can show that Protestant and Jewish private schools will also be affected, the more persuasive our argument is likely to be," Guthrie reminded him.[88]

In a unanimous decision, the federal court bench declared that the School Bill unconstitutional and granted the injunction. The attorneys for the State of Oregon had protested that parents had no standing in the case, but the court held that it was clear that parental rights were intimately involved because schools depended on the patronage of parents. The Court, however, offered a narrow rationale for striking down the law, sticking to established precedent. It found that the School Bill did violate the constitutional rights of parents, but only the economic rights of parents to contract with private schools, following the precedent in *Meyer*. Still, the unanimous judgment was overwhelmingly favorable for the NCWC and the Hill Military Academy. The judges found little merit in the State's case, stingingly dismissing the State's melting pot argument as "an extravagance in simile."[89] No matter what the result, however, both parties had known from the outset that the decision would be appealed to the Supreme Court. As the *Western American,* a Ku Klux Klan newspaper reported, "…as good American citizens, we smile and say 'round One." When the decision was "appealed to the highest court in the land," the paper informed its reader, "we expect an entirely

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[88] Letter Guthrie to Burke, October 22, 1923 (Church: Church and State: Oregon School Case, January-June 1924), box 14, folder 7, OGS, NCWC.
[89] *Society of Sisters v. Pierce,* 296 F. 928 (D.C. Ore. 1924) at 933.

different ending."[90] The District Court case was a mere dress rehearsal, and both sides had plenty of arsenal remaining.

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Fundamental Family Liberties: The Case of *Pierce v. Society of Sisters*

The Oregon School Law reached the Supreme Court on March 16, 1925. By then, the case had attracted the attention of the national press which all seemed to sympathize with the arguments made by the NCWC in favor of protecting paternal sovereignty. "The decision of the federal court if sustained," read the editorial of the *New York Times, "*[will] have its greatest value in protecting the parental right against a socialistic invasion."[91] Each side submitted multiple briefs. For the State of Oregon, George Chamberlain was retained to act on behalf of Governor Pierce. Chamberlain brought significant experience to the State's team having served as the first Attorney-General of Oregon and as the state's eleventh Governor. He had just finished his second term as a US senator. Though not a friend of Pierce, Chamberlain was a prominent Mason, and the Masons had agreed to pay for his representation in the case. Isaac Van Winkle, the current Attorney General, submitted a separate brief.[92] For the Society of the Sisters, Guthrie, who had been impressed with Kavanuagh's performance in the District Court case, permitted him to appear as counsel. Kavanaugh was admitted to the DC bar for the purpose of this -- his first national appearance -- and his brief remained largely unchanged from his earlier successful submission. Guthrie's own brief lent stature to the Sisters' case and a touch of grandiloquence as well. Seventh Day Adventists, the

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[90] "School Law Up To Supreme Court," *The Western American* as quoted in A. B. Cain, "The Oregon School Fight – A Complete and True History" (Portland: A.B. Cain, 1924), 147-148 at OHS.
[91] "The Oregon School Law" *New York Times*, April 2, 1924, 18.
[92] Van Winkle's brief was prepared in consultation with Wallace McCamant, the attorney the Masons had hired to represent the State in the District Court case. Abrams, *Cross Purposes,* 158-160. The attorneys for the State of Oregon divided their arguments between the two cases they were simultaneously appealing, with the Hill Military Academy's case reaching the Court at the same time. The Supreme Court conjoined the two in their judgment.

Domestic and Foreign Society of the Protestant Episcopal Church and the American Jewish Committee filed supporting briefs.

At the heart of the argument of the State of Oregon lay two contentions, each of which aimed to pre-empt Guthrie's arguments about parental rights and show that they had no legal standing in the Supreme Court. First, the federal courts had no right to interfere with the educational policy of the sovereign states. Second, the Fourteenth Amendment did not cover civil liberties, let alone parental rights. They reminded the Court that the *Slaughter House Cases,* the first Supreme Court decision to interpret the newly adopted Fourteenth Amendment in 1873, had immediately "swept away" the "extreme view of the Fourteenth Amendment" by distinguishing between the federal rights of citizenship and the rights of citizens guaranteed by state constitutions. The "federal rights of citizenship" were extremely limited, and did not extend to the civil liberties protected by state constitutions.[93] To emphasize the point, the attorneys quoted the Court's decision in the 1908 case of *Twining vs. New Jersey*. "There can be no doubt," the decision had stated in summarizing the *Slaughter House Cases,* that "civil rights sometimes described as fundamental and inalienable, which before the War Amendments (Reconstruction Amendments), were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment."[94] Nor did the fourteenth Amendment "originate" rights; rather it recognized existing federal rights of citizenship.[95] The claim, therefore, that the Oregon statute violated the fundamental liberties of the United States was "so manifestly without merit or legal basis as to hardly be worthy of serious consideration."[96] No federal rights of citizenship were at stake.

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[93] George Chamberlain, Brief of Appellant, The Governor of the State Of Oregon, *Pierce v. Society of Sisters of the Names of Jesus and Mary,* 268 U.S. 510 (1925), reprinted in *Oregon School Cases: Complete Record* (Baltimore: The Belvedere Press, 1925), 80. (Hereafter: Chamberlain Brief, *Oregon School Cases*).
[94] Chamberlain Brief, *Oregon School Cases*, 86.
[95] Chamberlain Brief, *Oregon School Cases*, 80.
[96] Chamberlain Brief, *Oregon School Cases*, 81.

Second, the attorneys for Oregon argued that the rights questions raised by the case fell firmly, and exclusively, within the jurisdiction of the states. "If any privileges or immunities have been infringed upon," they submitted, "they are relative to the rights of parents over their children and the whole field of law of Domestic Relations is beyond dispute under state jurisdiction and not under Federal jurisdiction." Family was not mentioned in the constitution and was entirely left to the states for regulation.[97] Indeed, the absence of precedent was the very proof that the case was beyond the jurisdiction of federal courts. "The reason why there have been no direct adjudications by the United States Supreme Court on the questions of Federal control over education or domestic relations," the attorneys argued, was because "these matters have been so universally recognized as being entirely within the field of state control that no one has previously considered it worthwhile to take up such a question for the adjudication of the court." Even lawyers who held "extravagant ideas" about the Fourteenth Amendment "had never conceived… that it would be stretched to such an extent as this." If federal authority did extend this far, it would strip the states of their functions. If the states were "deprived of their powers" over education and domestic relations, "it was hard to see what powers would logically be left to them," Chamberlain warned.[98]

The argument ought to have sounded familiar to Guthrie. After all, it rested on the principle of dual federalism that he had been instrumental in developing over the previous two decades. Indeed, the State of Oregon relied on *Hammer vs. Dagenhart* and *Drexel vs. Bailey* as its two primary points of precedent, the child labor decisions in which the Court had adopted Guthrie's framework to strike down federal regulation of child labor – another cause close to Guthrie's heart. Citing those cases, Chamberlain pointed out that the Court had held that "all questions relative to the care, control and custody of

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[97] Supplement to Chamberlain Brief, *Oregon School Cases*, 126. The Fourteenth Amendment does not "protect rights arising out of family relations," they urged, it was "one class of rights which the Constitution leaves in its entirety to state regulation and state protection."

[98] Chamberlain Brief, *Oregon School Cases*, 100-101.

minor children belong exclusively to the state." If the Court had held that Congress could not intervene in matters relating to child labor, Chamberlain asked, then how could the Court itself now intervene in the education policies of the states? If the Court were to do so, the "clear inference" would be that attending public school for forty weeks a year was more injurious to the child than laboring all year round in a factory. [99] Van Winkle borrowed arguments from *Dagenhart,* arguing that education should be left for each state to decide for itself for the same reasons child labor was, "local conditions in a few states may render laws necessary or advisable which would be unnecessary or inadvisable in other states." [100] Given that compulsory attendance laws were a constitutional exercise of police powers, the people of Oregon "should be permitted to exercise their discretion to the best means of promoting the general welfare in that regard." The Court should leave "some vestiges of sovereign power" to the states. [101]

Chamberlain and Van Winkle's arguments about the sovereign powers and rights of the states paralleled Guthrie's and Kavanaugh's characterization of the sovereign rights of the family. Chamberlain and Winkle offered a textbook definition of dual federalism, arguing that since the founding of the Union, there had been "two distinct governments within the territorial limits of each state of the United States." Chamberlain cited *Collector vs. Day,* a Supreme Court case on federal taxes from 1871, in which Justice Nelson defined dual federalism, stating that state and federal governments "are separable and distinct sovereignties, acting separately and independently of each other, within their respective spheres." While the federal government "in its appropriate sphere was supreme," the "powers" of the states were "not granted" but were "reserved" and "independent of the general government." The rights and powers of the state did not derive from the federal government, Chamberlain argued. Therefore, "of all the powers

[99] Chamberlain Brief, *Oregon School Cases*, 103.
[100] Chamberlain Brief, *Oregon School Cases,* 103.
[101] Isaac Van Winkle, Supplement to Brief for the Appellant, The Attorney-General of Oregon, in *Pierce*, reprinted in *Oregon School Cases,* 219-220.

possessed by the federal Government," the power of judicial review "should be exercised with the greatest of caution."[102]

In his submission, Kavanaugh argued that the sphere of the state and the sphere of the parent overlapped, but derived from distinct sources of power. Just as the powers of the federal government were in some circumstances "supreme" to the powers of the state, Kavanaugh conceded that the powers of the state were superior to the parent when a parent was negligent or abused his powers. He argued, however, that parents did not derive their rights from the state. It was not "privilege granted by the state to the parent which the state may at will withdraw." The duty to rear one's children was "not a function which the state delegates to the parents," rather it was a right and a power that belonged to parents in the first instance. The family was an institution with powers antecedent to civil government that might "outlive" the state as well. "Free government was built around the family," Kavanaugh argued. [103] To underscore this point, he quoted the somewhat antiquated language of Justice Lewis in the 1842 Pennsylvania Supreme Court case, *Commonwealth vs. Armstrong:* "the patriarchal government was established by the Most High, and with the necessary modification, it exists at the present day."[104] This parallel argument revealed the extent to which the Society of Sisters' case defending the "fundamental rights of parents" rested upon the suggestion that family had its own sovereign jurisdiction beyond the reach of government.

