

The Supreme Court's Response to Nativism in the 1920's

Jamie McNab

World War I was a period of intense nativism in the United States. The Anglo-Saxon majority in America viewed anything or anyone that was foreign as potentially subversive. Citizens and residents with close links to a foreign ancestry faced a number of injustices as a result of their ethnic heritage. Two of the most extreme measures taken to “protect” the United States against potential subversives were the Espionage and Sedition Acts. The United States Supreme Court upheld these acts as necessary wartime measures. The Supreme Court did not uphold other measures taken to ensure Americanization and loyalty passed on the heels of the War in ensuing years. In a series of decisions in the 1920's, the Supreme Court struck down various state laws that sought to instill loyalty in non Anglo-Saxons through strict educational restrictions. The Supreme Court's decisions in these cases partly reflected shifting public sentiment and a desire by the Court to protect civil liberties. The Court also wanted to take advantage of the opportunity to reaffirm its two-decade trend of striking down social and economic regulatory legislation.

John Higham is author of the seminal work on nativist history in America up to 1925. In *Strangers in the Land*, Higham argues that nativism in America from 1860-1925 was driven by anti Catholic sentiment, fear of foreign radicals, and a sense of Anglo-Saxon supremacy. He defines nativism as “intense opposition to an internal minority on the ground of its foreign (i.e., “un-American”) connections.”¹ Although Higham does a superb job tracing nativism in the United States up to 1925, he does not sufficiently examine the United States Supreme Court's (USSC) response to nativist measures. This paper attempts to explore the Court's role in addressing nativist legislation enacted by state legislatures in the immediate post World War I years.

Nativism as a major force in the United States during the WWI era dated from the Haymarket Riot of 1886. The riot led to the perception that anarchist immigrants existed in the U.S. and threatened the nation's stability.² Mixed into to the nation's mood that was already a proverbial tender box after the Haymarket riot, the last decades of the 19th century and the first quarter of the 20th century witnessed an influx of “new immigrants” that hailed largely from Southern and Eastern Europe. Anglo-Saxon Americans were uncomfortable with this rising tide of immigrants that were so different from their Western European, Protestant brethren; the “new” immigrants included Catholics, Jews, and Eastern Orthodox believers.³ Many Americans began to fear that the “new” immigrant would not assimilate and would pose a danger to the established order.⁴

The 1900's provided a mild respite from nativist discrimination. Higham describes that while discrimination may have declined in the decade, fear of foreigners did not.⁵ Therefore, the seemingly lessened hostility toward foreignness at the dawn of the Progressive Era was little more than a thin veneer that would rub off quickly in the face of a perceived foreign threat to the United States. Indeed, such a threat materialized in the form of World War I. One of the War's obvious effects in America was the closing of the gate into America to immigrants. In order to clamp down on immigration, a series of federal measures were passed such as the 1917 Literacy Test, the 1924 National Origins Act, and Hoover's strict system of quotas. The result of these measures was the near impossibility of anyone getting into the U.S. other than a small number of

Western Europeans.⁶ For those “undesirables” who had already slipped into the U.S., a heavy dose of Americanization was considered the cure to their “foreignness”.

The loyalty of German-Americans was constantly challenged during World War I and in the years immediately following the war. American patriots irrationally found it their duty to question anything with even the mildest connection to the Kaiser. The German language sadly fell into the cross hairs of these American patriots.⁷ This probably occurred in part because education professionals at the time viewed the English language as being the key aspect to Americanization.⁸ A 1919 scholarly article in *Educational Review* exhibits the provincialism that existed among many Anglo-Saxon educational professionals. The author questioned the usefulness of teaching the “soiled” German language arguing “If culture alone is what we seek, that expert in English will suffice.”⁹

