



## AMERICAN LUTHERAN HISTORY

# *MEYER V. NEBRASKA,* A LUTHERAN CONTRIBUTION TO CONSTITUTIONAL LAW

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One of the U.S. Supreme Court's most important civil liberties decisions arose out of a case that began in a one-room Lutheran schoolhouse in rural Nebraska. On a May afternoon in 1920, Robert T. Meyer, a teacher at Zion Lutheran Church's elementary school near Hampton, Nebraska, boldly continued teaching German in defiance of state law when the Hamilton County attorney entered his classroom. Meyer, a forty-two-year-old father of six, knew that this elected official did not want to offend the area's large German-American community and would not prosecute unless he witnessed Meyer violating a statute prohibiting the teaching of foreign languages to children who had not completed the eighth grade. "I had my choice," Meyer later told his lawyer. "If I changed into English, he would say nothing. If I went on in German, he would arrest me. I told myself that I must not flinch. And I did not flinch. I went on in German." Meyer believed that he had the same duty as a pastor to teach children "the religion of their fathers in the language of their fathers," particularly to enable them to participate in Zion's German-language worship services and to help them prepare for their confirmations.<sup>1</sup> Like most Lutheran schools by 1920, Zion's school provided its basic curriculum in English, teaching German only as a language.

Meyer was fined twenty-five dollars. Although some members of his congregation urged him simply to pay the fine, Meyer, together with the Missouri Synod and the parent of a child who attended a Roman Catholic school that taught Polish, challenged the constitutionality of the law, claiming that it infringed upon the religious liberty guaranteed by Nebraska's state constitution and violated the Fourteenth Amendment by depriving teachers, schools, and parents of property and liberty without due process of law. After losing in the Nebraska Supreme Court, Meyer appealed to the U.S. Supreme Court, which on June 4, 1923, in *Meyer v. Nebraska* overturned his conviction along with those of Lutheran parochial school teachers in cases arising under similar statutes in Ohio and Iowa.<sup>2</sup>

Although Meyer and the Missouri Synod objected to the law primarily as an interference with religious freedom, the Supreme Court did not address the religious aspects

of the case because the Court had not yet incorporated the First Amendment into state law. Consistent with earlier cases in which the Court had invoked the due process clauses of the Fifth and Fourteenth Amendments to protect property rights from what the Court regarded as undue governmental interference, the Court held that the statutes violated the rights of teachers to follow their vocations and unduly interfered with the contractual rights of parents and schools. For the first time, however, the Court also invoked due process to protect non-economic personal liberties. In sweeping language that would have enormous consequences for the future of the law, the Court declared that the liberty guaranteed by the Fourteenth Amendment included not only the right to enter into contracts and to pursue one's vocation, but also the right "to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>3</sup>

The prohibitions against foreign-language instruction in twenty-two states that *Meyer* invalidated were enacted to hasten the so-called "Americanization" of all immigrants and their children, especially those of German extraction. The statutes, which had been enacted during and immediately after the First World War, were part of a much larger epidemic of wartime animosity against German-Americans and expressions of German ethnicity. Widely admired before the war for their work ethic and their high cultural, moral, and educational standards, German-Americans were the nation's largest ethnic group and one of the most cohesive and assertive. Wartime assaults on German ethnicity accelerated the assimilation of German-Americans and largely removed them as a powerfully distinct political and cultural force.<sup>4</sup>

Since so many German-Americans were Lutheran, much of the wrath of super-patriots and advocates of so-called "100% Americanism" was directed against Lutherans and Lutheranism. Protestants of British origin, who constituted a majority of the population in most of the nation, often regarded Lutheran doctrine and liturgy as

“too Catholic.” Ignorant of Lutheran anxieties about “unionism,” local officials who facilitated the war effort could not understand why Lutheran clergy often refused to sit with other local clergy at patriotic rallies. Similarly, they could not comprehend that appeals for the sale of war bonds during *Gottesdienst* would have offended Lutheran liturgical proprieties.<sup>5</sup> They also failed to appreciate that the refusal of many clergy actively to promote the war reflected the Lutheran distinction between the two kingdoms. Cultural conflicts were exacerbated by the enrollment of many Lutheran children in parochial schools, the widespread use of the German language in religious services, the opposition of many Lutheran clergy to Lutheran membership in the fraternal lodges that were so powerful and popular at the time, and the hostility of most German-American Lutherans to Sabbatarianism and the burgeoning movement for the prohibition of alcoholic beverages.<sup>6</sup>