Moreover, the argument demonstrated how Guthrie and Kavanaugh would string together a series of judicial precedents on parental rights that had been marginal, or dissenting cases, from the overwhelming judicial consensus over the past fifty years that parental rights were subordinate to the police powers of the states. Their briefs wove together an alternate jurisprudence on parental rights, dating back to *Commonwealth v.*

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[102] Chamberlain Brief, *Oregon School Cases,* 71-72.
[103] John P. Kavanaugh, Brief of the Appellant in *Pierce,* reprinted in *Oregon School Cases,* 323.
[104] Kavanuagh Brief, *Oregon School Cases,* 327. See chapter one.

Armstrong (1842) which James Kent had complimented the correct interpretation of paternal rights under the common law. The submissions made much of decisions such as *People v. Turner,* where the Illinois Supreme Court had found that the Chicago Reform School violated parental rights – notwithstanding the fact that the Illinois Supreme Court reversed its own decision on that question less than a decade on.

Based on these cases, in his brief, Guthrie argued that parental liberty was the wellspring of all liberties and the foundation of free government. The Oregon School Law, therefore, threatened to undermine the republican system of self-government. He argued that the School Law violated the rights of schools as corporations and of teachers' right to contract. But then he put to the court that there was "a far more important group of individual rights" involved in the present case, "namely the rights of parents and guardians…"[105] "Reflection should soon convince the court that those rights – which the statute seriously abridges and impairs – are the very essence of personal liberty and freedom," he announced, before embarking on a grandiose reflection on the meaning of life, love and liberty:

> Children are, in the end, what men and women live for. Through them parents realize, as it were, a measure of immortality. To the parent the child represents the sum of all his hopes… For them parents struggle and amass property and put forth their greatest efforts and strive for an honored name. In return for the enormous sacrifice they make and burden they bear, parents have the right to guide and rear the children to be worthy of them. What right could be more truly and completely the essence of liberty?[106]

Guthrie argued that man's ownership of his child was the mark and measure of free government. Quoting French statesman and philosopher Jules Simon, Guthrie submitted: "If a state takes hold of the child, the father is no longer free, and tomorrow

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[105] William Dameron Guthrie, Brief of the Appellant in *Pierce,* reprinted in *Oregon School Cases,* 274.
[106] Guthrie Brief, *Oregon School Cases,* 274.

not a trace of liberty will be left."[107] As Chamberlain noted somewhat caustically, the suggestion that parental rights constituted a "fundamental liberty" relied upon "a strange perversion of the meaning of the word 'liberty' to apply it to a right to control the conduct of others."[108]

Guthrie elaborated on the analogy about the family and the state he had drawn in his *amicus* brief in *Meyer v. Nebraska* to Plato's Republic. The logic of Plato's ideal commonwealth was to make children "common property" to dissolve any loyalty children felt to their parents, and reapportion it exclusively to the state. It represented the germinal seed of autocratic government - the "state-bred monster… could readily be turned to whatever use a tyrannical government might conceive to be in its own interest." It was no coincidence, Guthrie therefore posited, that no modern government held "parenthood in so slight esteem as did Plato or the Spartans – except Soviet Russia." The Oregon School Law, Guthrie submitted in his "final analysis… is in consonance only with the communistic and Bolshevistic ideals now obtaining in Russia, and not those of free government and American conceptions of liberty."[109] The liberty at stake, as outlined in Guthrie's brief, was the foundation of free government.

In March 1925, the attorneys appeared before the Supreme Court to make their oral arguments. Each side amended their arguments by putting forward a new contention. Chamberlain, perhaps sensing that he was losing, included an argument that Oregon was upholding and defending the rights of the child. Hitherto, the central

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[107] William Dameron Guthrie quoting Jules Simon, *L'Ecole* (1867), 375 in Brief of the Appellee, *Pierce v. Society of Sisters of the Names of Jesus and Mary,* 268 U.S. 510 (1925), reprinted in *Oregon School Cases: Complete Record* (Baltimore: The Belvedere Press, 1925), 274. (Hereafter: Guthrie Brief, *Oregon School Cases*).
[108] Supplement to Chamberlain Brief, *Oregon School Cases,* 127. Indeed, Chamberlain pointed out that Guthrie's references to Jules Simon and Pufendorf were ironic when put in their proper context. Jules Simon was a French philosopher who had held the education portfolio under President Theirs of the French Republic between 1871-1875 had argued against ecclesiastical control of education in favor of universal public schooling. So to had Pufendorf, who had written the Laws of Nature and Nation in 1672 "with reference to the tyranny of the ecclesiastical system of education in effect in the Empire of Austria during, perhaps, the worst period in its history." Chamberlain Oral Argument, *Oregon School Cases,* 685, 688-689.
[109] Guthrie Brief, *Oregon School Cases,* 275.

argument put forward by Oregon was that School Law was within the police powers of the state and necessary for self-protection. But that argument now seemed to stand on slippery ground, without any evidence that private schools were fostering disloyalty or producing compromised citizens, the attorneys had begun to paint the amendment as a protection against future dangers. Like their opponents, they raised the specter of communism as well. "If the Oregon School law is held to be unconstitutional it is not only a possibility but almost a certainty that within a few years the great centers of the great centers of our country will be dotted with elementary schools which instead of being red on the outside will be red on the inside," Chamberlain had foreshadowed in his brief.[110] The State of Oregon required full powers over its educational system to ensure that none of its future citizens would be educated and controlled by "bolshevists, syndicalists and communists."[111] In his brief, Chamberlain had submitted that the case raised only the rights of parents. In fact, he submitted that it would be "admitted by all" that children did not have liberties and therefore had no legal rights at stake in the case.[112]

But as Chamberlain rose to conclude his case before the Court, he changed tact to include children's rights. As if sensing that he needed to meet Guthrie's arguments about parental rights and the states head on, he reverted to an argument that had long worked for state-builders who sought to expand the power of the state over the family over the past fifty years, and that was that the state's primary interest was to uphold the rights of child, which trumped the interests of the family. The rights of parents were "important, we concede," he stated, but they were not as important as the rights of children, and the Oregon School Law did not abridge rights but rather "it protects the rights of children in the right to free education."[113] He argued that the *Society of Sisters*

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[110] Chamberlain Brief, *Oregon School Cases*, 102 - 103.
[111] Chamberlain Brief, *Oregon School Cases*, 103.
[112] Chamberlain Brief, *Oregon School Cases*, 95.
[113] Oral Argument of Hon. George E. Chamberlain On Behalf of the Appellant, The Governor of Oregon in *Pierce,* reprinted in *Oregon School Cases,* 690.

sought to deprive certain children of their right to universal public education. Parental rights were, in fact, secondary to the rights of the child. Picking apart the precedents cited by Kavanaugh and Guthrie in their briefs, Chamberlain singled out one precedent from South Carolina to point out the case was dealing with "the autocratic power of the father." He argued that the appellants had misapplied the case in which the Court denied the father's absolute rights over the child. "The rights of the father and the mother are still subject to the still higher right of the child to have its welfare safeguarded," he quoted from the original decision.[114]

Chamberlain's second strategy in his oral argument was to attempt to deflate some the oratory gravitas of Guthrie's submission by arguing that Guthrie's efforts to analogize the Oregon to autocratic states was entirely out-of-place. He urged the Court to think carefully about Guthrie's rhetorical strategy and historical analogies, arguing that "the State" in question in the present case was fundamentally different from the allusions Guthrie invoked. Guthrie made constant references to "the State" but his frequent use of the term, designed to invoke the specter of authoritarianism, required close scrutiny. [115] "Counsel says that in this day and under our civilization, the child of man is his parent's child and – note the term – not 'the State's.'"[116] But, Chamberlain pointed out that all of Guthrie's references to "the State" dated back to ancient and medieval times. Every reference was to an historic period when the state meant autocratic power.[117] All his analogies, therefore, regarding the dangers of the state and its relationship to the child ought to be regarded with great skepticism for the "state" at issue in this case was of a fundamentally different character. Under the United States constitutions, the states were a "republican form of government" and no state in the Union, he boasted, was more

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[114] Chamberlain Oral Argument, *Oregon School Cases,* 684-685, discussing *Tillman vs. Tillman,* 26. L.R.A. 781 (1921).
[115] Chamberlain Oral Argument, *Oregon School Cases,* 688.
[116] Chamberlain Oral Argument, *Oregon School Cases,* 686.
[117] Chamberlain Oral Argument, *Oregon School Cases*, 686.

progressive and democratic than Oregon. If one struck out of Guthrie's brief all discussion of 'the State" except that which referred to or even resembled the nature of the state of Oregon, "there will be very little left of their argument." [118] On this basis, Kavanaugh hoped that the power of Guthrie's analogies likening the School Law to Plato's Republic and Soviet Russia would fall away.