Suspicion of German speakers led to a push at the Federal level to enact legislation restricting the teaching of German.¹⁰ In 1918, Senate Bill 4624 proposed to ban the teaching of German in District of Columbia schools and in any territory of the United States.¹¹ Eventually, the Senate agreed to an amendment to a D.C. appropriations bill that restricted German in the District. Not all Senators were pleased with the measure; Senator Gallinger of New Hampshire argued, “We can go too far in our prejudices sometimes.”¹² His voice was nothing more than a lonely cry in the wilderness though. More common were sentiments such as those of Senator Kenyon of Iowa, who exclaimed in debate on the amendment, “I think Germany should be branded as a world outlaw, and we should never have anything to do with her again as long as this Union lasts.”¹³

The vast majority of legislation restricting the use of the German language came from State legislators. This is for the obvious reason that States were in charge of their educational systems, as is still true today. Nebraska in particular provides an excellent case study into nativist legislation, because its statute on foreign languages was the basis for the crucial Supreme Court decision in *Meyer v. Nebraska* (1923).¹⁴ During the War, the Nebraska State Council of Defense led a charge calling for German Language restrictions in the state.¹⁵ The demand would most likely have sounded similar to the demand of the Council of Defense in Victoria County, Texas in 1918:

As a high evidence of patriotism and love for those tenets of freedom for which our sons are dying we call upon all loyal Americans to abandon the use of the German language, in public and private, as an utmost condemnation of the rule of sword.¹⁶

Proponents of language restriction ultimately achieved their goal in Nebraska, and the state legislature passed the Siman Act in 1919. The act banned the teaching of foreign languages to students who had not completed the eighth grade.

In 1920, Robert Meyer, a teacher at Zion Parochial School, was fined for violating the Siman Act by teaching a young boy. Meyer decided to challenge the constitutionality of the statute, and his case ended up before the USSC. The USSC ruled the Siman Act unconstitutional.¹⁷ In Justice McReynolds opinion, he explained that the act violated the 14th Amendment constitutional guarantee of liberty to Meyer, the student, and the student’s parents.¹⁸ The justice explained:

The established doctrine is that this liberty may not be interfered 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.¹⁹

McReynolds relied on substantive due process to strike down the Nebraska statute. The ruling was very much in line with the Court's wariness at the time of social and economic regulatory legislation.²⁰ The case was more than another example of substantive due process though; cultural conservatives view the ruling today as the foundation of parental rights, and others call the ruling the first ever civil liberties victory.²¹

The Nebraska Siman Act demonstrates that the end of World War I did not mark the end of nativism. The Bolshevik revolution in Russia and the Palmer raids actually ensured that nativism would be prolonged. In Oregon, nativism manifested itself after the War in discrimination against Catholics. The Ku Klux Klan controlled politics in the state, and their plan was grounded in "100% Protestantism" and the simple slogan "Down with the Pope and the Catholic Church."²² One statutory measure the Klan pushed through the state House took this to the extreme: the law required the Catholic chaplain from the state penitentiary to be fired, it prohibited the wearing of any Catholic garb in State schools, and it ended the ecclesiastical privilege of sacramental wine for Catholics.²³ The most controversial anti-Catholic measure was a 1922 statute that required all children between eight and sixteen to attend public school.²⁴ This measure sought to force the parochial schools in the state to shut down.

The Oregon statute requiring public school attendance went before the USSC in 1925.²⁵ In the Court's decision, Justice McReynolds wrote that the statute was not constitutional based on the *Meyer* Doctrine. The justice explained, "The Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."²⁶ McReynolds also posited the notion that a child is "not a mere creature of the state," thus adding the *Pierce* decision to the ranks of cases forming a basis for parental rights.²⁷

Nativist legislation even found its way to one of the most western U.S. territories. In 1920, the territorial legislature of Hawaii enacted a law that meant to effectively shut down all of the foreign language schools on the island. Before the statute went into effect, Hawaii boasted 163 foreign language schools totaling 20,000 pupils and 300 teachers.²⁸ These schools were only supplemental places of instruction. The pupils of the foreign language schools all attended some other school taught in English.²⁹ In passing the 1920 act, the territorial legislature explained that the statute was necessary "in order that the Americanism of the pupils may be promoted."³⁰ One proponent of the legislation argued that the act was "in the interest of the children."³¹ This was, of course, a bitter pill to swallow for many parents with children in the school, a majority of Japanese descent, who had hoped that their children could learn the native tongue of their ancestors.

