

*Two Worlds at Once:
A Classical Liberal Approach to the Evolution of the Modern Family*

Steven Horwitz

CHAPTER 9

KNOWLEDGE, INCENTIVES, AND PARENTAL RIGHTS: A FRAMEWORK FOR LIBERTARIAN FAMILY POLICY

Libertarians have not had a lot to say about issues of family policy and children's and parental rights. Though there are probably many reasons for this lack of attention, the most likely one is that children pose particularly difficult challenges for libertarianism. It is probably true that children pose difficult challenges for *any* political philosophy, as such systems are usually centered around some idealized picture of what "consenting adults" would do. Libertarianism's commitment to the sanctity of the choices of such consenting adults makes the question of children that much more vexing because libertarians, like others, also believe that all human beings have a minimal set of rights worth protecting, even if they are not the full set of rights extended to consenting adults. If one believes, as libertarians do, that adults should have a maximal range of choice open to them, then what to do when the choices of adults, parents in this case, might be thought to violate the rights of children? To take one of the "tough cases" I will return to at the end of the chapter: what do libertarians have to say about parents whose religious practice prevents them from providing their children with medical treatment without which the child is near-certain to die? How do we resolve the tension between the parents' presumed right to do what they see as best for their child, who libertarians might argue is not sufficiently mature to decide for herself, and the child's presumed right to life, which might entail certain obligations on the parents? Does the state have a role here, even within libertarianism's general skepticism about what states can and should do? At what point might, if at all, the exercise of parental rights violate the rights of children? And how should such cases be handled, and by whom?

In this chapter, I do not offer any easy answers for these sorts of tough cases. Instead, I wish to think through the principles that might guide libertarians in thinking about issues of family policy. My purpose is not to provide a fool-proof template for making policy, but to explicate a framework for thinking about issues that can be applied, with judgment, to a variety of policy questions. In particular, I want to argue for a fairly strong notion of parental rights and make use of a number of standard tools of classical liberalism in doing so. Parents should have a very broad range of rights with respect to how their children are raised and treated because they are the ones with the strongest incentives to act in the child's best interest and the local, often child-specific, knowledge to know what that interest might be and how best to achieve it. In addition, the incentives to act in a child's best interest facing state actors are weaker and they are less likely to possess the knowledge relevant to discerning the best interest of the child. Even in recognizing that parents are not infallible, I will argue that parents are less fallible than the state and that the burden of proof resting on the state should be high in order to demonstrate why parental rights should be overridden.

Before turning to the argument in detail, three other prefatory remarks are necessary. First, my use of the word “parent” in this chapter should not be taken to necessarily have any biological content to it. I am concerned with the rights of those who are legally responsible for the child, regardless of their biological relationship to the child, or another parent. The question of *who* should have the parental rights, and whether such rights could be unbundled in ways that might allow more than two people to possess them (e.g., step-parents) when all are performing parental functions, are fascinating questions beyond the scope of this chapter.¹ The question here is what should be the rights of those who are legally entitled to be the child’s parents under the current general legal framework.

Second, I am going to assume throughout the bulk of this chapter that there is a state and that its primary, if not only, duty is to protect the rights of its citizens against force and fraud by others. Libertarians with more anarchist leanings might wish to take up the project of thinking through what the principles I develop below might mean in a stateless society. I will say a few words about this question in the conclusion.

Finally, in reviewing the existing constitutional law on the issue of parental rights and exploring what the ideal might be, I am assuming that the “incorporation” of the Bill of Rights is legitimate. That is, all of the federal prohibitions on state action apply equally to the states.² I am largely going to take such fundamental questions of constitutional interpretation as given and then ask what should be the limits on the federal government’s, and via incorporation the states’, interference with the rights of parents.

Establishing Parental Rights in the Constitution

The evolution of constitutional jurisprudence on the question of parental rights is in many ways a microcosm of the more general changes in the Supreme Court’s approach to the relationship between legislative decisions and individual rights over the course of the 20th century.³ Early in the 20th century, there was a strong presumption in favor of parental rights with a high barrier to the sorts of legislation that could override them. Legislatures had to demonstrate a very compelling rationale for second-guessing parents’ rights to make decisions about their children. By the 1940s, the burden of proof had begun to shift, as it did in so many other areas of constitutional law, such that as long as legislatures had some “rational basis” for claiming that the “best interests of the child” justified overriding parental rights, whatever they might pass through the democratic process would be constitutionally acceptable. Although the Court continues to hold that the early 20th century decisions were basically good law, recent cases have clearly established that the hurdle that legislatures have to leap is somewhat lower than in years past. In reviewing the major cases establishing the parental right we shall see all of these trends played out.⁴

The whole concept of a constitutional parental right is a peculiarly 20th century phenomenon. Perhaps the best way to understand it is that the question of whether such a right exists is only relevant if governments see intervention into parent-child relationships as one of their legitimate functions and when people recognize that having limits on such intervention might be desirable. For most of the history of the West, areas that we would now describe as

“family law” were, for the most part, dealt with in the common law, and not seen as areas to be addressed by the administrative law of the state. As we noted in an earlier chapter, even the very notion of the family as “separate” from kin, community, church, and the state was not in play for most of human history. Questions of constitutionality cannot arise until we have a constitution and until the family becomes more nuclear and private in the ways that it did in the 18th and 19th century.

With the growth of government in the late 19th century, and, as we saw in Chapter 4, the Progressive Era’s romance with using government to “fix” families in particular, questions arose about the limits of the state’s ability to make decisions that had been previously the domain of parents. The irony here is that it was state intervention that required that we define the boundaries of the family with respect to the state. Stephanie Coontz (1992, p. 145-6) put it this way: “Western notions of privacy and family autonomy developed as a corollary to the new claims of an expanding state over the public sphere; both family privacy and individual autonomy were increasingly guaranteed by the state.” Coontz also notes that these same developments were part of the longer-run trend of trying to extract the family from its embeddedness in other parts of the community, as we saw in Chapter 3. The whole notion of family privacy and parental rights as we understand them today are indeed a creature of the economic and political changes that pulled the family away from the oversight of the community and the political and social changes that legitimated the possibility of state intervention into families.

The two cases generally credited with establishing the idea of the constitutional rights of parents are *Meyer v. State of Nebraska* (1923) and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925). Both cases, interestingly, dealt with educational issues. In *Meyer*, the State of Nebraska in 1919 had passed a law that prohibited the teaching of children in “any language other than the English language” before the completion of the eighth grade.⁵ The plaintiff, Meyer, was found guilty of teaching German to a ten year-old in 1920 and appealed the conviction. The school he was teaching in was a parochial one and the statute in question explicitly applied to “any private, denominational, parochial, or public school” in the state. The law was as much a possible infringement of the right of contract of the parents and school as having anything to do with parental control over their children. The issue in *Pierce* could also be framed this way as we shall see.

In fact, Justice McReynolds, speaking for the majority in *Meyer*, framed the question before them as “whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment” (399). He continued by noting that the Court had not historically defined with any “exactness the liberty thus guaranteed.” However, it was more than:

merely freedom of bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (399)

Then follows a long list of citations to previous decisions in the tradition of “substantive due process,” about which more below. McReynolds then indicated that the “established doctrine” is

that the liberty defined under the Fifth and Fourteenth amendments “may not be interferred with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect” (399-400). He also noted that it is the Court that has the final decision as to whether such exercises of the police power are proper.

After a discussion of why the law in question was not, in the Court’s view, addressing a legitimate concern of the police power, McReynolds notes that even though the state may “go very far indeed” in attempting to “improve the quality of its citizens,” it is still the case that “the individual has certain fundamental rights which much be respected” (401). Furthermore, even if a particular end were desirable, it “cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by a prohibited means” (401). He then illustrates the point by quoting from Plato’s *Republic* and noting that the scheme for raising children there might have had salutary effects, but it would not be permissible in the United States because it does “violence to both letter and spirit of the Constitution” (402). Here the Court is clearly laying out a view of the Constitution very much consistent with the jurisprudence of that era.

The role of *Meyer* in establishing constitutional protection for parental rights is linked with McReynolds’ majority opinion in *Pierce* two years later. Taken together, these two cases are considered to have established the necessary constitutional foundation. The facts in *Pierce* were similar to those in *Meyer*. The State of Oregon had passed a law in 1922 requiring that as of September 1926 all children aged 8 to 16 attend a public school in the district in which they reside. There were a few minor exceptions allowed, but the law was intended to apply statewide. A religious and a private school challenged the law before its implementation on the grounds that the law “conflicts with the right of parents to choose schools” for their children and “the right of schools and teachers therein to engage in a useful business or profession” (532). The private school explicitly claimed that the law “contravenes the corporation’s rights guaranteed by the Fourteenth Amendment” (533). The lower court had ruled against the State, arguing that the law deprived the schools “of their property without due process of law.” It made clear that the schools’ right to sell their services was a form of property and that “parents, as part of their liberty, might direct the education of [their] children” (533). The State of Oregon appealed that decision to the Supreme Court.

McReynolds’ majority opinion begins by noting that this case has no implications for the State’s more general attempts to regulate teacher qualifications or curricula or the like. He then points out that private and parochial schools are an “undertaking not inherently harmful” and that, in fact, they are seen as “useful and meritorious” (534). He then refers to *Meyer* as having established “the liberty of parents and guardians to direct the upbringing and education of children under their control” and that “rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State” (534-5). He then (535) even more clearly establishes the notion that parents have a powerful set of rights grounded in a broader theory of liberty:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the

State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

This passage is the one generally quoted in later cases where the existence of constitutionally protected parental rights is being established, especially when combined with *Meyer*'s list of liberties protected by the Fourteenth Amendment, even if they are not explicitly listed anywhere in the Constitution.