Guthrie, perhaps sensing he was winning in his novel argument about parental rights, made a play for more, asking the justices to consider the question of religious liberty as well. In the lead-up to the Supreme Court case, Burke had pleaded with Kavanaugh and Guthrie to include a claim that the School Bill violated religious liberties. He was anxious that a decision based on parental rights alone might protect the family, but leave the Church exposed. At the time, Kavanuagh declined and Guthrie continued to hone his argument about parental rights as the hallmark of his brief.[119] Guthrie believed, however, that Chamberlain's brief opened the window for him to make a further claim about religious liberty. In his oral argument, Guthrie argued that the Governor of Oregon had "deliberately disclosed and confessed" that the "true and real intent and motive, as well as the practical effect" of the enactment was anti-religious and thus constituted a violation of freedom of conscience.[120] The Court had never expressly decided that the Fourteenth Amendment guaranteed religious liberty, Guthrie conceded, but he again felt that it was "within the principle and spirit of Mr. Justice McReynolds' opinions in the *German Language* cases."[121] Pushing for the broadest possible interpretation of the fundamental rights guaranteed by the Fourteenth Amendment, Guthrie intertwined the two in his final oratory appeal: "it is consequently no

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[118] Chamberlain Oral Argument, *Oregon School Cases*, 687.
[119] Abrams, *Cross Purposes,* 179.
[120] Oral Argument of William D. Guthrie, On Behalf of the Appellee in *Pierce,* reprinted in *Oregon School Cases,* 653-654.
[121] Guthrie Oral Argument, *Oregon School Cases,* 655. An 1845 precedent, *Permoli v. Municipality No. 1* foreclosed any First Amendment argument by holding that the First Amendment did not apply to the states, see Woodhouse, "Who Owns The Child?," 1085.

exaggeration for us to urge that no more far-reaching and momentous question" had arisen before the Court that "more closely affect[ed] American institutions" and "the great freedom of conscience and religion of our people".[122] "If I do not magnify," Guthrie concluded his argument, "I profoundly believe that a decision upholding this law as valid would be the death knell of freedom of conscience, of freedom of education, and of religious liberty in the United States."[123]

The Supreme Court's decision was handed down on June 1, 1925. McReynolds authored the decision on behalf of a unanimous court. "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 court did not adopt Guthrie's belated argument about religious liberty, but the Court did hold that parental rights were a fundamental liberty protected by the Fourteenth Amendment. "The child is not the mere creature of the State," the Court declared, "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[124] The language of the Court was qualified: the inclusion of the word "mere" left open the possibility for future constitutional legislative actions that reflected the state's interest in children. But for Guthrie and the NCWC, it was enough: the child belonged to his parents. The decision embodied in the constitution the common law right to the custody, control and care of the child, which Blackstone had dubbed the "empire of the father."[125] Parallel to those of the states, parents had their own rights and duties, to govern their children as they saw fit without a higher government interfering.

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[122] Guthrie Oral Argument, *Oregon School Cases,* 644.
[123] Guthrie Oral Argument, *Oregon School Cases,* 672.
[124] *Pierce v. Society of the Sisters of the Names of Jesus and Mary*, 268 U.S. 510 (1925) at 535.
[125] William C. Sprague, ed., *Abridgement of Blackstone's Commentaries* (Chicago: Callahan and Company, 1915), 84.

"It is not an exaggeration to call the decision of the United States Supreme Court on the Oregon School Law a new birth of freedom," Burke trumpeted to the press after the decision was handed down. By the time the issue had reached the Supreme Court, Burke felt that the anti-Catholic bigotry that had so colored the campaign had vanquished. The victory of the NCWC in the *Pierce v. Society of Sisters* was not a victory for the Catholic Church but a victory all Americans as it created a new safeguard for the protection of a fundamental American freedom: parental rights. Burke stated that the decision recognized: "The American doctrine is not "the child is first of the nation: and afterwards the child of its parents." The "new birth of freedom" ignited by the decision "was not only in line with the traditions of our country: it gives those traditions new life." [126] The NCWC positioned itself as the true defender of the long-standing American tradition of natural rights and the liberal order.[127]

The decision in *Pierce v. Society of Sisters* (1925) would have far-reaching consequences for constitutional questions concerning the family and the state throughout the twentieth century.[128] In perhaps another ironic twist of fate, the decision formed the conservative basis of the modern right to reproductive freedom. In the Supreme Court in the cases of *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973) that found that the U.S. Constitution guaranteed a right to privacy, first for married couples that sought to use contraceptive devices and subsequently for the right of any woman to

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[126] J.J. Burke, Press Release, n.d., (Church: Church and State: Oregon School Case, May 1925-December 1926), Box 14, Folder 10 (iv), OGS, NCWC.

[127] This line of argument was famously expressed by John Courtney Murray, *We Hold These Truths; Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960). After the District Court decision, the Catholic Press had similarly argued that: "the doctrine of natural rights upon which the decision in the Oregon school case is based was given to the modern world by the theologians and canonists of the Catholic Church." Such a construal ran contrary to the common interpretation of natural rights ideology as part of an enlightenment reaction to absolute monarchism and the Catholic Church in England and France. It was a common misconception, the *Sentinel* readily conceded: "[t]he theory is often ascribed to Locke, the defender of the English revolution of 1688" which ended both Roman Catholic monarchy and absolute monarchy in England, consolidated Protestant rule and led to parliamentary democracy. But, the *Sentinel* pressed, Locke had found the doctrine of natural rights "ready to his hands in the works of Bellarmine and Suarez, theologians who distinguished the generation before this." "Still in the United States," *Catholic Sentinel*, April 3, 1924 as quoted in Cain, "Oregon School Fight," 151.

[128] For an excellent summary of its legal significance, see the epilogue of Abrams, *Cross Purposes.*

have an abortion. The fact that the right to privacy derived from the protection of the family was, however, no coincidence. In the 1920s, the decision in *Pierce* gave protection to the principle of paternal sovereignty, which by the late twentieth century would be referred to as the right to familial privacy.

Conclusion

In the 1920s, as a resurgent tide of nativism gripped the country, a new round of schooling wars flared across the country. In that respect, at least in the eyes of its supporters, the movement for compulsory education in the 1920s was the culmination of the common school movement of the nineteenth century. While the complementary movements to expand the powers of the states over education through compulsory public education laws and to establish federal powers over education both ultimately failed, the schooling wars of the 1920s reveal that from the 1870s through the 1920s, a diverse array of reformers and politicians alike consistently sought to expand the very boundaries of state power through the state's control over schooling, pointing to the important role that children played in state formation.

It further suggests that we cannot study the questions family, the state and politics in the 1920s in isolation as the result of the cataclysmic impact of the Red Scare or resurgence of the Ku Klux Klan. Both the nativist movement to expand the state's power over education and the anti-statist campaign it provoked had their roots in the schooling wars of the late nineteenth century. What changed, then, was the relative force those arguments held. In the 1890s, common school reformers and the Protestant majority had held up the Catholic defense of paternal sovereignty as un-American and foreign to the American liberal order. By the 1920s, amid the rising tide of communism, the Catholic Church presented itself at leading the vanguard of a defense of the American liberal order, based on its defense of the fundamental rights of parents against the state.

The battle over the Oregon School Law then also represented the culmination of more than fifty-years of campaigns that had mobilized ideas about paternal sovereignty against state regulation of children. In certain moments across the long Progressive Era, that idea that parents, namely fathers, possessed certain fundamental rights to govern their children had worked to great effect politically -- to stop or delay the introduction of compulsory schooling laws, school medical exams, and child labor laws, especially in the South. In particular, the imagined rights that parents held over their children had factored heavily in the ability of the Sentinels of the Republic to turn public opinion against the federal Child Labor Amendment by arguing that it invaded the rights of the family and the state alike. But as supporters of the Amendment had been at pains to point out, the parental rights that the Sentinels touted did not in fact exist. The Child Labor Amendment did not give Congress any powers over parents or children that the states did not already possess, and indeed, state courts had consistently held that parental rights were natural, but inalienable rights that were subject to the superior powers of the state.