The affected Japanese-Americans were set to endure the legislative enactment until they learned of the *Meyer* ruling.³² The outcome of that case gave the Japanese-Americans the confidence they needed to press forward with a legal challenge - they filed suit in the Supreme Court.³³ Ultimately, the USSC, in similar fashion to the *Meyer* and *Pierce* decision, struck down the xenophobic legislation. Justice McReynolds, by this

time an old pro at writing such rulings, argued in *Tokushige* that “The Japanese parent has the right to direct the education of his own child without unreasonable restriction; the Constitution protects him as well as those who speak another tongue.”³⁴ In this ruling, McReynolds and the court made pointed reference to both the *Meyer* and *Pierce* rulings as examples of precedent.³⁵

The *Meyer*, *Pierce*, and *Tokushige* cases all dealt with statutes that were publicly supported in their inception. In light of this fact, it is interesting that the public response to all three rulings was generally favorable, especially in light of the fact the rulings came back well under a decade after each statute was passed. For example, when the *Meyer* ruling came down, *The Washington Post* said the decision “would be hailed by every right-thinking person as another vindication of liberty which the Constitution and the amendments thereto guarantee.”³⁶ Following the *Pierce* decision, *The New Republic* declared, “The Oregon decision, like its Nebraska forerunner, in and of itself, gives just cause for rejoicing.”³⁷ *The Outlook* approved of the *Pierce* decision as well, and it called the Oregon statute a “preposterous idea.”³⁸ In response to the *Tokushige* ruling, the *Syracuse Post-Standard* opined “these Japanese and other schools are not to be considered seditious because they operate independently of the public-school system.”³⁹

These editorial responses suggest a shift in public sentiment from the immediate post war years to the mid 1920’s that may have been a crucial factor in persuading the Supreme Court to strike down the state laws. Although the Justices did not leave a record of their decision making process, they would have undoubtedly been aware of public opinion on the matter. The nativist statutes received significant national attention. In addition to the impact the shift in sentiment had on the public, it is interesting to explore what caused the shift itself. In a 1923 *Outlook Magazine* article, the author suggested that the immediate post War frenzy to attack any “foreignness” was a result of World War I ending too early.⁴⁰ The article posits the theory that with nobody to fight, unsatisfied Anglo-Saxon Americans turned inward to attack foreigners within its own borders. Noted 20th century American historian Arthur Link would probably agree with the statement, as he highlights in *American Epoch* that all postwar period in the U.S. have been full of partisanship and tension that have led to undesirable events.⁴¹ Scholars today now posit that the post War nativist frenzy may have died down thanks to a roaring economy and a general return to “normalcy” that took peoples’ minds off the matter.⁴²

It would be naïve to consider a shift in the public mood as the sole reason for the Supreme Court’s decision. After all, American legal history is replete with instances in which the Supreme Court went against the majority opinion in America. *The New Republic* in 1925 leads one to conclude that the Supreme Court may have had an ulterior motive in striking down the state legislation described in *Meyer*, *Pierce*, and *Tokushige*. Arguing that the definition of “due process” was as malleable as clay to the Court, the *New Republic* pointed out that the rulings to protect foreigners and Catholics had come at a high price. Namely, at the cost of the “The New York bakeshop case, the invalidation of anti-trade union laws, the sanctification of the injunction in labor cases,” and “the veto of minimum wage legislation.”⁴³ *The New Republic* suggests that the Court struck down the measures as a means to reaffirm its veto power over state legislation that went too far in the Court’s opinion. This suggestion is not impossible to imagine given the conservative nature of the Court in the first third of the twentieth century.