Before discussing the ways in the rights of parents have since been articulated and attenuated by the Court, it is worth putting these two decisions in some historical context. As noted earlier, these two decisions are still considered good law today. *Meyer* and *Pierce* were at the tail end of a series of decisions that found in the Fourteenth Amendment protection for a whole variety of rights not specifically enumerated in the Constitution. In the late 19th century, these rights were largely grounded in the "Privileges or Immunities" clause of the Fourteenth Amendment. As Barnett (2004, p. 66) argues, the accepted meaning of that phrase at the time of the amendment's adoption referred to "both natural and inherent rights as well as those particular 'positive' rights created by the Bill of Rights." However, not long after the Amendment's adoption, this phrase was gutted of this meaning and its expansive protection of liberty. In the *Slaughterhouse* cases of 1873, the Court adopted a very narrow conception of the Privileges or Immunities Clause that tied it to the rights of "national citizenship" rather than the more general civil rights that Barnett argues were intended by its authors.

However, the notion that the Fourteenth Amendment still somehow protected those unenumerated rights persisted and the emphasis shifted to the Due Process Clause instead. The clause was originally understood to refer to the *process* by which laws were adopted, but in a sleight of hand perhaps necessitated by the *Slaughterhouse* decisions, later courts took to viewing the clause as referring to not just process but the content of the laws in question. More specifically, the Due Process Clause was interpreted as protecting rights of contract, particularly in labor markets. As we saw in *Meyer*, McReynolds listed some of those and provided citations to a variety of cases from prior decades that had established that precedent. One of the most famous of the cases from that era was *Lochner v. New York* (1903) in which the Court overturned a New York law establishing maximum hours for bakers on the grounds that it unconstitutionally interfered with the right of contract of the bakery and its employees. The *Lochner* case was also notable for Justice Holmes' famous dissent in which he accused the majority of trying to read the Constitution as enacting Herbert Spencer's *Social Statics* and its defense of laissez-faire capitalism.⁶ *Lochner*'s fame now is as the representative case of this whole class of decisions that were to be subsequently rejected during the New Deal as the post-1935 Court sought to find constitutional justification for the greater willingness of Roosevelt and the Congress to intervene in a variety of private economic arrangements. "*Lochner*-era thinking" is now a perjorative among most constitutional experts, reflecting their belief that using the Due Process Clause to defend *substantive unenumerated economic rights* stood in the way of the greater economic role for government necessitated by the Great Depression and New Deal.

Despite the general rejection of such jurisprudence, *Meyer* and *Pierce* remain good constitutional law, even as their main conclusions have been softened in subsequent cases. Those two cases were crucial to establishing that the Due Process Clause's defense of substantive unenumerated rights could be applied outside the economic realm. Even as the Court

has overturned the use of the Fourteenth Amendment to protect economic rights and, as we shall see below, had to devise somewhat convoluted arguments to defend an unenumerated right to privacy in places *other* than the Fourteenth Amendment, these two parental rights cases are still recognized as binding precedent, right down to the specific source of those rights being the Due Process Clause.

The next major parental rights case facing the Court was *Prince v. Massachusetts* (1944). The case involved a nine-year old girl who, along with her legal guardian, was selling religious magazines on the streets of Brockton, Massachusetts. Sarah Prince was arrested and charged with violations of the state's child labor law, which prohibited boys under twelve and girls under eighteen from engaging in such sales on the street or in any public place. Prince argued that the law violated both her First Amendment freedom of religion and her Fourteenth Amendment protection of parental rights. The decision was read by Justice Rutledge and began with a now-famous summary of the Court's position on parental rights (166):

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder [citing *Pierce*]. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

The next sentence, however, brings the "but." Rutledge then catalogs the ways in which the family has nonetheless been subject to "regulation in the public interest," including requiring school attendance, regulating and prohibiting child labor, and others. Rutledge (167) then concludes "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare," including issues of religious practice.

The Court went on to make the case that a child of such "tender years" preaching on the public street would be exposed to numerous threats to her welfare, from "emotional excitement" to "psychological or physical injury" (170). Even though the parent or guardian might be present, she can at best "reduce, but cannot eliminate entirely, the ill effects of the prohibited conduct" (170). The Court also made clear that it was not creating a precedent for *any possible* state intervention into parental rights in the name of the best interests of the child; rather it was limiting such interventions to "the facts the case presents" (171). Despite that protest, *Prince* is now frequently seen as establishing the ability for the courts to weigh the "best interests of the child" against parental rights in establishing the constitutionality of legal interventions into the family. It is also worth noting, in light of the discussion in the last two chapters, that the Court's language leaves little room for trading off *in practice* its perception of the welfare of the child to protect the rights of the parents.⁷ The belief that state intervention is necessary because parental supervision alone cannot "eliminate entirely" the perceived dangers posed to the child suggests that the goal here is the "elimination" of such dangers. But is this realistic? How far is the state allowed to go to create a "danger-free" world for children, if that is indeed the implied standard? How much protection for parental rights does this really leave us with?⁸ In subsequent cases, the Court certainly has not applied such a standard, but the underlying logic behind the idea that because parents cannot "eliminate entirely" the dangers children are exposed, state intervention is *ipso facto* justified is alive and well in much family policy today.

Parental Rights in the post-New Deal Constitution

The move the Court made in *Prince* was consistent with the general direction of constitutional jurisprudence in the New Deal era. Many of the unenumerated rights that had been protected by the much-maligned *Lochner*-era Court began to fall by the wayside in the face of shifting cultural beliefs about the necessity of greater government intervention, especially in the economic realm. Put most simply, the burden of proof of constitutionality underwent a significant change from what Randy Barnett (2004) calls a “presumption of liberty” to a presumption of constitutionality.⁹ Until the New Deal era, the burden of proof lay on the state to demonstrate that a challenged law was within the defined powers of the legislature and did not violate the presumed, and broadly read, liberties of the people, including rights not explicitly enumerated in the Constitution. Since then, the presumption is that laws passed by the democratic process (assuming “due process of law”) are constitutional unless the challengers can demonstrate that such a law violates the rights enumerated in the Constitution or those that have been established by the Court to be “fundamental” even if not enumerated. The result has been the gradual extension of state power and erosion of liberties, except in those areas explicitly enumerated (such as the Bill of Rights) or that the Court has chosen to define as fundamental (e.g., privacy).

The key to this reversal of the constitutional burden of proof is found in *United States v. Carolene Products Company* (1938). In several decisions earlier in the decade, the Court had begun to undo the *Lochner* approach of putting the burden of proof on the state to show that legislation was “necessary and proper” and was explicitly authorized by the Constitution and did not override accepted unenumerated rights. By *West Coast Hotel Co. v. Parrish* (1937), the reversal was largely complete with the Court appearing to defer totally to the democratic process to a degree that the notion of judicial review itself might be rendered superfluous (Barnett 2004, p. 229). In *Carolene Products*, the Court pulled back from that precipice and began to define the terms under which it would proceed for a number of decades.

The relevant passage is the famous “Footnote Four.” In the text of Justice Stone’s majority decision the Court argued that the legal restrictions on the market for the milk substitute at the center of the case should be presumed to be constitutional “unless in the light of the facts made known to or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators” (152). Stone then qualified that presumption of constitutionality in the first part of Footnote Four:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. (152)

As Barnett (2004, p. 230) summarizes it, we now have the post-1941 theory of constitutional rights:

Adopt a loose conception of necessity and presume all acts of legislatures to be valid, except when an enumerated right listed in the Bill of Rights is infringed (or when legislation affects the political process of discrete and insular minorities), in which even the Court will employ a strict conception of necessity and put the burden on legislatures to show that their actions were both necessary and proper.

As long as the legislature could construct an argument that the legislation in question was reasonably perceived to be able to solve some problem (and that it did not violate one of the enumerated fundamental rights noted in Footnote Four), then it would pass the test of constitutionality. This gave, if not *carte blanche*, at the very least a wide latitude to the legislature and substantially weakened the grounds from which the Courts could overrule them.

The Footnote Four approach stood for over twenty years until it was attenuated somewhat further in *Griswold v. Connecticut* (1965), which dealt with a state law making the sale of contraceptives illegal, for both the parties to the exchange and anyone who assists in the exchange. The law was challenged and the Court agreed that it was unconstitutional. What was important about the case was the way in which it reached that conclusion. Justice Douglas had to find a way to avoid going back to *Lochner* type arguments, yet still find protection for activities that were not explicitly enumerated as rights in Bill of Rights or otherwise fit the criteria laid out in Footnote Four. The Court concluded that the law violated the “right to privacy,” which, of course, is found nowhere in the text of the Constitution. They did so, interestingly enough, by relying on the decisions in *Meyer* and *Pierce* as precedent for such an unenumerated right.

The problem, therefore, was how to ground that right constitutionally without going back to the Fourteenth Amendment, which would both violate the procedure laid out in Footnote Four and open the door to the unenumerated economic rights of the *Lochner* era that were overturned during the New Deal. Douglas’ solution was to find the right to privacy in the “penumbras, formed by emanations” of the various rights protected in the Bill of Rights. By the logic of Footnote Four, this was not a right deserving of presumptive protection and the high burden of proof on the state that would accompany it. Nonetheless, the Court had established this right to privacy, and 27 years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court would solidify it by referring to a “realm of personal liberty which the government may not enter.” It again referred to a number of cases including *Meyer* and *Pierce* to substantiate that view.