The decision in *Pierce* for the first time established a clear limit on how far the powers of the state extended over parents and their children. More than that, it established that the common law rights of parents, that Blackstone had once dubbed the "empire of the father" was one of the few fundamental liberties that the Fourteenth Amendment protected. By the 1930s, the Supreme Court came to reject the use of substantive due process clause relied upon in *Pierce* as it backed way from upholding the fundamental "liberty to contract," but the recognition of "fundamental family liberties" lived on into the 1960s when it formed the basis of the right to privacy.[129] William Dameron Guthrie would use his victory in *Pierce v. Society of Sisters* for a more immediate end, joining forces with the Sentinels of the Republic in their national fight to protect the

[129] Woodhouse, *Who Owns The Child?,* 1109.

complementary principles of paternal sovereignty and states' rights against the expansion of the power of the federal government when reformers attempted to revive the drive to ratify the federal Child Labor Amendment in the 1930s.

Epilogue

"Paternal Sovereignty and the Making of Modern Conservatism in the New Deal Era, 1925-1937

> "Here we enter upon one of the most effectively used propaganda ideas [of parental rights]. It is peculiarly appealing to our urban middle class and independent farmer, harking back, as it seems to, to the American sense of 'individual liberty.'... It is putty in the hands of those would-be patriots to whom any social welfare legislation is an alarming symptom of radicalism and un-American-ism. But the rationalization has been laid hold of with the greatest fervor by some pious and patriotic employers, who are never so firm in their convictions as when the role of defender of the home and fireside coincides with their economic interests." -- Katharine DuPre Lumpkin and Dorothy Wolff Douglas, *Child Workers in America,* in 1937.[1]

After his victory in *Pierce v. Society of Sisters* in 1925, the aging William Dameron Guthrie had one last fight left in him. And as the chances of ratification of the federal Child Labor Amendment fast faded in 1925, the Sentinels of the Republic were only getting started.[2] By the late 1920s, several interconnected campaigns that all mobilized ideas about paternal sovereignty had stemmed the flow of federal initiatives targeting children. For one, the Supreme Court decision in *Pierce* nipped in the bud nativist movements to aimed to centralize the powers of the states over schooling. The Oregon School Law never came into effect, and the Court's decision also undercut the movement rippling through other states.

In Washington D.C., by the late 1920s, the Sentinels of the Republic and their sympathizers had chalked up numerous victories. The proposal for a Federal Department of Education had been sunk. The National Catholic Welfare Council (NCWC) conducted an organized lobbying campaign against its adoption, with the

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[1] Katharine DuPre Lumpkin and Dorothy Wolff Douglas, *Child Workers in America* (New York: Robert M. McBride & Company, 1937), 243–244.

[2] In December 1925, the Sentinels organized a national meeting in Philadelphia to put themselves forward as the leader to coordinate and consolidate the various efforts to defeat the federal Child Labor Amendment, including the National Association of Manufacturers, The Pennsylvania Manufacturers Association, the New York Commercial, the Woman Patriot, the Moderation League, the Constitutional League, the National Security League and the American Defense League. Elizabeth Christman, "Interlocking Machinery Spreads Misrepresentation," *American Labor Legislation Review* 15 (June 1925): 119-121.

support of the Sentinels of the Republic and seemingly unaffected interest groups like the National Association of Manufacturers.[3] In 1926, Sentinels appeared again in Congress to broker the repeal of the Shepard-Towner Maternity and Infancy Act that provided federal funds to states for prenatal and children's health services on a matching basis. On this occasion, the Sentinels aligned themselves with the American Medical Association and continued their standing partnership with the anti-feminists organization, the *Woman Patriot,* successfully pressuring Congress to not renew the scheme.[4]

By 1930, the campaign for the federal Child Labor Amendment seemed dead in the water. In three years, no state had voted to either ratify or reject the Amendment. The National Child Labor Committee (NCLC) itself had all but given hope that the Amendment would be ratified. As early as 1925, the NCLC had determined that federal action was an unlikely political prospect, and, by the late 1920s, the NCLC had resolved to focus instead on strengthening and enforcing state-level laws. The decision was deeply disappointing to a number of the founding members of the NCLC, none more so than Florence Kelley, who complained to Lillian Wald in 1927, "why did I ever help to start the National Child Labor Committee?"[5] As the numbers stood at the end of the decade, thirty-seven out of forty-eight states had voted to reject the Amendment. For the

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[3] The Sentinels later claimed they were "entitled to credit of being the only entirely disinterested body that registered opposition on principle" to the Education bill. Letter from Chairman of the Executive Committee Thomas Caldawader to members, May 8, 1937, folder 11, box 35, legal, National Catholic Welfare Council Collection, Catholic University of America, Washington D.C. [Hereafter: NCWC, CUA]. William Dameron Guthrie boasted that he was the driving force that turned the Catholic Church against the Federal Education Bureau, telling Nicholas Murray Butler that some authorities had initially thought that Catholics might receive a more "fair and just treatment from a Washington body that in some of the States, but I urged my view…" William Dameron Guthrie to Nicholas Murray Butler, December 28, 1923, folder 4, box 171, Nicholas Murray Butler Papers, Columbia University, New York, NY. [Hereafter: Butler Papers].

[4] "Sentinels Appeal for Repeal of the Maternity Act," February 3, 1926, reprinted by the *Women's Patriot,* A-109, folder 2, box 1, Alexander Lincoln Papers,1919-1940, Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, MA. [Hereafter: Lincoln Papers].

[5] Florence Kelley to Lillian Wald, April 13 1927, Lillian Wald Papers, New York Public Library as quoted in Walter I. Trattner, *Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in America* (New York: Quadrangle Books, 1970), FN 52, 287. On the decision the NCLC to back away from federal regulation, see Trattner, *Crusade for the Children,* 179-186.

Amendment to be adopted, the US Constitution required that thirty-eight states vote to ratify it, making the adoption of the Amendment seem a mathematical and political impossibility.

But in the 1930s, the federal Child Labor Amendment was resurrected – as its opponents saw it, the Amendment rose from the dead. The onset of the Great Depression in 1929 drew children back into industry in great numbers.[6] It also precipitated the landslide victory of Franklin Delano Roosevelt in 1932 and the roll out of his New Deal. Roosevelt did not campaign on the ratification of the federal CLA in 1932, but made his opposition to industrial child labor known. (His wife, Eleanor, was heavily involved in the campaign for ratification throughout the 1920s.) In 1933, President Roosevelt, under the auspices of his National Industrial Recovery Administration (NRA), effectively outlawed all forms of industrial child labor for children under the age of sixteen, crowing to Congress in January 1934 "child labor is abolished."[7] The women behind the Children's Bureau, including Grace Abbott, Lillian Wald and Florence Kelley, apprised that a shift in the political winds had occurred. They also recognized that the gains made under the NRA constituted temporary legislation and did not extend to agricultural child labor. In 1933, Abbott, Wald and Kelley reignited the drive for ratification to cement the gains made under the NRA and grant Congress the power to regulate all forms of child labor.[8] With little ado, fourteen states ratified the Amendment in 1933.[9] Twelve of those fourteen states reversed a previous vote by the

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[6] The Depression was also disastrous for the fundraising efforts of anti-child labor reform groups, which might explain the lag between the onset of the depression and the effort to revive the Federal Child Labor Amendment. Jeremy P. Felt reports in *Hostages of Fortune: Child Labor Reform in New York State* (Syracuse: Syracuse University Press, 1965), that the fundraising drive for the New York Child Labor Committee fell from $15, 884.75 in 1929 to $7227.08 in 1932, 219.

[7] Lumpkin and Douglas, *Child Workers,* 87.

[8] "The Child Labor Amendment," *Social Service Review*, 9, no.1 (1935): 107-109.

[9] The Sentinels complained the "women in the Labor Department at Washington were successful in their quiet campaign in securing ratification by fourteen states" which was "possible only because the people were generally too distressed by economic conditions to realize that a proposal rejected nearly ten years ago by 38 our 48 states was being resurrected." News Bulletin of the National Committee for the Protection of the Child, Family, School and Church, April 9, 1934, Box 78 Butler Papers.

state legislature to reject it.[10]

Taken off guard by the revival of the ratification campaign, the opponents of the Amendment regrouped and redoubled their efforts to defeat the Amendment. The Sentinels of the Republic used their executive committee to establish the National Committee for the Protection of the Child, Family, School and Church, operating out of an outpost in St. Louis, Missouri, perceiving that Midwest farm states would be the crucial battleground this time around. David Clarke, the conservative editor of the *Southern Textile Bulletin,* who had personally crafted the two successful constitutional challenges to the federal child labor laws, revived his Farmer's States Rights League. The National Association of Manufacturers renewed its efforts as well. These familiar opponents received support from the American Bar Association (ABA), which threw its professional heft behind the opposition campaign. By the 1930s, the hierarchy of the Catholic Church was united in its opposition, and the Lutheran Church – Missouri Synod joined the fight in the Midwest as well.[11] By 1934, under the pressure of these interest groups and lobbies, eleven states had voted to reject the Amendment.[12]

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[10] William Dameron Guthrie for The Special Committee of the American Bar Association, "The Federal Child Labor Amendment," 30 folder 17, box 8, Education Department Files, NCWC, CUA. [Hereafter: Guthrie, "The Federal Child Labor Amendment.]
[11] Lupmkin and Douglas, *Child Workers,* 240-242.
[12] Guthrie, "The Federal Child Labor Amendment," 30-31.