William G. Ross has addressed the issue of the Court's motives in recent legal scholarship. He notes that the decision in *Meyer* and *Pierce* had something to offer to all: a strike against nativism for ethics, protection of human rights for liberals, and a warning that the USSC could curb state power for economic conservatives.⁴⁴ In the case of *Meyer*, and this interpretation could be applied to all three cases discussed in this paper, Ross concludes that it's a Janus-faced decision – both an affirmation of the old doctrine of substantive due process and a new theory of personal freedom protection.⁴⁵ In light of this analysis, combined with evidence from the era, it is reasonable to argue that the Court's motives were probably neither entirely the result of public sentiment, nor entirely a selfish desire to make a point to state legislatures. The Court most likely saw a chance to make both a stand for civil liberties that were grossly violated during and after World War I and to reaffirm its supremacy over economic and social regulation that it felt went too far. These two factors combined with the public sentiment created a confluence of factors for the Court that led to opinions that would have been optimal in its eyes.

The history of immigration in America proves that the U.S.'s relationship with its sons and daughters of foreign ancestry has been far more complicated than Israel Zangwill's melting pot metaphor suggests. Too often, as highlighted by the treatment of the American Indians, the writings of Madison Grant, or the legislative restrictions on "foreignness", for example, America has been unwilling to allow those of foreign ancestry to slowly "melt" into America. Looking once again at Higham's theory of the driving forces behind nativism in the U.S. (anti Catholicism; fear of radicals; Anglo-Saxon superiority), one sees them demonstrated in all three statues contested in the *Meyer*, *Pierce*, and *Tokushige* cases. Ultimately, the Supreme Court reflected a shifting public sentiment in America, and its decisions played a decisive role in legally affirming a slackening of this nativist mood in America. Although the motive of the Court may have been more than a mere altruistic defense of civil liberties, its rulings in the three cases sent a clear message that the peak of nativism reached in America was over.

Works Cited

- “Can the Supreme Court Guarantee Toleration?” *The New Republic* 17 June 1925: 85-87.
- “Conference Upon Problems of Educational Administration in Texas,” *University of Texas Bulletin*. No. 2311 15 March, 1923. Austin: University of Texas.
- “The Cross Words at the Crossroads.” *The Literary Digest* 26 March 1927, 10.
- “Foreign Language Decision.” *Washington Post* 4 June 1923, 6.
- “Freedom for Schools.” *The Outlook* 10 June 1925, 205.
- Hartmann, Edward G. *The Movement to Americanize the Immigrant*. New York: Columbia University Press, 1948.
- Higham, John. *Strangers in the Land*. New Brunswick, NJ: Rutgers University Press, 1955.
- Link, William A., and Arthur S. Link *American Epoch: A History of the United States since 1900, Volume I: War, Reform, and Society, 1900-1945*. New York: McGraw-Hill, 1993.
- O’Brien, Kenneth B. “Education, Americanization and the Supreme Court: The 1920’s.” *The American Quarterly* 13 (Summer 1961), 161-171.
- Roberts, Waldo. “The Ku-Kluxing of Oregon.” *The Outlook*, 14 March, 491.
- Ross, William G. “The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education.” *Akron Law Review* 34/177 (2000): 20 pages on LexisNexis.
- Ross, William G. “A Judicial Janus: *Meyer v. Nebraska* in Historical Perspective.” *University of Cincinnati Law Review* 57/125 (1988): 54 pages on LexisNexis.
- Schwartz, Henry Butler. “The Foreign Language Schools of Hawaii.” *School and Society* 23:578 (1926): 98-104.
- U.S. Congress. House. Committee on the Judiciary. *The Immigration and Naturalization Systems of the United States*. 29 March, 1950. Washington, D.C.: GPO, 1950.
- U.S. Congress. Senate. Bills introduced. S. 4624. 65th Cong., 2nd sess., *Congressional Record* 56, pt. 7 (27 March 1918).
- U.S. Congress. Senate. Senator Gallinger of New Hampshire arguing that xenophobia going too far. 65th Cong., 2nd sess., *Congressional Record* 56, pt. 8

(15 June 1918).
U.S. Congress. Senate. Victoria County, Texas Council of Defense letter submitted for the record by Senator Sheppard of Texas. 65th Cong., 2nd sess., *Congressional Record* 56, pt. 2 (10 October 1918).