Barnett (2004, p. 233) argues that *Casey* “exemplifies the current approach to constitutional rights.” In this approach, what he calls “Footnote Four-Plus,” it is the Court that decides which of the unenumerated rights in the Constitution are worthy of being declared “fundamental rights” and getting the higher level of protection demarcated in Footnote Four. This puts the Court in the position of making “moral assessments of different exercises of liberty” (Barnett 2004, p. 233). Generally, the liberties associated with non-economic activities have received the protection of being “fundamental,” while economic ones have not. Of course, as Barnett notes, there are exceptions, such as the lack of protection for the liberty to ingest marijuana. Nonetheless, the Footnote Four-Plus approach has allowed the Court to pick and choose among liberties guided, presumably, by any particular set of Justices’ sense of which rights are deserving of such protection at the particular time in question. Barnett rightly points out that this approach is better than the original Footnote Four jurisprudence that did not recognize unenumerated rights at all, but it suffers mightily from the appearance of capriciousness.

That perception of capriciousness may well lie at the center of debates over “judicial activism,” in the sense that courts that define those liberties associated with

liberalism/conservatism as fundamental cause the other group to charge “judicial activism.” When the Court defines those liberties a group likes as fundamental, then Court is just perceived to be doing its job in preventing legislative overreach. With Footnote Four and the stigma of the *Lochner* era having pushed the Court down a path where it has to protect non-economic unenumerated rights in a way rightly seen as capricious, it is no surprise that the Supreme Court has become a lightning rod in the culture wars, including a variety of issues related to the family.¹⁰

Since *Prince* in 1945 there have been several noteworthy parental rights cases and I want to take a brief look at two of them to see where the rights of parents stand in the world of the Footnote Four-Plus world. As the continued reliance on *Meyer* and *Pierce* as good constitutional law would suggest, parental rights have largely been deemed sufficiently fundamental to garner a fair degree of protection. The two case we will explore are both ones in which parental rights were upheld against claims of the state, though not without having to demonstrate that such protection was warranted under the current approach.

In *Wisconsin v. Yoder* (1972), the Court was faced with an Amish family in violation of a Wisconsin law that required children to attend a public or private school until the age of 16. The Amish saw no need for education beyond the 8th grade and removed the children from school at age 14 and 15 in order to work on the family farm. The children did not object to this decision. The family argued that the law violated their rights under the First Amendment. The Supreme Court of the State of Wisconsin agreed and the Court upheld that decision. Most of the Court’s opinion, written by Justice Burger, focused on the reasons for the Amish’s objection to schooling and whether this was harmful to the children. The Court noted early on (213) the importance of requiring public schooling but that it could be “made to yield to the rights of parents to provide an equivalent education in a privately operated system,” citing *Pierce*. In line with the Footnote Four-Plus approach, the Court (214) noted:

Thus a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children....

Implicit in this sentence is the idea that the State’s interest is presumed to be constitutional, unless it “impinges on fundamental rights and interests.” That is, the burden of proof is on the side of those asserting a liberty to demonstrate that it is among the protected categories. This contrasts with the approach in *Meyer* and *Pierce*, in which the state was expected to demonstrate some compelling reason to exercise the police power that would override the presumption of parental rights. Even here, the parental right is not seen as a given against which a piece of legislation must be deemed necessary and proper to reach a particular goal. Rather it is one of a limited list of rights deemed sufficiently fundamental to be “balanced” against presumptively constitutional legislation.

After establishing that the Amish’s religious beliefs were not mere “personal preferences,” but deeply rooted practice of hundreds of years, the Court then noted that no social harm appears to have come to Amish children who lacked the additional two years of education, nor were they under any risk of serious harm working on the family farm. The latter point was

particularly important in distancing this case from the facts in *Prince*, where the claim was that the selling of religious magazines on a city street constituted a physical danger to the child. In the end, the Court did indeed hold the Wisconsin law unconstitutional, arguing that the high burden posed by the parental right as a fundamental right was not met in this case as there was no harm being imposed on the children (and the children were in agreement with the parents' decision). The Court was also very careful to lay out the limited applicability of the case to the context of groups such as the Amish with this long-standing set of beliefs. Mere parental preference not to educate children all the way to age 16 would not have been sufficient to invalidate the law in the name of parental rights.

The most recent parental rights case in front of the Court was *Troxel v. Granville* (2000). This case involved a pair of grandparents suing for visitation rights over their deceased son's children over the objection of the children's mother. The State of Washington had a law that permitted "any person" to petition for visitation rights and that allowed courts to "order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstance" (2). The Washington Supreme Court overruled a Court of Appeals decision that denied that the Troxels (the grandparents) had standing to seek visitation, but also ruled that the law itself was an unconstitutional violation of parental rights. The decision was based on two claims: the law did not require a demonstration of actual or potential harm, which should be necessary to override the parents' wishes and the law's language allowing "any person" to get visitation rights if it only serves "the best interests of the child" was too broad as it gave the state inappropriate power to decide upon the proper rearing of children. The U.S. Supreme Court's decision upheld that finding, with Justice O'Connor writing the opinion.

The Court's (6) review of the precedents begins with the Fourteenth Amendment's Due Process Clause having a "substantive component" that protects "certain fundamental rights and liberty interests" (quoting *Washington v. Glucksberg* [1997]). The "liberty interest" associated with parental rights is then described as "perhaps the oldest of the fundamental liberty interests recognized by this Court" with citations to *Meyer*, *Pierce*, and the language of *Prince*. O'Connor then notes the "breathtakingly broad" nature of the law in question and its clear implication that the parents' wishes are irrelevant, which "places the best-interest decision determination solely in the hands of the judge" (8). In fact, that is what happened when the Washington Superior Court ordered visitation rights for the Troxels. There was no finding that the mother was an unfit parent in any way. Rather the judge simply decided that it was good for the children to spend time with their grandparents, *regardless of their mother's preferences*, given that there was no reason to think such visits would adversely affect them. As the Court pointed out, this put on the mother the "burden of *disproving* that visitation would be in the best interest of her daughters." This flips the notion of parental rights on its head in a way that, perhaps unsurprisingly, parallels the switch in burden of proof in constitutional law: the burden shifts to those with the rights to show that there is a reason their rights should not be violated rather than being on the violators to show reason why they should be.

The Court put its conclusion rather plainly: "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made" (14). O'Connor quickly added

that in holding the law unconstitutional because of its breadth, the Court was not considering the issue of whether the constitutional protection of parental rights “requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation” (14-15). The Court thereby refused to overturn specific nonparental visitation statutes per se. So here too, the scope of the decision is somewhat limited, with the Court making clear that the constitutionality of such statutes depends on the “specific manner” in which the laws and their associated standards are applied.

Parental Rights and the Ninth Amendment

At the moment, the constitutionally protected rights of parents in the US are generally considered a “fundamental right” under the approach Barnett labels “Footnote Four-Plus.” That is, the rights of parents are nowhere enumerated in the Constitution including the Bill of Rights, but are nonetheless protected as fundamental by the long tradition of recognizing them as implicit in the Due Process Clause of the Fourteenth Amendment. Strictly speaking, they are not among those rights that Footnote Four alone would protect given that they are unenumerated. But faced with the pre-*Carolene* precedents of *Meyer* and *Pierce* that still made sense as good law, even as economic liberties that had once been protected by the same Clause were seen to be no longer worthy of protection, the Court had to find a way to continue to offer such protection. The solution, interestingly enough, has been to define them as “fundamental” and to do so under the idea of “substantive due process” without much of a blink in the face of the rejection of that doctrine in other areas.

Put differently, it is something of a mystery that *Meyer* and *Pierce* remain good constitutional law and serve as the binding precedent for later parental rights cases and, as we shall see in the next chapter, cases involving the right to marry. Faced with the Footnote Four approach, the Court in *Griswold* felt it necessary to cram the square peg of privacy into the round hole of a Bill of Rights that never mentions such a right in order to avoid two unpalatable alternatives. The first was to find such a right in the Fourteenth Amendment, arguing that a right to privacy had the same standing as the right to marry or parental rights under the Due Process Clause. That alternative was likely rejected for fear of a return to *Lochner*, yet no such fear accompanies declaring as good law the very same argument made in the parental rights case. Perhaps it is the finding of new rights in the Due Process Clause that is the problem?

The second alternative open to the *Griswold* Court was the approach in Justice Goldberg’s concurrence: make use of the Ninth Amendment. As Barnett’s (2004) book argues, taking a second look at the Ninth Amendment’s explicit discussion of unenumerated rights provides us with a way to both undo the damage to the Constitution’s protection of rights done by the post-New Deal courts and to find a way to protect unenumerated rights that does not rely upon the Court having to pass judgment on the very contentious issue of which unenumerated rights are fundamental and which are not. Relying on the Ninth Amendment can resolve a number of the constitutional puzzles in which the parental rights cases play a curious role. It could also offer a better ground for parental rights themselves. A brief exploration of Barnett’s case for reviving the Ninth Amendment is in order as a concluding thought on the constitutional history of parental rights.

The text of the Ninth Amendment is straightforward enough: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” As Barnett argues, the historical context of the amendment was a concern that a Bill of Rights that specified certain rights that people had might be interpreted as an exhaustive list. Many present at the drafting of the Bill of Rights wanted to avoid that interpretation and make it clear that just because they had listed a whole series of rights in what are now the first eight amendments, later generations should not take that list as exhaustive. The people “retained” a whole variety of rights that they had prior to entering into the constitutional “contract” that gave certain specified powers to government. Barnett argues that the historical context out of which this argument rose was one in which people were believed to possess certain natural rights prior to the creation of a constitution and government. Even as they agreed to institute a government for the purpose of enforcing those rights, they did not give up those rights to the state. Rather, they accepted limits on those rights necessary for the limited powers of government, but “retained” all of the other rights they possessed previously. In Barnett’s view, the Ninth Amendment just confirms that view.