Image 6.1 "The Child Labor Amendment?" *The Rortarian*, March 1935, 37 in Sam McCune Lindsay Papers, Box 43, Columbia University.

In 1935, the battle was fully drawn after the Supreme Court struck down the NRA as unconstitutional.[13] With it, President Roosevelt's regulations on industrial child labor fell and he too joined the fight for ratification. By that time, the cracks in the once bi-partisan support for the federal Child Labor Amendment had become fully pronounced. Roosevelt leaned on all Democratic governors to pursue ratification in 1935. The Child Labor Amendment became a key issue that alienated conservative Democrats, such as former New York Governor and presidential hopeful Al Smith, who

[13] Justice McReynolds, who authored the decision in *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925), continued to play his role as well; he was one of the "four horseman," a conservative block of judges on the Supreme Court who overturned many of FDR's key New Deal policies in his first term

flipped to join the opposition campaign.[14] The greatest realignment, however, occurred on the other side of the aisle. The federal Child Labor Amendment had been introduced in 1924 by a majority Republican Congress, with Democratic support, and endorsed by Republican Presidents Calvin Coolidge and Herbert Hoover respectively.[15] In the 1930s, the opposition of the Republican Party to the Amendment became nearly uniform.

With the roll out of the New Deal, Republicans became increasingly critical of the growing size of federal bureaucracy and the proliferating number of New Deal agencies. In that context, more Republicans became wary of the potential of the Amendment to further aggrandize the power and bureaucratic size of the federal government as the GOP assumed the mantle of defending "states' rights." The changing position of the Republican Party on the Amendment reflected the broader on-going power struggle between the liberal and conservative wings of the Republican Party.[16] A core group of conservative Republicans, including William Dameron Guthrie, Elihu Root and Nicholas Murray Butler, had long dissented from the Republican Party's support for the federal Child Labor Amendment, believing the Party had betrayed its principles in the 1920s. Maneuvering to reverse that position, conservative Republicans saw the Amendment as an opportunity to put the Party back on course. While the divisions between the liberal and conservative wings of Republicans would continue to play out over the 1930s, a 1935 Gallup poll suggested that the growing partisan division over the Amendment was filtering down to the base. The poll revealed that overall six

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[14] On Smith walking back his support in the 1920s, see Felt, *Hostages of Fortune,* 208-209.
[15] Hoover was the Secretary of Commerce at the time the Amendment was proposed and was one of the prominent Republicans who supported it. Felt, *Hostages of Fortune,* 196.
[16] On the internal divisions within the Republican Party at this time, and the growing clout of conservatives, see Elliot A. Rosen, *The Republican Party in the Age of Roosevelt: Sources of Anti-Government Conservatism in the United States* (Charlottesville: University of Virginia Press, 2014).

out of ten Americans favored ratification. Seventy-two percent of Democrats approved of the Amendment, whereas fifty-four percent of Republicans opposed it.[17]

A small, but powerful, network of anti-statist activists mobilized to turn public opinion against the Amendment in the 1930s, just as had happened in the 1920s, and, again, ideas about paternal sovereignty constituted the core of their campaign. Indeed, anti-statists, such as the Sentinels of the Republic, carried their campaign against the Child Labor Amendment from the 1920s into the 1930s, and formed the nucleus of a growing set of interlocking networks of anti-statists and businessmen that attacked the New Deal.[18] Looking at the long roots of the opposition to the New Deal brings into light that the ideological commitments that drove anti-New Deal activism encompassed more than a belief in free markets and private property rights. For the Sentinels of the Republic, for instance, who were propelled into action in the early 1920s after the passage of the women's suffrage and Prohibition, and sustained into the 1930s by opposition to the federal Child Labor Amendment, paternal sovereignty was in fact constitutive of the "individual liberty" and "constitutional rights" that they championed, and part and parcel of their commitment to private property rights. The lineage of anti-statist causes from the 1920s into the New Deal era reveals that the "individual" who sat at the heart of the emerging libertarian politics was the white, male head of the household who wanted freedom from state both in the management of his family and his finances.

William Dameron Guthrie was clearly one such ideologue, and between 1933 and 1935, he brokered the key connections between different organizations that gave force to the renewed anti-ratification campaign. Since the 1890s, Guthrie had made a name for

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[17] "Child Labor Now a City-Farm and Political Issue," *New York Herald Tribune,* May 24, 1936 and Dr. George Gallup, "National Poll Is In: Voters in 45 States Back Amendment's Principle," *New York Herald Tribune,* May 24, 1936 in box 78, Butler Papers.

[18] This was also true of the groups that mobilized to oppose Prohibition, but with the repeal of Prohibition in 1933, the issue did not continue to sustain anti-statist campaigns in the same way.

himself as a *laissez-faire* lawyer attacking Progressive Era economic reforms such as the federal income tax. In the 1920s, he was consumed by his legal work challenging the Prohibition Amendment and the Oregon School Law.[19] Publicly, at least, he came to the cause of opposing the federal Child Labor Amendment late, but he quickly made up for lost time. In 1933, Guthrie tapped into his long-standing connections with conservative Republican heavyweights in New York to form the New York State Committee Opposed to Ratification. Nicholas Murray Butler, the outspoken President of Columbia University and a founding member of the Sentinels of the Republic, agreed to serve as the Chairman of the Committee.[20] The two men approached Elihu Root, a former Secretary of State and Secretary of War who had served under Republican presidents Roosevelt and McKinley, who lent his stature as the honorary Chairman of the Committee.[21] Behind the scenes, Guthrie worked his connections within the Catholic Church hierarchy whose public condemnation of the Amendment was enough to lead many New York Democrats with large Catholic constituencies to disregard the directions of the Democratic Governor and President to support the Amendment.[22] In short, between 1934 and 1936, Guthrie was the key bridge between the Catholic and

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[19] The Sentinels of the Republic called for the repeal of the Sixteenth Amendment that gave the federal government the power to levy income tax in the 1930s.

[20] Butler and Guthrie were long-standing friends, as lone conservatives on the Columbia faculty and ideological allies within the Republican Party. Butler had previously lent his public stature to Guthrie's case against the Oregon School Law. An anti-Semitic narcissist, Butler saw himself as a statesman perhaps out of proportion to the position he held, but the establishment certainly fueled his sense of status as well. Butler held over thirty-seven honorary degrees and was the recipient of the Nobel Peace Prize in 1931. The *New York Times* printed his annual Christmas message to the country. the 1930s, he took time out of the campaign against the Child Labor Campaign to travel to Italy to meet Benito Mussolini, a rare public figure who Butler thought matched his own leadership skills and at the end of his time as president of Columbia University, he left behind a chart comparing his time in power to Mussolini, Stalin, Hitler and FDR. For more on Butler, see Michael Rosenthal, *The Amazing Career of the Redoubtable Dr. Nicholas Murray Butler* (New York: Columbia University Press, 2006).

[21] "68 Leaders Fight Law on Child Labor: Root, Dr. Butler and Guthrie, Head State Group Seeking to Block Amendment: Warn of Major Peril," *New York Times,* April 16, 1934, 1.

[22] See, for example, Guthrie boasting to Butler that Cardinal Hayes had registered his private disapproval to Guthrie who was confident the Cardinal would be convinced to make his opposition public at the right time, William Dameron Guthrie to Nicholas Murray Butler, April 2, 1934, Box 171, Folder 3, Butler Papers and the correspondence between Guthrie's anti-ratification committee and the New York State Catholic Welfare Committee, e.g., Charles J. Tobin, Secretary of the New York State Catholic Welfare Committee to Nicholas Murray Butler, May 27, 1936, box 78, Butler Papers. On the decisive role that Catholic opposition played in New York, see Felt, *Hostages of Fortune,* 213-214.

Republican opposition that combined to sink the prospects for ratification in New York.