Weber, S.E.. "The Kindergarten as an Americanizer." *Educational Review* 59 (1920): 206-212.

Wilkins, Lawrence A. "The War and World Languages," *Educational Review* 58 (1919): 289-302.

Wunder, John. R. *Law and the Great Plains*. Westport, CT: Greenwood Press, 1996.

¹ John Higham, *Strangers in the Land*. (New Brunswick, NJ: Rutgers University Press, 1955), 4.

² *ibid.*, 53-55.

³ Edward G. Hartmann, *The Movement to Americanize the Immigrant* (New York: Columbia University Press, 1948), 14-15.

⁴ *ibid.*, 18.

⁵ Higham, 110.

⁶ From 1911 to 1920, 27,412 aliens were deported from the United States. In the time span from 1921 to 1930, 92, 157 aliens were deported. These numbers highlight the reality that the U.S. not only closed off its doors in the post War years, but it also opened its windows in order to toss foreigners out.

House Committee on the Judiciary, *The Immigration and Naturalization Systems of the United States*, 81st Congress, 2nd Session, Report No. 1515, 29 March, 1950 (Washington, D.C.: GPO, 1950), 873.

⁷ The effectiveness of measures to end the study of German is readily apparent when studying statistics on the matter. In 1915, 24% of all high school students in America studied German. By 1922, less than 1% of high school students studied the language.

John R. Wunder, ed., *Law and the Great Plains*. (Westport, CT: Greenwood Press, 1996), 41-42.

⁸ S.E. Weber, "The Kindergarten as an Americanizer," *Educational Review* 59 (1920): 207.

⁹ Lawrence A. Wilkins, "The War and World Languages," *Educational Review* 58 (1919): 294.

¹⁰ Congress addressed the push for anti-German measures in a variety of ways. In one case, they repealed a special corporate charter that they had granted to the National German-American Alliance in 1907. The charter called in part for the organization to promote "the cultivation of the German language." Congress repealed the charter in 1918 and President Wilson signed the measure into law.

Congress, Senate, Senator Borah of Idaho speaking for the repeal of the National German-American Alliance charter, 65th Cong., 2nd sess., *Congressional Record* 56, pt. 9 (1 August 1918). 9192.

¹¹ Congress, Senate, Bills introduced, S. 4624, 65th Cong., 2nd sess., *Congressional Record* 56, pt. 7 (27 May 1918): 7111.

¹² Congress, Senate, Senator Gallinger of New Hampshire arguing that prejudice going too far, 65th Cong., 2nd sess., *Congressional Record* 56, pt. 8 (15 June 1918): 7841.

¹³ *ibid.*

¹⁴ *Meyer v. Nebraska* 262 U.S. 390; At the time of the *Meyer v. Nebraska* ruling, twenty-one states had statutes similar to the Siman Act. For a comprehensive listing of these statutes, refer to pages 23-29 of the USSC brief filed by the State of Nebraska's lawyers before the court.

I found the brief in the *University of Texas Bulletin*, "Conference Upon Problems of Educational Administration in Texas", No. 231: March 15, 1923.

¹⁵ William G. Ross, "A Judicial Janus: *Meyer v. Nebraska* in Historical Perspective," *University of*

Cincinnati Law Review 57/125 (1988): 4-5 accessed via LexisNexis

¹⁶ Congress, Senate, Victoria County, Texas Council of Defense letter submitted for the record by Senator Sheppard of Texas, 65th Cong., 2nd sess., *Congressional Record* 56, pt. 2 (10 October, 1918): 11194.