The importance of unenumerated rights is clear every time that debates erupt over whether or not a certain right is “in” the Constitution. This is certainly obvious in the debate over contraception and abortion as to whether a “right to privacy” that is never explicitly stated in the Constitution can really be said to exist. The same could be said of the recent decision in *Lawrence v. Texas* (2003), which was read by Justice Scalia as finding a “right to sodomy” that appears nowhere in the Constitution. Barnett’s view of the Ninth Amendment gets around these problems by pointing out that it provides a textual location for unenumerated rights. Yes, there’s no explicit right to privacy in the document, but that is equally true of any of a million individual “rights” that one could list. The whole point of the Ninth Amendment is to respond to this argument by shifting the burden of proof by indicating that courts should approach constitutional interpretation with what Barnett calls a “presumption of liberty” and expect the state to show where the powers it wishes to exercise are explicitly granted, or necessary and proper.

Historically, this was never better articulated by the Court than in Justice Goldberg’s concurring opinion in *Griswold*. He there makes the case for grounding the right to marital privacy and the consequent right to purchase contraceptives in just this sort of reading of the Ninth Amendment. After both explaining the history of the amendment and the Court’s earlier protection of the right to marry and raise children in *Meyer* and *Pierce*, he (495-6) makes the case for using the Ninth Amendment to ground those rights:

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family - a relation as old and as fundamental as our entire civilization - surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government, though not specifically mentioned in the Constitution.

Goldberg still frames the discussion in terms of those “fundamental” rights the Court has decided to protect, but he also notes earlier in his concurrence that such rights must come from a broad

social and historical understanding of our institutions, rather than the personal preferences of judges.

Goldberg's concurrence and the larger intellectual framework provided by Barnett provide a way to ground parental rights in the Constitution in a manner consistent with both the unenumerated non-economic rights currently protected by the Due Process Clause of the Fifth and Fourteenth Amendments, in some cases, and by the "emanations and penumbras" of the Bill of Rights in others. Uniting all of these unenumerated rights, including parental rights, in the language of the Ninth Amendment would have three salutary effects. First, it would provide a grounding in the actual text of the Constitution for the idea that unenumerated rights are deserving of constitutional protection. This might have the consequence of avoiding the charge that judges are inventing constitutional language that does not exist in the text. Second, it would bring all of these rights into an intellectually consistent framework rather than picking and choosing which part of the Constitution applies in which case. Third, it could provide a framework, as Barnett argues, for re-establishing the existence of constitutionally protected, yet unenumerated, economic rights and liberties. Bringing all of these unenumerated rights under the Ninth Amendment would solidify each by the presence of the others. Even though parental rights do not seem to be under any serious constitutional threat, the possibility is always out there and any steps that could ground them more firmly would be desirable.

Parenting as Stewardship

It might be tempting to see the argument for a strong constitutional protection of parental rights as somehow being antithetical to the welfare of children. That temptation is one to be avoided. The assumption behind most calls for taking parental rights seriously is that the interests of parents and their children are sufficiently congruent to ensure that protection for parents' decision-making rights will be the way to do best by their children. In this section, I unpack that assumption and provide some reasons for believing it to be the case. I do not believe that those interests are *always* congruent, as plenty of real world examples of various forms of abuse would demonstrate. However, as I will argue in the next section, the imperfections of parental behavior do not make for an *ipso facto* case for the state abrogating their rights. Just as modern political economy realizes that so-called "market failures" and other imperfections of the market do not *by themselves* mean that state intervention is a superior solution, so it is with parental rights. Any theory of parental rights and the role of state intervention into the family has to take seriously the possibility of "government failure." Both parents and the individuals who work for the state in places such as Child Protective Services are imperfect and flawed. The question is which group of people, and under what set of institutions, are more likely to get it right more often, and learn from their mistakes so as to avoid egregious errors. I will argue that the case for parents is strong enough to justify a high burden of proof upon the state before its agents intervene in the family.

Thinking of children as their parents' property is a very tempting move for both economists and classical liberals. We normally resist that temptation very quickly by pointing out that truly owning another human being is a practice we have long fought against and would, in the case of children, lead to monstrous results if taken literally. However, the underlying intuition is not necessarily misguided. Parents do, and I will argue *should*, have the right to boss

their children around and make decisions for them in ways that we would never allow in other human relationships. In those ways, children look somewhat like property. At the same time, parents frequently treat their children much like assets in which they are investing in hopes of a future return (which is rarely financial), at least for the children themselves if not for the parents directly or indirectly. This too looks like the way people might treat a valuable piece of property that they hope will appreciate.

Given that the *de facto* behavior of parents makes children look like property in important ways, and given that we would reject treating them fully as property, is there way we can capture the former without stumbling into what we would reject? The concept of “stewardship” might provide the answer. One definition is “the careful and responsible management of something entrusted to one’s care” (<http://www.merriam-webster.com/dictionary/stewardship>). The advantage of talking in terms of “stewardship” is that all the definitions make clear that the object of that stewardship is not something that the steward owns. The object in question has simply been “entrusted” to the steward’s care. For physical objects, this presumably implies that they are owned by someone else who has done the “entrusting,” but in the case of children, we can alter that understanding. Parents choose to entrust *themselves* with the task of “careful and responsible management” by accepting legal parenthood of a child, either through birth or adoption. The child, like a physical object of stewardship, is not the property of the parents, but they accept the responsibility of caring for it by accepting the legal rights of parenthood.

One of the few extended discussions of children’s and parental rights in the libertarian literature is in Murry Rothbard’s (1998) *The Ethics of Liberty*, where he offers a conception of the rights that parents have with respect to their children that is similar to “stewardship,” but differs on a key implication. He (1998, p. 100) argues that parental “ownership is not absolute, but of a ‘trustee’ or guardianship kind.” Rothbard rightly argues that children, once out of the womb at least, possess a right of self-ownership by virtue of being potential adults. This prevents them from being treated strictly as the parents’ property. So far, Rothbard’s “trustee” concept parallels our notion of “stewardship.” However, Rothbard further argues that although the child’s right of self-ownership prohibits anyone, including the parents, from aggressing against it thereby distinguishing it from property, that right does not create a “*legal obligation* to feed, clothe, or educate” the child (Rothbard 1998, p. 100, emphasis in original). The trustee conception of children prevents the parent from actively aggressing against the child, but still gives the parent “the legal right *not* to feed the child, i.e., to allow it to die. The law, therefore, may not properly compel the parent to feed a child or keep it alive” (Rothbard 1998, p. 100, emphasis in original).¹¹ To put it in different language, parents cannot abuse their children, but they can neglect them.

The key premise in Rothbard’s argument is that if parenthood implied an obligation to feed and clothe etc., it would mean that the parents were being coerced into doing “positive acts...depriving the parent of his rights” (1998, p. 100). Because Rothbard’s version of libertarianism is rooted in natural rights and begins with what he calls the “non-aggression axiom,” any situation in which the state coerces a person (who has not initiated force him or herself) into acting in a particular way constitutes a violation of that person’s fundamental right not be aggressed against. The natural response is that parents have somehow voluntarily accepted that obligation by creating the child in the first place, so that having a child constitutes a

form of contractual obligation on the parents. If so, then ensuring that parents do not neglect their children is a matter not of coercion but legitimate contract enforcement.

Rothbard's response to this criticism is to raise a number of counter-examples that aim to show the absurdity of what he calls the "creation argument." He rightly (102) asks how this can be true of a child conceived in a rape. But then he also asks how step-parenting, foster parenting, or guardianship can be legitimate if those people did not participate in "creating" the child. What he seems to miss in this discussion is the idea that the obligation to care for a child does not come from the act of sexual creation per se, but from the assumption of the legal rights associated with making the child "one's own." In most cases, sexual creation and the assumption of rights take place together, as the birth parents take actions to establish that they wish to keep the child and thereby accept the obligations that come with it being theirs.¹² However, adoptive parents, perhaps even more clearly than in the case of birth parents, must take affirmative steps in the legal system to acquire stewardship of the child, which makes it even more clear that they have voluntarily accepted the responsibilities to the child that come with parenthood. All of the other examples Rothbard mentions are amenable to the same sort of analysis. For example, accepting foster parenthood of a child involves a different set of rights and responsibilities. The same could be said of step-parenthood, although as noted at the outset of this chapter, the way in which the law limits parental right to a maximum of two adults prevents step-parents from more easily accepting both rights and responsibilities over the child.

One possible interpretation of Rothbard's inability to see these possibilities is that he has a fairly static and universal conception of property (or property-like) rights, perhaps deriving from his deductivist natural rights perspective. The set of rights associated with parenthood seem to be defined once and for all and cannot be divided up or altered in various contexts. Looking at rights from a more consequentialist perspective allows us to imagine ways in which the bundle of rights (and responsibilities) that come with assuming the stewardship of a child can be both subject to changing definition as our understanding of child development changes, or as the technology of child production changes. It also allows us to imagine different kinds of stewards having different sets of such rights and responsibilities depending on the nature of their relationship with the child (e.g., step-parents might have fewer and foster parents fewer still). Rothbard's apparent need to settle this question in one way for all cases leads him to needless concern about the issues that technology raises for who the "creator" of the child is. Defining the relevant sets of rights as social institutions and technology evolve is why we have a legal system.