On the national scene, Guthrie was a founding executive member of the National Committee for the Protection of the Child, Family, School and Church, formed in December 1933. (At the time, the supporters of the Amendment decried the "preposterous" name of the Committee; certainly it makes for quite the acronym, the NCPCFSC).[23] The director of the NCPCFSC was Sterling Edmunds, a member of the executive committee of the Sentinels of the Republic and, like Guthrie, a prominent lawyer and member of the ABA. Edmunds was an anti-New Deal disaffected Democrat, who played a key role campaigning against Roosevelt, particularly as an executive member of the Southern Committee to Uphold the Constitution.[24] In addition to Guthrie, the remaining members that made up the NCPCFSC Executive Committee were Mrs. John Balch, the long-term Secretary of the Sentinels, Mary Kilbreth, the anti-feminist behind the Woman Patriot (and Sentinel executive member), and Alexander Lincoln, the former President of the Sentinels.[25]

Guthrie's third tactic was to convince the American Bar Association to publicly oppose the Amendment. Guthrie and Edmunds persuaded the American Bar Association to form a Special Committee Against the Ratification of the Child Labor Amendment in early 1934.[26] At the urging of the NCPFSC, the ABA also agreed to work with its state associations to block ratification in the twenty-four states whose legislatures

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[23] "Exploiting the Child," *The Nation*, 138, no. 3593 (May 1934), 551. This editorial misreported the name of the committee as "National Committee for the Protection of the Child, Family, Home, and Church." Another critic noted in reporting the long list of values the Committee claimed to defend "by some inadvertence the Constitution was left out!"

[24] Ex-Senator James A. Reed of Missouri, who was an early member of the Sentinels of the Republic and Sterling Edmunds established the National Jeffersonian Democrats in the 1930s, inviting forty prominent anti-New Deal Democrats from 22 states to meet in Detroit in August, 1935. On the role the Edmunds played in encouraging Al Smith and John Raskob to defect from the Democratic Party, see Robert Burk, *The Corporate State and the Broker State: The Du Ponts and American national politics, 1925-1940* (Cambridge: Harvard University Press, 1990), 262-268 and George Wolfskill, *The Revolt of Conservatives: A History of the American Liberty League* (Boston: Houghton Mifflin Company, 1962), 196-197.

[25] National Committee for the Protection of the Child, Family, School and Church, "Child Labor Amendment, June 23 1937" and "Purposes of the National Committee to Protect the Child, Family, School and Church," box 78, Butler Papers.

[26] Sterling Edmunds to Nicholas Murray Butler, July 24, 1934 and Sterling Edmunds to Nicholas Murray Butler, November 15, 1934, box 78, Butler Papers.

would meet in 1935.[27] Guthrie was asked to serve as the Chairman of the ABA's Special Committee and authored its influential report that was circulated in 1935. Despite this tight web of interlocking connections, with Guthrie and the Sentinels at the helm, to outsiders at least, the opposition of civic-minded groups such as the NCPCFSC, of churches and ministers, of prestigious professional organizations like the ABA, of prominent politicians from both parties, like Elihu Root and Al Smith, and public figures such as Nicholas Murray Butter, Lawrence Lowell, and Harry Pritchett gave the impression of a broad swathe of respected and disinterested actors who spoke with marked unity about how the Amendment would lead the federal government to "invade the home."[28]

And to be sure, all of these actors rolled out the same arguments about paternal sovereignty, the same rumors of the insidious socialist plot that lurked behind the Amendment and raised specter of federal agents invading the home as they had in the 1920s.[29] To that mix, in the 1930s, Guthrie injected two new legal arguments. The first argument was that the time for ratification had lapsed, which Guthrie contended meant that state legislatures could not validly ratify the Amendment, let alone reverse previous votes, unless the Amendment was proposed anew in Congress.[30] The second built

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[27] Sterling Edmunds to Nicholas Murray Butler, November 15, 1934, box 78, Butler Papers, Lumpkin and Douglas, *Child Workers,* 221.

[28] Lawrence Lowell and Harry Pritchett were the former presidents of Harvard University and MIT respectively. They had played a prominent role in the anti-ratification campaign in 1924 in Boston, and continued to lend their support to the opposition campaign, see "Dr. Lowell Hits Child Labor Act: 'Worst Move I Have Ever Known Taken In This Country,' He Says," *Boston Herald,* January 26, 1934 and Statement by Henry S. Pritchett, Press Release National Committee to Protect the Child, Family, School and Church," January 22, 1934, in box 79, Butler Papers. Indeed, even subsequent historians have overlooked the degree to which such groups overlapped. Trattner, for instance, notes that that the NCPCFS was an extension of the Sentinels of the Republic, but treats the ABA opposition and the New York State Committee Against ratification as different groups, *Crusade for the Children,* 204-207.

[29] Supporters of the Amendment pointed out, that opponents of child labor regulation had been trotting out the same arguments about parental rights for nearly one hundred years. "Above all, opponent tell us 'the child belongs to the parents,' and 'the home is the castle.' Proposed child labor laws (they said this of state laws as well as of the federal law) invade and threaten the home." Lumpkin and Douglas, *Child Workers,* 224.

[30] Guthrie "The Federal Child Labor Amendment," 6-7, and William Dameron Guthrie "Child Labor Amendment, Radio Address, Chairman of the Special Committee of the American Bar Association, NBC, January 7, 1935, box 78, Butler Papers.

directly off his success in *Pierce v. Society of Sisters.* "The authority and rights of parents are now safeguarded alike against state and federal denial," Guthrie stated in his ABA report.[31] The report of the ABA, and the legal claims that circulated in the 1930s, reflected the great strides made in the 1920s towards cementing a once marginal strain of jurisprudence about parental rights and the state's jurisdiction over the child as the orthodox position. Despite the great number of court decisions in the Progressive Era that affirmed the state's broad grant over of power over the child, Nicholas Murray Butler announced on national radio in 1934, "it must be borne in mind that the government has no possible jurisdiction over a child merely because it is a child." It would therefore be a "social revolution of the most extreme sort," he alleged in defiance of all recent history to the contrary, "for any government to attempt such an exercise of state power."[32]

The decision in *Pierce* served as constitutional bedrock to bolster the long-running arguments about paternal sovereignty. "The Amendment should be actively opposed as unwarranted invasion by the Federal Government in the field in which the rights of the individual states and of the family are and should remain paramount," the ABA report concluded, warning that the Amendment would grant Congress power that "could be exercised so as to invade the privacy of the home and the sacred authority, control and duty of parents." [33] Guthrie's role in the anti-ratification campaign was cut short when he died from a heart attack in December 1935, at the age of seventy-six, but his legacy lived on through the appeals based on the "fundamental liberty" of parental rights made by

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[31] Guthrie "The Federal Child Labor Amendment," 30.
[32] Nicholas Murray Butler, Radio Broadcast, February 2, 1934, "Why the Child Labor Amendment Should be Defeated," An Address Broadcast from the National Broadcasting Station, New York, February 2, 1934, box 78, Butler Papers. An internal memo for speakers opposing the Amendment circulated by the NCWC strung together the same list of cases from *Commonwealth v. Armstrong* (1842), *The People v. Turner* (1870) to *Meyer* (1923) and *Pierce* (1925) to argue that the Constitution had always safeguarded parental rights. "Against the Proposed Child Labor Amendment," N.D., Education Department Files, Folder 17, Box 8, NCWC, CUA.
[33] Guthrie, "The Federal Child Labor Amendment," 30.

the numerous opposition committees he had established.[34]

Florence Kelley did not live to see the end of the final fight over the Amendment either, but her friendship with Frederick Engels would continue to haunt the campaign for ratification. Kelley died in February 1932. Soon after, Kelley's friend, the German-born communist, F.A. Sogre, donated her papers to the New York Public Library. Her critics charged that the letters in that collection, especially Kelley's correspondence with Engels dating back to the 1880s, contained the final and definitive proof of the socialist plot that they had long alleged lay behind the Amendment. Sterling Edmunds, the director of the NCPCFS, used this evidence often and with great alacrity. The "chief draftsman" of the Amendment, he would inform Young Republicans, was Florence Kelley, "the most zealous, intelligent and energetic apostle of Marxian socialism who ever promoted that cause in the United States." Kelley had "caught the virus" from her personal encounters with Frederick Engels in Europe in the 1880s. She returned to the United States as Engels' "disciple," Edmunds claimed, and under his direct instruction began her lifelong campaign to transform "our free Republic into a socialist Utopia." [35]

Edmunds claimed that Engels instructed Kelley that in order to bring about a socialist revolution in the United States she should start with the children. One of Engels letters in the 1890s, Edmunds asserted, advised Kelley that "the less it (socialism) is knocked into the Americans from without the more they test it by experience the deeper it will go into their flesh and blood." She should therefore seek out "legislation that will weaken family ties and tend to make the children the creatures of the State" along with demanding pensions, welfare programs and high taxes that would leave little

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[34]"Noted Lawyer Dead," *The Gaffney Ledger,* 17 December 1935. Guthrie was found dead by his good friend John Davis who had been invited to join Guthrie for lunch at his house. Davis, the one-time Democratic Presidential Nominee who would be a founding member of the American Liberty League, offered the eulogy for Guthrie at his funeral. John Davis, "William D. Guthrie," *United States Law Review*, 70, no. 192 (1936): 192-198.