In many states, public officials urged Lutherans to demonstrate more enthusiasm for the war and to shed vestiges of German ethnicity. In particular, many officials admonished Lutheran churches and schools to desist from any use of the German language. Some went so far as to demand this or even closed or tried to close Lutheran schools.<sup>7</sup> In banning the use of German in public places, even churches, the governor of Iowa declared that “God is only listening to the English tongue.”<sup>8</sup> Lutheran clergy who resisted various demands to assimilate themselves and their congregations were sometimes beaten or at least threatened with violence,<sup>9</sup> and many Lutheran churches and schools were vandalized. Shortly before Meyer defied the Nebraska language law, his school had been ransacked by vandals who ripped up all the German language books other than the Bible.<sup>10</sup> A mob burned down a Lutheran church in Kansas; a Lutheran church in Indiana that refused to stop teaching German was blown up with dynamite;

arsonists destroyed a Lutheran school in Missouri that continued teaching German.<sup>11</sup> A Nebraska pastor lamented in 1918 that a “fiendish cyclone” had placed Lutherans in “a precarious position,” causing them to “suffer for conscience’ sake.”<sup>12</sup>

Although many Lutheran clergy were at first cool toward the war, they increasingly supported it.<sup>13</sup> As one Missouri Synod pastor observed, “[I]f our church gets into disrepute during the war, it will kill our future missionary success among Americans—the greatest mission field we have.”<sup>14</sup> Meanwhile, many Lutherans viewed the restrictions on the German language as more of an opportunity than

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a burden<sup>15</sup> since they believed that the persistence of the use of the German language in many schools and churches had caused what Theodore Graebner, the editor of the *Lutheran Witness* and a Concordia Seminary professor, described as “staggering losses” of members.<sup>16</sup> Another Lutheran clergyman believed that the continued use of German was “suicidal to the future of the Lutheran church in this country.”<sup>17</sup>

Graebner and other Missouri Synod leaders, however, actively opposed legislation during the early postwar period that was designed to suppress the use of the German language. In an early example of

Lutheran political activism in the United States, Missouri Synod officials helped to coordinate efforts by Lutheran legislators in various states to prevent or dilute legislation aimed at German instruction.<sup>18</sup>

Meyer had been prosecuted at a time when opposition to the German language and German ethnicity had largely played itself out. At the same time, however, a new wave of nativism was directed at southern and eastern European immigrants and Roman Catholics. One of the principal features of this new nativism was hostility against parochial education, which nativists claimed hindered assimilation and exacerbated ethnic, class, and religious tensions and divisions. During the early 1920s, opponents of parochial education conducted a well-financed and highly organized campaign to destroy parochial schools by requiring all children to attend public schools. The movement received the active support of a strange coalition of professional educators, fraternal lodges, nativists, and the Ku Klux Klan, which during this time attained significant membership in the Midwest and West, where its activities were directed largely against Roman Catholics.<sup>19</sup>

Similarly, the movement to eliminate parochial education appears to have been animated by animosity against Catholics rather than Lutherans, even though it posed the same threat to the schools of both. For example, a nativist newspaper in Missouri in 1922 praised the “splendid achievements” of Lutheran schools, but contended that the only way to cure “the papal cancer” was to “abolish all parochial schools” and that Lutherans should sacrifice their schools for the common good.<sup>20</sup> Laying aside their traditional reluctance to have contact with other churches or involve themselves in political causes, Lutherans worked successfully with Roman Catholic dioceses and various Protestant denominations in successful political and legal efforts to defeat the movement. There was

much at stake, since Lutherans had the nation's second-largest network of parochial schools. Most of these were German-American, as Scandinavian-Americans established few elementary or secondary schools.<sup>21</sup>

Some Lutherans expressed discomfort with the political activism of their traditionally apolitical church.<sup>22</sup> Indeed, Meyer's resignation as a teacher at Zion shortly after he challenged the Nebraska language law may have been caused by controversy about whether he ought to have obeyed the law or at least paid his fine.<sup>23</sup> Although Graebner disparaged allegations that Roman Catholic schools were subversive, he emphasized that Lutherans should make clear that their common cause with Catholics was political rather than spiritual.<sup>24</sup>