A more consequentialist approach also allows us to avoid the logically consistent (given his premises), but unpleasant, conclusion that parents should be legally able to neglect their children. Unpleasantness per se is not a reason to reject an argument, but many people, libertarians and not, would probably be more persuaded by an argument that both defended parental rights and implied that parents had some positive responsibility for the care of their children. Intuitively that is how most parents understand what they have signed up for as parents.¹³ Given the alternative approach to parental rights sketched above, we can construct a view of parental obligations to their children that derives from the parent(s)' consensual acceptance of those responsibilities via some positive action taken that indicates their acceptance of the rights that entail those responsibilities.

Jan Narveson (2002) provides one of the few other attempts at addressing this set of issues in the libertarian literature. His argument is more consequentialist than Rothbard, centering on the idea that moral obligations emerge as agreements among rational agents as a way to allow us to disagree about the nature of the ends we wish to pursue but agree upon the means by limiting our interference with the plans and projects of others. For reasons different from those articulated above, Narveson comes to a similar conclusion that parenthood implies both a wide scope for parental discretion and an obligation on parents to care for their children in the ways Rothbard denies they must. For example, Narveson points out that viewing children in some sense as property does not mean that parents can do *anything* with them, because all property involves limits on what owners can do with it in that they must respect the rights of others. For Narveson, this is not so much about what the parents must do for their children directly, but more about the obligations parents have to steward their children in ways that do not lead them to violate the rights of *other adults*. Doing so also implies that one's children should not become a burden on others (Narveson 2002, p. 272). Narveson's commitment to pluralism and the classical liberalism that it implies politically leads him to want to respect a wide variety of parenting strategies and parental authority over children. He (276) concludes: "A rational view of morals will leave parents largely in charge, to be shown right or wrong when their children emerge into the world as fellow grown-ups." Though Narveson does not mention it, I would emphasize our ignorance about both how much influence parents have on their children and what parenting strategies work best. Given a commitment to pluralism and a recognition of our ignorance, Narveson's argument is a strong one and is consistent with my own argument for stewardship and a strong conception of parental rights.

Having made the argument for a conception of stewardship that involves both rights and responsibilities, we must recognize that one additional rationale for those responsibilities is that children differ from other objects of stewardship in that they eventually become "owners of themselves." The parents' responsibilities are fixed neither in kind nor across all time. They remain responsible for their children until either the children emancipate themselves through a recognized legal process or they reach a state-enforced age of majority. This implies that part of the responsibility parents have is to help children take on the responsibilities of adulthood, or at the very least, not engage in behavior that significantly and intentionally retards their ability to do so. Therefore, in accepting stewardship of a child, parents agree to limit the choices they can make with respect to the child as well as agreeing to some general obligations that may require them to make certain sorts of choices. In the extreme, their obligation to "careful and responsible management" means that physical or emotional abuse of the child would not be permitted.¹⁴ Even as we have argued that parents do not have the legal right to neglect their children, the question of what constitutes neglect is much trickier, as the line between "neglect" and simply lacking resources to meet some pre-set standard of care is often difficult to ascertain. And, as I shall discuss below, even finding that parents are engaged in neglect does not imply that the solution is necessarily to terminate or otherwise abridge their parental rights.

Incentives and Knowledge as a Rationale for Parental Rights

I do not wish to construct a full-fledged philosophical theory of parental rights. I do, however, want to offer reasons to justify the claim that parents have the strongest claim to the stewardship rights and responsibilities toward children and that, therefore, the bar the state must

hurdle to abrogate or terminate parental rights is a high one. The argument I will make is a Hayekian one: *it is parents who have the right incentives and best relevant knowledge to know what is best for their children*. This argument explains both why, in general, a child's parents rather than others are in the best position to do what is best for them, and why the state, specifically, is unlikely to improve on parental stewardship in the vast majority of cases. As noted in chapter seven, one of the key Hayekian functions of the family is its role in socializing children for the task of living in "two sorts of worlds at once." There we argued that families help children understand the rules of both intimate orders such as the family or a firm and the anonymous order of the Great Society, as well as the differences between the two. A child's parents and the broader institution of the family, as opposed to other people or institutions such as the state, are best positioned to provide this particular aspect of socialization.¹⁵

The key to the family's advantages in doing so is its very intimacy. In contrast to the challenges we face in the Great Society in getting knowing other people in a very deep way, the intimacy of the family provides parents with a deep, and often tacit, knowledge of their child that can be deployed in finding the most effective ways to transmit social rules and norms. In addition, at least in healthy families, the parents have the best incentive to make sure that such behaviors are learned, as the family remains a major site of social interaction where appropriate behavior will make such interactions smoother, and because other family members may suffer negative external reputation effects due to the misbehavior of children.¹⁶ Children who do not learn the rules of social interaction will cause their parents to suffer both directly and indirectly, thus providing parents with an incentive to ensure that such rules are learned. As we move out from the nuclear family to the more extended family, many of these same incentives remain in place, though weaker in degree. Grandparents, for example, will still have an interest in making sure grandchildren are well-socialized in these ways, though not to the degree that parents will given that the costs and benefits do not fall as heavily on them. This argument also suggests that other children might have an interest in the socialization of their siblings to the degree they have to live with the consequences of good or bad socialization. Of course only older children would be in much of a position to act on that interest. It might, however, enable us to see even minor sibling complaints about each other's behavior as more than an attempt just to annoy parents.

In addition, there is an evolutionary explanation for parents' desire to transmit such rules to their children: children who are better able to navigate the social world are more likely to survive and pass on the parents' genetic material. This point has increased in importance as social competition has come to dominate biological factors in determining "success" in modern society. If one assumes that having better skills at navigating the social world generally translates into greater economic success and greater resources to ensure the survival and success of one's own children, then each generation of parents has a strong incentive to ensure the social success of their children for the results it has on both their children and their grandchildren. In a world where biological advantages and disadvantages play a much smaller role in the ability to pass on one's genes, the incentives facing parents to socialize their children well are very strong.

Hayek also argues that many of the rules that guide our behavior in social situations, especially in the more anonymous world of the Great Society, have a tacit component to them. For example, we might know *that* it is a good idea to respect property but we might not be able

to articulate the reasons *why* or even *how* property rights work. We might be able to say that we trust another person, but we might not be able to explain the rules we use in making that judgment. Because adults often cannot articulate the rules that guide their behavior even in more intimate social situations, the learning of such rules must take place through observation and imitation. The intimacy and frequent physical proximity of the parent-child relationship creates a unique environment for this observation and imitation process. The range of social activities that most parents and children engage in together offers a number of opportunities for children to observe and imitate the social behavior of parents. As they learn through application in this way, children begin to internalize the observed behavior even if the parents do not, or cannot, explicitly state the rules that are guiding their behavior. A parent might be unable to explain the rules that guide her behavior when interacting with a stranger, but the child can observe and later imitate the behavior, and in so doing, adopt the implicit rules that are at work. Or consider how children, one hopes, learn to behave appropriately in restaurants, which are rich with often unarticulated rules and norms. Although parents can verbally explain a good number of the rules and norms, many of them are tacit and children will learn the best through observation and imitation, supported by parental encouragement, praise, and punishment. The family can thus act as an institution for the transmission of social rules that even the parents themselves cannot necessarily articulate or understand.

This same imitative learning process might be at work in the context of learning how to develop the more intimate social connections of the micro-cosmos. Consider chapter seven's discussion of "attachment." How to create these attachment bonds cannot be explicitly "taught." Rather, it is parental behavior and proximity that enables children and parents to form such bonds, as children learn through experience what it means to be attached to someone. As they develop, they deploy that learned experience in creating such bonds with others. How one "creates" a friendship or romantic relationship or the working relationships of face-to-face social institutions is not something that can easily be articulated. That process is learned through experience and imitation and may be imprinted very deeply within the mind. Not only do children learn the rules of social interaction of the macro-cosmos through an imitative process greatly facilitated by the intimacy of the family, but they can also learn the rules of intimacy themselves in a like fashion. The family is a *discovery process for learning the explicit and implicit rules of social interaction in both the intimate micro-cosmos and the anonymous macro-cosmos.*

The family's role in this Hayekian socialization process is complemented by schools, houses of worship and the other elements of civil society. All of these other institutions, at least ideally, contribute to the learning of social rules in the ways that families do. However, certainly with respect to children, the institution of the family is necessary, although probably not sufficient, for accomplishing these tasks, as the secure attachment bonds necessary for healthy development will be much more effectively created in situations where the relationship between child and caregiver is a deep and intimate one. The parental transmission of knowledge, norms, and culture requires a highly detailed understanding of the child, not to mention an incentive to undertake the actions. This is why schools, churches, daycare, or "the village" can never replace the family, although they surely complement it. These other institutions are to one degree or another more anonymous than the intense intimacy of the family, and will therefore never be as effective in doing, nor have as strong an incentive to do, all the things families can do. This is

why a strong conception of parental rights is so important: no other institution is in nearly the position that families are to socialize effectively in the ways that functional adulthood require, both from a psychological and Hayekian perspective. No other institution has the strong incentives or the knowledge of time and place necessary to do the job.

Placing the stewardship responsibility for child-raising in the hands of parents gives those with the most knowledge and greatest social and biological incentive the right to make the relevant decisions about the children. Those decisions might include asking others to take on those stewardship responsibilities some of the time (child-care or school, for example), although the contractual (whether explicit or implicit) nature of such an arrangement provides for a solution of the implied principal-agent problem (via “exit”), ensuring that it is still the parents who are ultimately the stewards. Where children have clearly defined stewards and where those stewards have the necessary knowledge and incentives, they will be more likely to engage in the sorts of “modelling” of behavior and explicit instruction concerning social behavior that are the key Hayekian functions of the family. Where responsibility is diffuse, and where those in charge lack the necessary knowledge and incentives, we would expect the same sorts of commons problems we are familiar with in other realms. Allowing “the village” to raise children is no more likely to succeed than has allowing “the village” to run agriculture or industry.