[35] Sterling Edmunds, "Why Federal Control of Youth?" *The Young Republican,* July 1936, 21, 30-31 in box 78, Butler Papers.

capital for the growth of private enterprise. Edmunds explained that Kelley set about this radical work with a core group of women then resident at the Hull House Settlement in Chicago, who would later establish the Children's Bureau in 1912, and from there launch their campaign for the "nationalization of children."[36]

In pinning this entire plot on Kelley, Edmunds was still sympathetic to her, describing her as "wholly sincere" in her belief that socialism would lead to "Utopia." Such convictions had been "inculcated" in her early, he alleged, as the "friend, associate and translateress" of Frederick Engels, when she translated his works *Conditions of the Working Class* and *Origin of the Family, Private Property and the State.* The latter work, in particular, Edmunds emphasized (and which Kelley did not in fact translate) "not only preaches communism but is a violent arraignment of monogamous marriage as the main obstacle to ushering in the Socialists' Ideal State."[37] Edmunds concluded that the federal Child Labor Amendment was, at its root, Karl Marx's deep-seated plot to bring about socialism in the United States, with Frederick Engels and Florence Kelley serving as the respective conduits for that vision. It was surprising that in his deep dig in into Kelley's past to explain the true intents of the present Amendment that Edmunds did not unearth Kelley's first published writing, her thesis from Cornell, in which she had celebrated compulsory schooling laws and child labor laws as guarding "all children without reference to the family, diminishing paternal power, and making the child more and more nearly the ward of the State."[38] Nonetheless, Sterling Edmunds' writings and speeches suggest he was certainly sincere in his belief that the true goal of the federal Child Labor Amendment was to abolish the patriarchal family, nationalize the child and bring about

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[36] The Child Labor Amendment And What It Means," An Address by Sterling E. Edmunds before the Missouri State Society, Sons of the Revolution, St. Louis, Mo., November 29, 1933 at the Statler Hotel, box 79, Butler Papers

[37] "The Child Labor Amendment And What It Means," An Address by Sterling E. Edmunds before the Missouri State Society, Sons of the Revolution, St. Louis, Mo., November 29, 1933 at the Statler Hotel, box 79, Butler Papers.

[38] Florence Kelley, "On Some Legal Changes to the Status of the Child Since Blackstone," *The International Review* (August 1882), 93-95.

the Socialist state.

The fight over the ratification of the Amendment effectively ended in 1937, and in a sense, both sides were in a position to claim victory but to also be disappointed nonetheless with the result. In 1938, Congress passed the Fair Labor Standards Act (FLSA) that included national regulations to end industrial child labor. The limited scope of the FLSA with respect to child labor reflected how few gains had been made in favor of universal legislation to end child labor since 1916 when the federal bi-partisan consensus had emerged in support of the Keating-Owen Law. The FLSA effectively replicated the provisions and mechanisms of the Keating-Owen Law; it relied on the commerce clause to prohibit the shipment of goods across state lines that had been produced in establishments with "oppressive child labor conditions." In 1941, the Supreme Court upheld the FLSA as constitutional, in the process overturning the decision *Hammer v. Dagenhart* that had struck down the Keating-Owen Law.[39] Some reformers, disappointed by the scope of child labor provisions in the FLSA, continued to push for the ratification of the Amendment. But in the end, only twenty-eight states ratified the federal Child Labor Amendment. For some opponents, that victory was sufficient – they had stopped the passage of an Amendment that they believed would have done irreparable damage to the Constitution and given Congress a dangerously broad grant of power. Others, such as the National Association of Manufacturers, still condemned the national legislation as a "step in the direction of Communism, bolshevism and Nazism."[40]

The limitations of the FLSA with respect to child labor reflected the racial

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[39] Elizabeth Marjorie Wood, "Emancipating the Child Laborer: Children, Freedom, and the Moral Boundaries of the Market Place, 1853-1938" (PhD diss., University of Chicago, 2011), 336-337. Jonathan Grossman, "Fair Labor Standards Act of 1938: maximum struggle for a minimum wage," Monthly Labor Review, 101, no.6 (June 1978): 29.

[40] On the response of some NCLC reformers to the FLSA, see Trattner, *Crusade for The Children,* 204-205 (quote from the NAM cited on 204). In 1937, a Gallup Poll showed that support for the Amendment had increased from 61% to 76% and that a majority of voters in every state favored ratification – that given, the success of the NFSCPC and like groups to defeat it were significant.

limitations of the entire movement towards expanding state power to uphold the rights of the child over the past half century. All agricultural child labor, which since the 1920s had constituted the vast majority of child labor, was exempt from the FLSA and most agricultural child labor was performed by black children. The 1900 census had revealed that one million children worked in industrial occupations and one million children in agricultural work. By 1930, the census reported that more than 500, 000 of the 668, 119 children working were employed in agricultural labor. Less than one percent of children aged ten to fifteen were employed in manufacturing.[41] Put another way, black children made up less than one tenth of all children in the United States in the 1930s, but constituted more than a third of all child workers.[42] Clearly, much progress had been made through public pressure, state laws, changing economic conditions and the expansion of public schooling to reduce the rates of industrial white child labor over the twentieth century. In excluding agricultural labor as well as "children working for their parents in any occupation other than manufacturing or mining," the FLSA had minimal effect in further reducing the rates of child labor – with some estimates claiming its provisions reached only 30, 000 children.[43]

The exclusion of agricultural child labor, which was disproportionately made up by black children, was of course not new. The NCLC had briefly taken up the cause of agricultural child labor in the 1920s, when the federal Child Labor Amendment was first proposed. But in the barrage attacks from anti-statist groups, who often invoked romantic ideas about the independent white farmer receiving much needed help from his bucking teenage son, the plight of agricultural child workers, especially on individual farms had faded from view. The myth of the fictive white farm child was particularly

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[41] News Bulletin of the National Committee for the Protection of the Child, Family, School and Church, April 9, 1934, box 78, Butler Papers.
[42] Lumpkin and Douglas, *Child Workers,* 64-67. On the exclusion of African-Americans from the New Deal generally, see Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright Publishing, 2013).
[43] Wood, "Emancipating the Child Laborer," 336-337; Grossman, "Fair Labor Standards Act of 1938," 29.

pernicious because it masked the racial and economic realities of "independent" farm life. In 1930, 88% of children who were classified under the census as "unpaid family workers" worked in the South, and black children were disproportionately overrepresented among these children by a ratio of four to one. The vast majority of these children were not working for parents who were independent farmers, but rather were the children of tenants and sharecroppers in the cotton belt of the South. [44] And in these states, compulsory education laws did less to protect the interests of rural children, black and white alike, than laws in predominantly industrial states. In New York, children in rural areas were required to attend 175 days of school a year but in South Carolina rural children were required to attend for 133 days. All states built long summers into the school year to accommodate seasonal rural work, but Southern states were particularly willing to cut the school year further for farm work with two and half million pupils in rural states having their school days cut short in 1934-1935. [45]

Throughout the 1930s, the Sentinel of the Republic also continued their war against "state paternalism" in other campaigns. Raymond Pitcairn, the son of John Pitcairn of American Anti-Vaccination League fame, assumed the presidency of the Sentinels of the Republic in 1933.[46] In addition to promoting the campaign of its proxy organization, the NCPCFSC, against the Child Labor Amendment, the Sentinels attacked a raft of New Deal program, including the Social Security Act, the Wagner Act, and the Public Utility Holding Company Act. Maintaining their focus on "defending the constitution," the Sentinels called for the repeal of the Sixteenth Amendment that had granted Congress the power to levy income tax and proposed eliminating the "general

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[44] Lumpkin and Douglas, *Child Workers,* 101.
[45] Lumpkin and Douglas, *Child Workers,* 81-82.
[46] The Pitcairn family donated over $100, 000 to the Sentinels in the early 1930s. Philip Jenkins, *Hoods and Shirts – The Extreme Right in Pennsylvania, 1925-1950* (Chapel Hill: University of North Carolina Press, 1997) 59-60. Raymond Pitcairn also donated significant funds to the American Liberty League, see below.

welfare clause" of the constitution for federal economic intervention.[47]

The Sentinels were part of an intricate web of anti-New Deal anti-statist organizations, including the American Liberty League, the Crusaders, American Taxpayers League, the Southern Committee to Uphold the Constitution, the National Committee on Monetary Policy, League for Industrial Rights, to name but a few, who shared an small overlapping personnel, and even more concentrated number of wealthy backers.[48] Most of all, these groups shared common ideological precepts and goals– yet could not consolidate their efforts due to personal rivalries and disagreements over how to best bring about the end of the New Deal.[49]

Among that group of anti-New Deal lobbies, the Sentinels were considered toward the far-right end. They vacillated between impressing their compatriots with effective lobbying campaigns and confusing them with questionable campaign strategies. The Sentinels impressed with their "pink slip" campaign in 1935 that quickly led to the repeal of a provision of the federal tax measures passed in 1934, which had opened up income tax information to public scrutiny.[50] The Sentinels backed Henry Breckenridge as a primary challenger to Roosevelt for the 1936 election, producing an anti-Roosevelt cartoon feature film called the *Amateur Fire Brigade.* The film, which included scenes with the President as a boy riding a donkey backwards, and depicted the Administration as a

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47 The Sentinels Legislative Policies from 1930 to 1935 included opposing the Child Labor Amendment, the Uniform Marriage and Divorce Amendment, the ERA, repealing Prohibition, initiatives to introduce public referendums on all constitutional amendments, opposing the Costigan-La Folette Bill (S. 5125), for unemployment relief, Black-Connery Vills (S. 5627) to establish a thirty house week in industry, the Farm Relief Bill, Maternity and Infancy Bill, Education Bills and the Social Security Bill. See Sentinels of the Republic, Statement of Legislative Platform, 1930-1935, all contained box 1, folder 2, A-109, Lincoln Papers and Burk, *The Corporate State,* 202-203.