In Michigan, where the Missouri Synod maintained ninety-four schools, a Lutheran Schools Committee successfully opposed referenda in 1920 and 1924 to require all children to attend public school. Assisted by a professional campaign manager and ten thousand volunteers, in 1920 the committee placed advertisements in newspapers, distributed more than four million handbills and pamphlets, and established local committees in each of the state's eighty-three counties and in every Missouri Synod parish. Lutherans adopted a slogan—"Whose is the Child?"—which was emblazoned on fifty thousand campaign buttons. This was the theme of a widely distributed pamphlet, in which W. H. T. Dau of Concordia Seminary insisted that parental rights over children were superior to those of the state. Lutherans also emphasized that parochial schools saved taxpayers enormous expense by reducing enrollment at public schools.<sup>25</sup>

In the wake of similarly spirited opposition by Roman Catholics, Michigan voters defeated the measure by a vote of nearly two-to-one in 1920.<sup>26</sup> Keenly aware of the continued nationwide effort to extinguish parochial education, the Lutheran

Schools Committee carried on its work even after the 1920 election, establishing a permanent office in Detroit and continuing to distribute pamphlets defending parochial education.<sup>27</sup> Graebner amplified Dau's arguments in a pamphlet contending that natural law endowed parents with the right to direct the education of their children. He also indignantly rejected allegations that Lutherans were insufficiently "Americanized."<sup>28</sup> Michigan voters again rejected compulsory public education by a margin of two-to-one in 1924, on the same day that 58% of voters in Washington state rejected a similar measure that

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had been opposed by a wide range of religious denominations, including Lutherans.<sup>29</sup>

In 1922, the compulsory public education movement scored in its only victory in Oregon, where voters approved an initiative by a narrow margin. A Lutheran Schools Committee had actively opposed the initiative, along with the Roman Catholic, Episcopal, and Seventh-Day Adventist churches. Many Jews also opposed the measure, which they regarded as a threat to religious freedom.<sup>30</sup> An official of the Lutheran Schools Committee welcomed the election result as "a God-sent blessing in disguise" because it provided an opportunity to stop the anti-parochial school movement once

and for all, assuming a favorable decision could be obtained in court.<sup>31</sup> The statute, which was not scheduled to take effect until 1925, was immediately challenged in court by a Roman Catholic order of nuns acting with the support of bishops throughout the nation, and a private nonsectarian school.<sup>32</sup>

The *Meyer* decision, handed down while this challenge to the Oregon law was pending in a federal trial court, provided immense encouragement to opponents of compulsory public education since the Court had extended constitutional protection to parental rights and religious liberty. Recognizing, however, that the federal courts remained more protective of economic liberties, opponents of the law also emphasized that the Oregon law, like the Nebraska law in *Meyer*, was destructive of the value of an enormous amount of property and interfered with contractual and vocational rights.<sup>33</sup> After the federal district court held the law to be unconstitutional in a decision that relied in part on *Meyer*,<sup>34</sup> the state appealed to the U.S. Supreme Court. When the attorney opposing the statute asked Chief Justice William Howard Taft for more time to argue the case, Taft replied, "I don't see why you need any more time. This case is simply the *Meyer* case over again."<sup>35</sup> The Court relied heavily upon *Meyer* in its unanimous decision striking down the statute in *Pierce v. Society of Sisters* on June 1, 1925. As in *Meyer*, the Court in *Pierce* based its decision upon property rights rather than religious liberty, but the Court in *Pierce* addressed the issue of parental rights more squarely than it had in *Meyer*. Providing a forceful answer to the Lutheran question, "Whose is the Child?" the Court declared that "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."<sup>36</sup>

Shortly after deciding *Pierce*, the Court began the long process by which

it has incorporated into state law nearly all of the liberties prescribed by the Bill of Rights. *Meyer*, however, has remained a precedent for the controversial proposition that there are some constitutional rights that are not found in specific provisions of the Constitution. Judges, lawyers, and scholars have interpreted its Delphic dicta in highly divergent ways.

*Meyer* has served as precedent in various U.S. Supreme Court decisions that have struck down laws restricting abortion,<sup>37</sup> homosexual activities,<sup>38</sup> and contraception.<sup>39</sup> In *Roe v. Wade*, for example, the Court cited *Meyer* in support of its contention that a right to privacy can be inferred from the due process clause of the Fourteenth Amendment. Some scholars and judges, however, have argued that *Meyer*'s protection of parental autonomy provides no valid precedent for such decisions and may even compel contrary rulings,<sup>40</sup> and political conservatives have invoked *Meyer* and *Pierce* in support of homeschooling rights and school vouchers.