If parents have stronger incentives and better knowledge to do what is right for their children than do others, we have a pretty good *prima facie* argument for a strong notion of parental rights. However, the superior position of parents does not mean they are infallible. The newspapers are full of stories of parents who have made choices that clearly do not have the best interests of their children in mind. One need not think that children are the only thing that matter to believe that many of these cases seem to require some action on the part of the state or others to stop the parental behavior in question. The question, however, is always a comparative one: even if parents are imperfect, will the state or other institutions that intervene in the family necessarily improve upon the imperfect parenting?

Comparative Institutional Analysis

The problem of the imperfect parent should sound familiar to those who know something of the history of 20th century economics. Over the course of the century, economists developed progressively more sophisticated, though less realistic, models of how markets achieved equilibrium and optimality. These models were often used as the basis for general policy recommendations, especially when real world markets failed to match the optimality properties of the models. Such situations were labeled “market failures,” and the general conclusion for about the first 70 years of the century was that such failures called for government intervention as the cure. To take the classic example, where markets produced significant costs on third parties who were not part of the market (what economists call “externalities”), the models predicted that actors would produce “too much” of the good in question, given that they could shift the costs onto others. The implication was that government was necessary to correct this problem by taxing the producers and using the revenues to compensate those bearing the costs. As economists drew it on the blackboard, this would lead to the optimal quantity of the good being produced.

The problem with this story is that economists never asked whether, in fact, the political process could or would produce the result their blackboard models said it should. While the theory of the market relied heavily on the belief that market actors were self-interested and would respond to incentives such as higher taxes or the ability to externalize costs, the implicit theory of politics used in suggesting solutions assumed that political actors were all-knowing and selfless, and lived in a world where incentives were irrelevant. Analysts did not ask questions such as “can political actors acquire the knowledge necessary to know the optimal tax to place on the producers?” or “why would politicians seeking votes be interested in taxing potential supporters?” Consider the similar political economy of budget deficits. Early macroeconomic models assumed that politicians would run deficits when the economy was in recession and surpluses when the economy was doing well, so as to use the budget to balance the economy. The people behind these models never asked what the incentives were for vote-seeking politicians to raise taxes and cut spending when times were good. The institutional incentives of the real-world political process were in conflict with the blackboard model of the economists. The result was that “optimal tax” policies got loaded with special interest taxes and exemptions while budget deficits were the norm, no matter how well or poorly the economy was performing.

The pioneering work of James Buchanan and Gordon Tullock (1962) sparked an entire approach to the political process known as the “economic theory of politics” or “public choice theory.” Public choice theory was responsible for the kinds of arguments we have just raised. In particular, this theory and subsequent empirical work demonstrated that just as the real world economy “failed” in comparison to the abstract and unreal models of the economists, the interventions intended to correct those failures themselves failed in comparison to the abstract models of the economists. The combination of looking more closely at the actual incentives facing political actors and the limits to the knowledge such actors might possess (recall the discussion in chapter two) provided economists with a theory of “government failure” to put up against the market failure theories that dominated the discourse mid-century.

The result was that no longer could economists make what might be termed the “*ipso facto* leap”: market failure could not be said to *ipso facto* make a case for the desirability of government intervention to “solve” the problem. Once the idea of government failure was taken seriously, determining whether the state should act became a matter of comparative institutional analysis. Political economists had to understand the consequences likely to be produced by markets or other voluntary processes of civil society in general versus those likely to be produced by political processes in general. They also had to explore the specifics of the issue or policy in question to determine the degree to which those general insights were likely to hold. As I have argued throughout this book, there are strong reasons to believe that the decentralized, voluntary cooperation of the market and other institutions of civil society are likely to produce desirable, if unintended, outcomes on a regular basis. Taking a closer look at the incentives and knowledge facing political actors suggests political processes are far less likely to do so.

How would this framework apply to family policy? First take a simple case where comparative institutional analysis can be applied. Imagine a case of child neglect, though not physical abuse. The parents are not sufficiently caring for the kids in terms of consistently providing warm clothes or regular, nutritious meals, or medical well-care. They also leave the children home alone and unsupervised quite a bit and none of them are older than ten. Assume

that the children are in no immediate physical danger. It might be tempting to call this a case of “parenting failure” and ask Child Protective Services to intervene, perhaps even removing the children from the home. The first question worth asking is “and do what with them?” Is the alternative that the state will offer for the children really better, on net, than their current situation? Suppose that alternative is foster care. There is enough empirical evidence on the problems with foster care, especially short-term placements where the incentive to really behave as a steward for the child is weaker, to be skeptical that it would be an improvement. When we account for the psychological effects on younger children of being taken from their parents and placed with strangers, the comparative analysis suggests the case for intervention is even weaker.

Finally, just as we might ask with apparent “market failures” whether there are ways to improve the rules of the game such that market outcomes might be even better, or whether there are other forms of voluntary cooperation other than traditional private property rights that might address the situation (see, for example, Ostrom 1990), we can ask in the case of “parenting failure” whether there are other institutions that could be brought into play to help these parents perform better, (e.g., a religious institution, a neighborhood group, extended family members, etc.). In the specific case of neglect, the problems are often financial, either directly or indirectly rather than bad parenting per se. Parents may be too poor to afford what others would see as an adequate level of care and/or they may be working so many hours, that supervising children is challenging, as is finding the time to cook, shop, or get them to a doctor’s. In such cases, the sorts of civil society solutions noted above are far more likely to be appropriate than removing the kids from the home of what are otherwise well-intentioned parents. Obviously, in the long run, removing barriers to the acquisition of human capital and reducing the costs of child care and health care through greater competition are ways to avoid these kinds of situations as well. One of the problems facing state intervention is knowing all of the fine details of each particular case sufficiently to come up with a solution. In general, those closest to the family are in the best position to understand the problems at hand, imagine an effective solution, as well as having an incentive to act on that knowledge. Bureaucrats with dozens of cases or more are unlikely to come close to the knowledge and incentives possessed by those in the family’s local sphere.¹⁷

The choice here is not between just the nuclear family and the state; there are myriad other ways that humans can solve their problems through voluntary cooperation even if it does not look just like our idealized vision of the nuclear family. Ostrom’s work points us in the direction of distinguishing between the form that solutions to social problems take and the function that those particular solutions perform. As Boettke (2009) has argued, voluntary, bottom-up solutions to a commons problem or other apparent market failure do not have to take the *form* of traditional private property rights to perform *the functions* that such rights perform, i.e., ensuring efficient use that does not destroy the commons. This distinction maps directly on to the very same form versus function distinction that we have made about the way families work throughout this book. Good comparative institutional analysis not only recognizes the possibility of government failure; it also recognizes that alternative institutional solutions in civil society come in a variety of forms, not just private property or families strictly speaking.

Beyond the possibility of non-state solutions to problematic parenting from outside the family, the incentives facing state actors are such that they are likely to err in intervening too often into families, for fear that they make a much more costly error of omission by not acting

when they should have. This follows a more general pattern we observe with political actors: they will try to avoid making choices where being wrong involves a very visible cost and will prefer choices where the costs of an error are less visible, more subtle, and often long run. Consider the risks facing Child Protective Services in situations of possible abuse. If they do not act, they risk the children being injured or possibly killed. Should that happen and it becomes known that CPS was involved and chose not to act, the cost to CPS in terms of publicity is significant. If they do intervene and it turns out that the possible abuse was exaggerated or non-existent, they will certainly take some heat for over-reacting, but not nearly what they would for the error of omission involved with kids being injured or killed. In addition, the other costs of their erroneous intervention fall not on them but on the parents and children, mostly in terms of less visible and longer-term psychological damage to the kids or to the functioning of the family. Faced with these alternatives, it is no surprise that CPS is likely to intervene more often than is justified so as to avoid making the mistakes that are more costly to them. When added to the usual public choice arguments about government agencies trying to maximize their own budgets, which is not forwarded by actually solving the problems they were created to address, this aversion to large, visible errors provides yet another element in the cost-benefit calculations that should be part of a comparative institutional analysis of family policy.

Given the problematic incentives facing political actors and given the limits on their ability to acquire the fine grained knowledge needed to know when and how to intervene in families, we have yet another reason to put a very heavy burden of proof on the state when it is considering intervening in families. Lacking the sorts of local and tacit knowledge we outlined above and having to consider the political consequences of their choices means that the failures of agencies such as CPS are more likely to be damaging than the failures of parents, especially when we consider that there are other, non-state, resources available to families facing a variety of problems.

That said, it remains the case that in a world where the state is charged with the responsibility for protecting individual rights, there is a role for it to protect children from truly abusive parents. Any such action will face the dangers noted above, but there are several principles that might be applied to attempt to reduce unwarranted interference with parental rights:

1. The constitutionally protected status of parental rights, along with the arguments we have made for the superior knowledge and incentives facing parents, should place a heavy and high burden of proof on the state in order to justify intervention.
2. Intervention should generally be limited to clear and present physical danger to children.
3. Removal of children should take place only with the agreement of a judge and only after a good-faith attempt is made to interview the parents.
4. If children are removed, if at all possible they should be relocated to religious or community organizations with a connection to the family or extended family members.
5. In cases deemed to be short of clear and present physical danger, the state should relinquish its role to community organizations or extended family.