48 Wolfskill, *The Revolt of the Conservatives,* 228. Wolfskill points out the main finding from the Black Committee was that this "galaxy" of anti-New Deal groups received more than a million dollars in eighteen months and that 90% came from the same people.

49 In particular, Robert Burk describes the great desire of the DuPont brothers for control, and the fact they seemingly looked down upon Raymond Pitcairn as a barrier to the groups merging. For example, at one point when the American Liberty League was strapped for funds, the DuPonts accepted a one-time donation from Raymond Pitcairn but refused to let him be "long term underwriter." Burk, *The Corporate State,* 172-177.

50 Robert Burk, *The Corporate State and the Broker State: The Du Ponts and American national politics, 1925-1940* (Cambridge: Harvard University Press, 1990), 172-173.

house built out of "alphabet agency" blocks on fire while an inept New Deal fire brigade futilely attempted to douse the flames, raised some eyebrows but failed to raise the $360, 000 desired for national distribution.[51]

For the Sentinels, the decision to establish the NCPFSCS to run its anti-ratification campaign proved fortuitous because the Sentinels was one of a number of anti-New Deal organizations whose reputation was publicly tarnished in the Black Committee hearings held between 1935 and 1936. Chaired by Hugo Black, the Black Committee was ostensibly a Senate inquiry into the lobbying efforts against the Public Utility Holdings Act, but its broader aim was to expose the money and the sinister intentions of anti-Administration groups. The Administration was most eager to tarnish the reputation of the American Liberty League, backed by the DuPont family and Roosevelt's long standing rival, Al Smith. The inquiry did not need to subpoena the American Liberty League, however, because the web of money and connections ran so deep between the League and the anti-statist organizations that did appear, that the Liberty League was "tried in absentia" and "declared guilty by association." The inquiry revealed that all of these organizations received over ninety percent of their funding from the same small nucleus of wealthy conservatives, banks and corporations.[52] For the Sentinels of the Republic, it was the first and only time the organization was forced to disclose its financial records. The Sentinels were particularly tainted at the Black hearings after subpoenaed correspondence made public some deeply anti-Semitic statements made by its former President Alexander Lincoln. John Henry Kirby, the chairman of the Southern Committee to Uphold the Constitution (who along with Sterling Edmunds was also a

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[51] At John Raskobs's invitation the executive committee of the American Liberty League received a private screening with comments from Breckenridge to view the film in 1936. Burk reports that Lammot DuPont was "not particularly impressed," and the League declined the invitation to finance the film. By contrast, Wolfskill recounts a separate screening at the Palm Beach Home in which Thomas Chadbourne, James A. Reed and other Liberty Leaguers were apparently "delighted" with the film. Chadbourne strongly urged the League finance the film. Latter correspondence subpoenaed by the Black Committee revealed that Chadbourne was the driving force in suggesting the two groups should merge. Burk, *The Corporate State,* 202-203, and Wolfskill, *The Revolt of the Conservatives,* 232-234.

[52] On the Black Committee Hearings, see Wolfksill, *The Revolt of the Conservatives,* 229-250.

Sentinel) was exposed for being the source that circulated the "n***** pictures" used to slander Mrs. Roosevelt in the presidential campaign. [53]

All told, it should be no surprise that the core group of businessmen, libertarians and free market-ideologues that attacked the New Deal were also deeply racist, anti-Semites who viewed the autonomous white patriarchal family as the bedrock of a decentralized State. And yet, while all of these factors have received independent treatment as sources of twentieth-century conservatism, the connections between factors have not been fully illuminated.[54] The role of gendered ideas about the traditional family has been treated as a cultural factor that reared its head in white supremacist movements such as the Ku Klux Klan and elsewhere.[55] Additionally, gendered ideas about the traditional family have been considered, at length, in explaining why conservative women became active in conservative politics, but the role that gendered ideas played in creating the ideological and organizational links between anti-statist networks has not been studied with respect to the formation of modern conservatism as a whole.[56] This dissertation has shown that ideas about paternal sovereignty were not separate to or distinct from the economic beliefs that drove businessmen to oppose the New Deal, but rather paternal sovereignty constituted a core component of that ideology, that the private property rights of men encompassed his rights over his family and his finances.[57]

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[53] Wolfskill, *The Revolt of Conservatives,* 240-241. Though the American Liberty League did not formally disband until 1940, the Black Committee effectively spelt the end of its presence as a lobbying organization as well.

[54] Kim Phillips-Fein has traced the continuing influence of the core members of the American Liberty League, and their ideas, to the development of late twentieth conservatism in *Invisible Hands: The Makings of the Conservative Movement from the New Deal to Reagan* (New York: W.W. & Norton, Inc., 2009).

[55] Kathleen Blee, *Women of the Klan: Racism and Gender in the 1920s* (Berkeley: University of California Press, 1991), Nancy MacLean, *Behind the Mark of Chivalry: The Making of the Second Ku Klux Klan* (New York: Oxford University Press, 1999).

[56] Kim E. Nielsen, *Un-American Womanhood: Antiradicalism, Antifeminism, and the First Red Scare* (Columbus: Ohio State University Press, 2001), Kristen Delegard, *Battling Miss Bolsheviki: The Origins of Female Conservatism In The United States* (Philadelphia: University of Pennsylvania Press, 2010), Erica Ryan, *Red War on the Family: Sex, Gender and Americanism in the First Red Scare* (Philadelphia: Temple University Press, 2015).

[57] Robert Self argues that in the late twentieth century "the way that [conservatives] sought to constrain government interference in an idealized private family sphere was intimately linked to the way they also sought to limit government interference in the private market." I would argue those same linkages were

Moreover, ideas about paternal sovereignty were more than a smokescreen for the true interests of big business. Many supporters of the federal Child Labor Amendment derided the use of "parental rights" as a diversionary tactic, an interpretation numerous historians have subsequently adopted as well. It is certainly true, of course, that manufacturing interests and big businesses in the 1920s played up ideas about paternal sovereignty in their campaigns while downplaying their own economic interests. The question is why. The answer to that question lies with the groups that could never be neatly incorporated that narrative. It lies in the involvement individuals like William Dameron Guthrie, Sterling Edmunds, and Nicholas Murray Butler, ideologues who had no clear skin in the game, and in the involvement of religious organizations, especially the Catholic and Lutheran Churches. It lies in the campaigns of anti-vaccinationists and alternative medical practitioners in the early twentieth century who cried "a man's home is his castle" when school medical inspections and vaccination requirements were proposed. And further clues lie in the Democratic National Party Platform of the 1892, when the party was still firmly the defender of small government and states' rights, and put itself forward as the protector of parental rights. Indeed, we can trace the intellectual roots of the role of paternal sovereignty in anti-statist thought back to Herbert Spencer himself, who warned in 1892, that when people understood that the powers of government needed to be limited, "every parent will hold his sphere as one into which the State may not intrude." [58] The very reason, then, why anti-statists in the 1920s and 1930s mobilized ideas about paternal sovereignty was because they rightly understood that it was a call to arms that would rally a diverse array of Americans to support anti-statist causes if and when it appeared that the state was invading the home.

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evident in the conservatism of the 1920s and 1930s. *All in the Family: The Realignment of American Democracy Since the 1960s* (New York: McMillan Press, 2010), 6.

[58] Herbert Spencer, *Justice: Being Part IV of the Principles of Ethics* (New York: D. Appleton & Company, 1892), 522.

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John and Gertrude Pitcairn Papers
Raymond Pitcairn Papers

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Records of the Legal Department, National Catholic Welfare Council
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Samuel Lindsay McCune Papers

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Oregon Historical Society, Portland, OR
Benjamin Wilson Olcott Papers
Lutheran Schools Committee Records
Reuben H. Sawyer Papers

Oregon State Archives, Salem, OR
Department of Justice Records

Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, MA
Alexander Lincoln Papers, 1919-1940.
Mrs. William Lowell Putnam Papers, 1862-1935

Utah State Archives, Salt Lake City, UT

Governor Wells Series

Williams College Manuscripts and Archives, Willams, MA
Sentinels of the Republic Records 1922-1924

Yale University Library, Manuscripts and Archives, New Haven, CT
Harry Weinberger Papers

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The American Educational Journal
The Arena
Brooklyn Daily Eagle
Catholic Sentinel
The Catholic World
Collier's Magazine
The Common School Journal
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Journal of the American Medical Association
Ladies Home Journal
The Latter Day Saint's Millennial Star
The Liberator
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