¹⁷ The USSC also struck down similar state language statutes in four other cases in addition to *Meyer v. Nebraska*. They include: *Bartels v. State of Iowa*, No 134.; *Bohning v. State of Ohio* No. 181; *Pohl v. State of Ohio*, No. 182; *Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and Other State et al. v. McKelvie et al.*, No. 440. These cases were all decided under the heading *Bartels v. State of Iowa* 262 U.S. 404 in 1923. The *Bartels* decision contains a dissent of Justice Holmes that pertains to the *Meyer v. Nebraska* ruling as well. Justice Holmes argued that it was reasonable that if a child heard only a foreign language at home, he should have only English at school. The country needed a common tongue he argued, and that since it was reasonable it did not infringe unduly on one's liberty. *Bartels v. State of Iowa* 262 U.S. 404 at 412.

¹⁸ *Meyer v. State of Nebraska* 262 U.S. 390 at 401.

¹⁹ *ibid.*, 399-400.

²⁰ William G. Ross, "The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education," *Akron Law Review* 34/177 (2000): 2 accessed via LexisNexis

²¹ Wunder, 9 and Ross, "The Contemporary Significance of Meyer and Pierce..." , 2.

²² Waldo Roberts, "The Ku-Kluxing of Oregon," *The Outlook*, 14 March 1923, 491.

²³ *ibid.*, 490.

²⁴ The day the compulsory public school statute passed, the Ku Klux Klan placed an ad in the *Daily Oregon Statesmen*. The ad was headed, "Good Americans!, Attention!". The ad warned voters in the upcoming midterm elections to be aware that Catholics were subversive and trying to elect officials friendly to the pope. The ad was an attempt to kick up nativist sentiment before the election to help anti Catholic candidates. The Ku Klux Klan was listed among the sponsors of the advertisement.

Daily Oregon Statesmen 7 November 1922, 3.

²⁵ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* 268 U.S. 510

²⁶ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* 268 U.S. 510 at 534-535.

²⁷ Ross, "The Contemporary Significance of Meyer and Pierce..." , 2.

²⁸ *Farrington v. T. Tokushige* 273 U.S. 284 at 290-291.

²⁹ *ibid.*

³⁰ *ibid.*, p. 3.

³¹ Henry Butler Schwartz, "The Foreign Language Schools of Hawaii," *School and Society* 23:578 (1926): 103.

³² Schwartz, 102

³³ *Farrington v. T. Tokushige* 273 U.S. 284

³⁴ *ibid.*, 5.

³⁵ *Farrington v. T. Tokushige* 273 U.S. 284 at 299.

³⁶ "Foreign Language Decision," *Washington Post* 4 June 1923, 6.

³⁷ "Can the Supreme Court Guarantee Toleration," *The New Republic* 17 June 1925, 86.

³⁸ "Freedom for Schools," *The Outlook* 10 June 1925, 205.

³⁹ Quoted in "The Cross Words at the Crossroads," *The Literary Digest* 6 March 1927, 10.

⁴⁰ Roberts, 491.

⁴¹ William A. Link and Arthur S. Link, *American Epoch: A History of the United States since 1900, Volume I: War, Reform, and Society, 1900-1945* (New York: McGraw-Hill, 1993), 175.

⁴² Edward Hartmann (cited above) argues that four key factors led to the fizzling of the Americanization drive in the 1920's. One factor was economic. The relative prosperity of the 1920's made people more content and less prone to worrying about others. Additionally, there was a general return to "normalcy" that occurred gradually after the war. Moreover, stricter immigration laws seemed to be taking part of some of the problem of foreigners. Finally, state legislation passed just after the War may have led people to see the issue as taken care of, thereby leading to a slackening of pressure to push for stricter Americanization laws. (pp 265-266)

⁴³ "Can the Supreme Court Guarantee Toleration," 491.

⁴⁴ Ross, "The Contemporary Significance of Meyer and Pierce..." , 2.

⁴⁵ Ross, "A Judicial Janus..." , 25.