These principles are hardly a detailed set of policy guidelines, nor will they stop every possible mistake by even well-intentioned state actors. Nor will they prevent every real case of abuse

from happening, but neither does the existing process. No institutional arrangement will be perfect, but more severely limiting the state's ability to remove children by focusing on the clear and present danger of physical abuse and ensuring some checks on the process will improve matters. Rather than pursuing parents who fall short of an ideal, resources can be devoted to those kids who really are having their rights violated and those parents who are doing the violating. We can also change our focus on how to improve the way families function in ways that involve reducing the state's role, or that do not involve it at all. Placing the solution in the hands of community organizations also increases the flexibility and responsiveness of the process while using already-established connections to the family to help address whatever the problem might be. More completely respecting parental rights need not come at the expense of dealing with genuine cases of abuse if the right sorts of principles and processes are in place. The goal of family policy should not be to punish families for failing to reach an unreachable ideal (just as we should not use the same metric in judging the performance of real-world market competition), but instead should be seeking ways to help families who really need it from, as it were, "below" through institutional change and the other institutions of civil society.¹⁸

Conclusion: The Tough Questions and Cases

If the discussion in this chapter has been at an unsatisfactory level of abstraction and generality, it is because many of these issues are crying out for more attention from a classical liberal perspective. It is unfortunate that libertarian thought remains disproportionately dominated by economists, philosophers, and political/legal theorists, with few psychologists and sociologists (and perhaps historians) who might be very helpful in thinking through many of the topics this chapter has touched on. Even with so many scholars thinking about political economy and constitutional issues, children and family policy remains underdeveloped. My presentation here is intended only to put a number of considerations on the table for others to run with in directions that I would not pretend to prescribe. In this last section, I wish to raise what I think are some of the "tough questions and cases" for libertarians to think about.

Many of the questions raised by children for libertarianism are extremely difficult, as they are for most political philosophies. I deliberately side-stepped the question of how children's rights might be protected in a world without government, and this remains a very underdeveloped topic in the various works by the anarcho-capitalist libertarians. Thinking about non-state solutions to those problems is particularly difficult, in my estimation, but this is a challenge that libertarians have risen to in other areas, especially as they have thought more seriously about institutions other than the state and the market. I do not have any special wisdom to dispense on these questions, other than to point out that I do not think either of two solutions is viable: 1) children *cannot* be treated as the mere property of their parents and thereby denied all of the meaningful rights that adults have; 2) children *cannot* be treated with the full set of rights that adults have. Children clearly have some rights as human beings but not all of the rights of adult human beings.

The problems with the two extremes should be obvious enough to not require too much argument. The hard part is, of course, deciding what are the minimal set of rights all humans have by virtue of being human and then determining the criteria by which that minimal set of rights becomes maximal. In our own world, we use a variety of government-imposed age-related

rules, often buttressed by attempts to gauge maturity. There are legitimate concerns about the arbitrariness of age-related rules in general (e.g., we all know 16 year-olds who could handle adult responsibilities and 30 year olds who cannot) and there are a whole variety of inconsistencies that seem to make little sense (e.g., a 15 year old girl can likely get an abortion without parental consent, but not a tattoo, and a 17 year old boy can drive a car but cannot buy a utility knife at a hardware store in New York State).¹⁹ There are admittedly advantages to the state's ability to draw universal lines in that they do reduce a variety of transaction costs. However, they come at the large cost of both our strong intuition that the issue is not age but maturity and the predictable amount of rent-seeking and other special interest behavior that leads to the inconsistent set of rules that the state actually produces. It is difficult to imagine a legal system, even without a state, not having to make use of some rules of thumb in this area. Deciding the maturity of children on a case-by-case basis would seem to be extraordinarily unwieldy. Anarchist libertarians will need to think through exactly how determining which rights which children have might work and articulate reasons for thinking it will improve on the far from perfect, though not totally disastrous, idea of universal age minimums as proxies for maturity. Whatever non-state solutions anarchist libertarians might develop must recognize this intermediate status of children.

A related problem facing more anarchist-oriented libertarians is the question of how to deal with physical abuse of children. If we assume that this is a violation of those children's rights (i.e., children are not completely their parents' property), the question then is how to protect those children in the absence of the state, especially if we recognize a strong prior notion of parental rights. By what process and with what authority would anyone be able to press a claim on behalf of the children against the parents? Rothbard (1998) argues that neglected children would be less likely in his libertarian utopia if only because a more open market in trading parental rights would enable those who do not wish to care for children to transfer their rights to those who do at a suitable price.²⁰ Why just leave a child to die when one can earn some income in selling the parental rights, perhaps to an intermediary such as an adoption agency? This is a plausible argument from an economic perspective, but still leaves open the question of what to about parents who "want" their children but neglect them in ways that are clearly damaging to the child's ability to ultimately exercise her rights and liberties as an adult (e.g., not feeding a child enough such that the child is physically damaged).²¹ Do such parents at some point cease to be *de facto* parents, thereby giving up their *de jure* parental rights and making them available for the equivalent of homesteading? This would seem to be a solution consistent with the approach favored by anarchist libertarians, but it surely needs further development to explore its strengths and weaknesses.

Even in the world of the limited state where we are willing to give it a role in protecting the rights of children, we face a number of difficult cases from a libertarian perspective. Again, I cannot treat these exhaustively and will raise one of them to suggest the kinds of questions that a more complete consideration of parental rights should be prepared to address.

Consider the case of the parents whose religious beliefs are such that they are unwilling to provide medical care to their severely ill child. They might refuse blood transfusions or other interventions that medical professionals deem necessary to save the child's life, preferring instead to engage in their own attempts to treat the child through prayer or other means, such as

folk remedies.²² Is their refusal to treat their child with modern medicine a form of abuse or neglect, or is that within the scope of their parental rights? A first response might be that such a decision *does* constitute abuse or neglect, given that it might well indeed lead to either severe damage or the death of the child. However, what if the parents truly believe that prayer or folk remedies work better than medical science? In such a case, their intentions are to help their child and those intentions are followed up with specific actions that they believe will address the problem. It becomes harder to view their decision as “neglect” when they wish to do what they see as the right thing and use what they see as appropriate means to that end. It is perhaps even harder to see it as abuse, since they are not taking any *active* steps to worsen the child’s well-being and because they do wish to see the child’s condition improve.

The question in some sense is where the line is between “a difference of opinion over the appropriate treatment of an illness” and making a choice with a much lower probability of saving the child’s life. These cases raise several difficult questions. How confident are we in the power of science to declare it so superior that alternative healing methods are to be viewed as forms of abuse or neglect? How do we decide what sorts of scientific procedures are then “sure enough” such that refusing to use them would be actionable? Would the same sort of logic apply to other kinds of parental beliefs and decisions also? Could parents with unorthodox views about other issues related to caring for their children also be second guessed, and with what standard or burden of proof?²³

The framework developed in this chapter supports the idea that parental intentions matter a great deal and that the bar for second-guessing them should be high. Although parents are hardly infallible, if it is true that they have strong incentives and notably better knowledge with respect to serving the interests of their children, then the claim that they should be allowed to care for them in ways they see fit should be seen as the strong, though rebuttable, presumption in place. As with so much public policy, there are no absolute solutions, only trade-offs. Taking a strong position like this will undoubtedly lead to cases where children are exposed to harm or even death in ways that were perhaps preventable. But the trade-off to a more aggressive policy is opening up the family to a degree of state intervention that many would find unacceptable and would create a larger number of dysfunctional families than it prevented. One of the essential elements of classical liberalism is the commitment to rules rather than discretion when it comes to government policy. As we saw in an earlier section, discretionary policies might be able to solve the problems on the blackboard, but in practice, discretion faces serious incentive and knowledge problems that prevent it from working the way an abstract model might suggest. Committing to a rule means giving up the possibility of fixing every wrong. However, it brings with it the greater gain of avoiding errors of commission that would outweigh the benefits of trying to right all wrongs.

Like all other areas of public policy, family policy offers us no perfect solutions. The classical liberal tradition gives us strong reason to think that even though a strong defense of parental rights will risk harm to some small number of children, the damage to parents, children, the family as an institution, and society as a whole that would result from giving the state the power to try to fix all of those problems would be significantly greater. Binding ourselves to such a rule is difficult when the costs of doing so are visible, in the form of harm to children, while the costs of discretion are often more subtle, in the form of the longer-term damage to

children and families.²⁴ This is especially true in our own time, when our sentimental view of children and childhood has dramatically reduced our tolerance of harm of any sort to children, with the result that “what about the children?!” becomes the rallying cry for public policy “corner solutions” that refuse to think about trade-offs. Trying to lash the state to the mast in the area of family policy is at least as much of an uphill battle as it is elsewhere, but it is a crucially important battle to win given the importance of the family as an independent institution in the liberal order.

Notes

¹ Mason (2003) offers an analysis of step-families that suggests ways in which parental rights can be unbundled to allow more than two parents to have legal rights to control aspects of a child's upbringing. Her argument is based on the idea of "de facto parenthood," which amounts to noting that we might wish to consider giving adults *rights* to control those aspects of the child's life in which they are already *functioning* as a parent, even if the current legal system does not, or cannot, allow them to have such rights. For example, why should not a step-parent who is providing for a child financially and meeting with school teachers be able to sign permission slips and other school-related documents for the child as their legal parent?

² Some libertarian legal scholars, such as Stephan Kinsella, have criticized the view that the federal government should have the power to strike down bad state laws, calling it "libertarian centralism." I am not going to take up that line of argument here.

³ I thank my colleague Cathy Crosby-Currie for introducing me to the cases below and to participants at a 2009 Liberty Fund colloquium, especially John Hasnas, for further discussion.