Although the scope of the liberties recognized by *Meyer* is likely to continue to generate controversy, the meaning of the case for religiously affiliated schools is clear and perhaps was best summarized by Meyer himself in a 1938 letter to the attorney who had represented him. "It is indeed very gratifying to know," he wrote, "that the case had a happy termination... The rights of parents over their children have been safeguarded by that decision."<sup>41</sup> IF

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#### Notes

1. Arthur F. Mullen, *Western Democrat* (New York: Funk, 1940), 218.
2. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, *Bohning v. Ohio*, *Pohl v. Ohio*, and *Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and Other States et al. v. McKelvie et al.*, 262 U.S. 404 (1923).
3. *Meyer v. Nebraska*, 399.
4. See Frederick C. Luebke, *Bonds of Loyalty: German-Americans and World War I* (DeKalb: Northern Illinois University Press, 1974).
5. *Ibid.*, 238.
6. See William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917–1927* (Lincoln: University of Nebraska Press, 1994).
7. *Ibid.*, 44–52, 135.
8. Nancy Derr, "The Babal Proclamation," *The Palimpsest* 60 (1979): 114. Harding and the State Council of Defense, however, granted various dispensations to Lutheran churches. Ross, 44–45.
9. Luebke, *Bonds of Loyalty*, 15; Frederick C. Luebke, "Legal Restrictions on Foreign Languages in the Great Plains States, 1917–1923," in *Languages in Conflict*, ed. Paul Schach (Lincoln: University of Nebraska Press, 1980), 9–10.
10. Author's interview with Clarence Heiden, Hampton, Nebraska, June 27, 1990. In 1920, Heiden was the student of another teacher at Zion.
11. Ross, 47.
12. J. M. Weidenschilling to Theodore Graebner, April 13, 1918, Theodore Graebner Papers, Box 122, Concordia Historical Institute, Clayton, Missouri [hereafter cited as TGP].
13. Luebke, *Bonds of Loyalty*, 284.
14. Martin Graebner to Theodore Graebner, Feb. 4, 1918, TGP Box 122.
15. Ross, 82.
16. Theodore Graebner to H. Grueber, Sept. 27, 1918, TGP Box 122.
17. A. J. Schlichting to Theodore Graebner, Oct. 26, 1918, TGP Box 122.
18. Ross, 61–65.
19. *Ibid.*, 68–73.
20. *The New Menace* (Bronson, Missouri), May 13, 1922, in mss 308 (microfilm), Papers of Benjamin W. Alcott, Oregon Historical Society, Portland, Oregon.
21. Ross, 17–18.
22. John Fahning to Theodore Graebner, Dec. 22, 1920, TGP Box 40; Theodore Graebner to John Fahning, Dec. 27, 1920, TGP Box 40.
23. Author's interview with Raymond

Parpart and Clarence Heiden, Hampton, Nebraska, June 27, 1990. Parpart was receiving instruction from Meyer when the county attorney entered Meyer's classroom and is mentioned by name in the Supreme Court's decision.

24. Theodore Graebner to F. A. Hertwig, June 5, 1921, TGP Box 40.
25. Ross, 136–8.
26. *Ibid.*, 140.
27. *Ibid.*, 41.
28. Theodore Graebner, "An Impossible Amendment and an Anti-Social Petition," published by the Lutheran Schools Committee, in Lutheran Schools Committee file, TGP Box 40.
29. Ross, 144–5.
30. *Ibid.*, 148–9, 156–9, 168.
31. Rudolph Messerli to F. Pfothenhauer, Nov. 10, 1922, Lutheran Schools Committee file, mss 646, Folder 19, Oregon Historical Society.
32. Ross, 160–2.
33. *Ibid.*, 161–3.
34. *Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce et al.*, 296 F. 928 (D. Ore. 1924).
35. John J. Burke to Thomas F. O'Mara, March 25, 1925, Records of the United States Catholic Council, Box 14, Catholic University of America, Washington, D.C.
36. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).
37. *Roe v. Wade*, 410 U.S. 113, 152–3 (1973); *Planned Parenthood v. Casey*, 505 U.S. 717, 849 (1992).
38. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).
39. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Carey v. Population Services*, 431 U.S. 678, 684–5 (1977).
40. See, for example, Ross, 198–200; *Lawrence v. Texas*, 539 U.S. at 593 (Justice Scalia, dissenting).
41. Robert T. Meyer to Arthur F. Mullen, Apr. 29, 1938, Arthur F. Mullen Papers, Creighton University, Omaha, Nebraska. Meyer continued to teach until 1942 and died at the age of ninety-four in 1972. Ross, 185.