⁴ We shall also see the ways in which the fact that the parental rights cases are still considered good law seems to run against the grain of other 20th century developments, as they rely on a conception of substantive due process that largely fell out of favor, only to be readmitted through the back door during the reproductive rights cases of the 1960s and 70s.

⁵ The rationale for such a law was clearly wartime concerns about teaching enemy languages to impressionable children.

⁶ I hesitate to say "Social Darwinism" here because the set of views commonly associated with "Social Darwinism" bears little resemblance to what Spencer and people like him actually believed. If anything, the real "Social Darwinists" of the era were the progressives who saw in eugenics a scientific path toward "race health" by eliminating the feeble-minded and members of minority groups. (See the discussions in Goldberg [2007, chapter 7] and Leonard [2005]). In one of the rich ironies of political and judicial history, it was the very same Justice Holmes who penned one of the most notorious decisions in Supreme Court history in *Buck v. Bell* (1927), in which the Court upheld a Virginia statute compelling the sterilization of the mentally incompetent on eugenic grounds. That decision included his famous phrase "three generations of imbeciles is enough" as well as "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." Holmes is often known today for his attack on the "Social Darwinist" Spencer, but the evidence is much stronger that he was more deserving of that title.

⁷ I use the word "perception" here quite intentionally. One of the interesting elements of this case is how dangerous the Court perceived the street to be to a girl of nine. (It is also worth noting the gender disparity in the law, which as we noted in chapter 6 was typical of this era.) Would a court today categorize what the girl was doing as so dangerous? What if it were in a

shopping mall? One of the problems with the implied standard created by *Prince* is that the “best interest of the child” is so historically contingent.

⁸ One is once again reminded of the *South Park* episode mentioned earlier where the parents discover that parents are the people most likely to harm their children and respond by banishing the kids to the woods to fend for themselves in the name of protecting them from danger.

⁹ Much of the analysis in this section and the next one is an application of the core argument in Barnett (2004), which remains the best classical liberal treatment of the evolution of constitutional law.

¹⁰ Barnett (2004) offers a way out of this dilemma and we will explore that later in this section.

¹¹ Rothbard adds that the *legal* question of what parents can or cannot do is distinct from the issue of whether parents have a *moral obligation* to care for their children. In Rothbard’s political framework, these are separate questions. Questions that he sees as matters of personal morality are not matters of legal enforcement.

¹² It is tempting to make a Lockean argument about stewardship rights in children arising from “mixing one’s labor” with the land. Aside from the awful pun involved, this might be an interesting direction to explore in the question of how parental rights and their according responsibilities are acquired. On this point, compare Narveson (2002, p. 267):

In the standard case where the child does have parents and those parents intentionally brought the child into existence, the overwhelming argument for recognizing those parents as having right to the direction and overseeing of those children is the same as the argument for recognizing any producer of a good as the owner of that good: it exists because that person exerted himself to bring the thing into being, and did it for reasons which will be frustrated if it is taken from him.

¹³ At the risk of being accused of a form of *ad hominem* argument, I cannot help but wonder whether Rothbard’s willingness to accept the remorseless logic of his position and not hold parents legally responsible for neglect is related to the fact that he never had children. There are many political arguments that I gladly accept even though they might make me worse off as an individual, but as a parent, I have no doubt that my acting to take stewardship of my children also imposes on me a set of obligations to care for them that should be legally enforceable because I have taken said steps to accept them. There are certainly parents who find Rothbard’s argument persuasive, but I am not one of them. Experiencing the helplessness of one’s child and watching the developmental process simply makes it impossible to deny both the responsibility that parenthood involves and the ways in which I, as a parent, have accepted that responsibility.

¹⁴ I leave aside for now the question of where the line is that separates “physical abuse” from mild forms of corporal punishment as this would take us too far afield. I will only note that if one agrees that parental actions that “significantly and intentionally retards” their children’s ability to function as an adult later in life are wrong, it is easier to accept mild forms of corporal

punishment that have no lasting effects and distinguish them from true abuse that leaves permanent scars, whether physical or emotional, that compromise adult functioning.

¹⁵ The following draws heavily on Horwitz (2005).

¹⁶ Narveson (2002) recognizes the incentives (or motivation) point but does not include the role of parental knowledge in very explicit ways, other than through his general commitment to pluralism.

¹⁷ I have made a very similar argument about private and public responses to natural disasters such as Hurricane Katrina (Horwitz 2009).

¹⁸ Compare to this point to Hayek's (1978, p. 185) famous description of how we should judge market outcomes:

Yet we do injustice to the achievement of the market if we judge it, as it were, from above, by comparing it with an ideal standard which we have no way of achieving. If we judge it, as we ought to, from below, that is, if the comparison in this case is made against what we could achieve by any other method – especially against what would be produced if competition were prevented[.]

¹⁹ I ignore the most nonsensical age-related law of all, namely the 21 year-old drinking age.

²⁰ To be clear, the market here is not a market for children per se, but for the parental rights associated with that child.

²¹ Elsewhere in Rothbard's (1998) chapter on children and rights, he offers several excellent responses to the judicial and legislative over-reach frequently associated with so-called "child-savers" and the "best interest of the child" standard. Judicial definitions of "neglect" are often too low, leading to the violation of parental rights and even greater damage to children who are taken from homes and placed in the state's care. More careful consideration of the comparative institutions perspective and a greater respect for some set of due process rights for children would help swing the balance back to a more appropriate place.

²² A case where parents simply refused modern medicine and did nothing instead might more easily be seen as neglect in an actionable sense, particularly if cost is not an issue.

²³ We are already seeing something like this in some divorce cases where one spouse objects to the religious upbringing the other spouse is providing, or perhaps is upset at the other spouse's sexual orientation or behavior. It is an interesting question what power courts should have, if any, in restricting parental behavior in such cases. See Volokh (2006).

²⁴ See Hayek (1973, chapter 3) on "Principles vs. Expediency" for more on this point.

References

- Barnett, Randy. (2004). *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton: Princeton University Press.
- Boettke, Peter. (2009). “Elinor Ostrom’s Nobel Prize in Economics: Why Those Who Value Liberty Should Rejoice,” *Foundation for Economic Education*, October 15, available at: <http://fee.org/articles/elinor-ostroms-2009-nobel-prize/>
- Buchanan, James and Gordon Tullock. (1962). *The Calculus of Consent*, Ann Arbor: University of Michigan Press.
- Buck v. Bell, 274 U.S. 200 (1927)
- Coontz, Stephanie. (1992). *The Way We Never Were*. New York: Basic Books.
- _____. (1997). *The Way We Really Are*. New York: Basic Books.
- Goldberg, Jonah. (2007). *Liberal Fascism*. New York: Doubleday.
- Griswold v. Connecticut, 381 U.S. 479 (1965)
- Hayek, F. A. (1973). *Law, Legislation, and Liberty, Vol. 1*, Chicago: The University of Chicago Press.
- _____. (1978). “Competition as a Discovery Procedure,” in *New Studies in Politics, Philosophy, Economics and the History of Ideas*, Chicago: The University of Chicago Press.
- Horwitz, Steven. (2005). “The Functions of the Family in the Great Society,” *Cambridge Journal of Economics* 29, 669-84.
- _____. (2009). “Wal-Mart to the Rescue: Private Enterprise’s Response to Hurricane Katrina,” *The Independent Review* 13, 511-28.
- Lawrence v. Texas, 539 U.S. 558 (2003)
- Leonard, Thomas C. (2005) “Mistaking Eugenics for Social Darwinism: Why Eugenics is Missing from the History of American Economics.” *History of Political Economy* 37, supplement: 200-233.
- Lochner v. New York, 198 U.S. 45 (1905)
- Mason, Mary Ann. (2003). “The Modern American Stepfamily: Problems and Possibilities,” in Mary Ann Mason, Arlene Skolnick, and Stephen D. Sugarman, eds., *All our Families: New Policies for a New Century*, 2nd ed., New York: Oxford University Press.

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

Narveson, Jan. (2002). *Respecting Persons in Theory and Practices: Essays on Moral and Political Philosophy*, Lanham, Maryland: Rowman and Littlefield.

Ostrom, Elinor. (1990). *Governing the Commons: The Evolution of Institutions for Collective Action*, New York: Cambridge University Press.

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

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)

Prince v. Massachusetts, 321 U.S. 158 (1944)

Rothbard, Murray N. (1998). *The Ethics of Liberty*, New York: New York University Press.

Slaughter-House Cases, 83 U.S. 36 (1873)

Troxel v. Granville, 530 U.S. 57 (2000)

Tubbs, David L. (2007). *Freedom's Orphans*, Princeton: Princeton University Press.

United States v. Carolene Products Company, 304 U.S. 144 (1938)

Volokh, Eugene. (2006). "Parent-Child Speech and Child Custody Speech Restrictions," *New York University Law Review* 81, 631-733.

Washington v. Glucksberg, 521 U.S. 702 (1997)

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)

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

Two Worlds at Once:
Classical Liberalism and
the Evolution of the Modern Family

Steven Horwitz

OUTLINE as of 7/12/08

1. Introduction: The Family and Classical Liberalism
2. Evolutionary Theories and the Family as a Social Institution

Capitalism and the Creation of the Modern Family

3. The Family in a World of Scarcity
4. Capitalism and the Emergence of the Modern Family
5. Gender and Family in the 20th Century

The 21st Century Family

6. Marriage, Divorce, and the Market Process
7. The Family in a World of Abundance
8. The Problems at the Top of the Pyramid

Classical Liberalism and Family Policy

9. Knowledge, Incentives, and Parental Rights: Toward Libertarian Family Policy
10. Marriage and the State
11. Conclusion