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Michael Farris

Bradley P. Jacob

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PUBLIC SCHOOLS' PYRRHIC VICTORIES OVER PARENTAL RIGHTS

Michael Farris* & Bradley P. Jacob**

Their string of courtroom wins is indeed impressive. Public schools have been uniformly successful in beating back the legal claims of parents seeking a meaningful role in decisions concerning their own children's education -- so much so that two expert commentators, Professors Uerling and Strobe, presented a session at the Education Law Association's 1997 annual meeting entitled: *The Parental Right to Direct Their Child's Education in a Public School Setting: As An Evolving Matter It Is Almost Extinct*.¹

Many within the public school establishment dance within unrestrained enthusiasm on the grave of parental rights. But, we respectfully submit, they celebrate a pyrrhic victory. Left unremedied, the defeat of parents' rights in this context would prove not only harmful for parents and students, but would also damage public schooling in two interconnected ways.

First, when court decisions effectively shut out parents who want to have a meaningful say in their children's education, they will often choose to remove their children from the public schools. These parents will instead look to alternative forms of education which respect their desires and their rights. The number of students in private education, including home schooling, continues to increase dramatically.² Home schooling, an insignificant component of our nation's educational mix as recently as the 1980s, has grown so rapidly that as of 1996, the number of home schooled students nationwide stood at 1.23 million -- comparable to the number of public school pupils in either Georgia or New Jersey, and more than the

* Founder and President, Home School Legal Defense Association, Purcellville, Virginia. B.A., Western Washington University, 1973; J.D., Gonzaga University School of Law, 1976.

** Director of Academic Planning, Home School Legal Defense Association, Purcellville, Virginia. B.A., University of Delaware, 1980; J.D., University of Chicago Law School, 1983.

¹ John Strobe, Jr. & Donald F. Uerling, Address at the Education Law Association's 1997 annual meeting (Nov. 20-22, 1997).

² In looking at alternatives to public education, this article will focus primarily on home education, which is the area of the authors' primary expertise. Private institutional schools have not experienced recent growth at the same dramatic rate as home schools, but the same points about the availability of school choice and the incentives for parents to leave the public school system apply there as well.

total number of public school students in the states of Wyoming, Vermont, Delaware, North and South Dakota, Alaska, Rhode Island, Montana and Hawaii combined.³ Setbacks in parental rights fuel the desire for an even greater variety of educational choices, including charter schools, vouchers, and tuition tax credits. Every time parents' rights are diminished -- whether in a local school board skirmish or a published decision of a United States Court of Appeals -- a greater number of families become determined to take their own money, their tax money, and their children to non-public schools.

Second, the public schools' victories over parental rights serve to diminish the quality of American public education. Overwhelming evidence demonstrates that one of the greatest predictors for a child's educational success in any school environment is parental involvement.⁴ Indeed, public educators themselves routinely affirm the overwhelming importance of active parental participation in the educational process. According to one recent survey, 83% of public school teachers (95% in inner-city schools) would like to see the level of parental involvement in their schools increase⁵ However, the survey also revealed that when teachers were asked how this involvement should be demonstrated, the majority did not want parents to play a role in curriculum changes or homework policy; instead, 96% found it valuable for parents to act as promoters and fundraisers for the schools.⁶

Schools' legal victories over parents who want real involvement in their children's education, not just raising money, have a chilling effect on the parents who remain in the public school system. As a consequence, there grows a greater "involvement gap" between private and public education resulting in an even greater "achievement gap." Not only do the schools lose the students who transfer to other educational venues, but the students who do remain lose the benefit of improved education that results from active involvement of concerned parents in the educational process.

In our litigious culture, it is often assumed that a win in the courtroom is a cause for rejoicing. However, it is essential that those who care about

³ Brian D. Ray, Ph.D., *Home Education Across the United States*, National Home Education Research Institute, Salem, Oregon, 1997, 2-3.

⁴ There are many studies and reports confirming this intuitively-obvious point. See, e.g., U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Oversight and Investigations, *Education at a Crossroads: What Works and What's Wasted in Education Today*, Chairman's Report Draft July 1998, 42-51 ("Parents Involved in Their Children's Education"); William J. Bennett, Secretary, *What Works: Research About Teaching and Learning*, U.S. Department of Education, 2d ed. 1987, 17 (including citations to original sources).

⁵ See Louis Harris and Associates, Inc., *The Metropolitan Life Survey of the American Teacher*, 1998, Building Family-School Partnerships: Views of Teachers and Students 53-55 (1997).

⁶ *Id.* at 87-114.

the long-term success of the public schools -- a concern shared by these authors -- be engaged in a thoughtful assessment of whether the victories of schools over parents' rights are worth the cost.

The erosion of parental rights in the context of public education is due in no small part to the apparent apathy of the Supreme Court. Despite its sweeping pronouncements declaring the "right of parents to direct the education of their children" to be a fundamental right of the highest magnitude,⁷ the Supreme Court has never decided even a single case involving that right within the context of public education.⁸ The Court's silence on the topic seems to be deliberate, since there has been no shortage of cases seeking review which would have required a determination by the Court of the breadth of parents' rights once their child has entered the doors of a public school.⁹

⁷ See *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) ("The Fourteenth Amendment guarantees the right of the individual . . . to establish a home and bring up children"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) ("the liberty of parents and guardians to direct the upbringing and education of children The child is not the mere creature of the state; those who nurture him and direct his destiny have the right and the high duty, to recognize and prepare him for additional obligations"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("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"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential'"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This case involves the fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children This primary role of the parents in the upbringing of their children is now established beyond debate"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("freedom of personal choice in matters of family life is a fundamental liberty interest protected by the 14th Amendment"); *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) ("We have long held that there exists a 'private realm of family life which the state cannot enter'").

⁸ The Court's decisions regarding the rights of persons in the public education arena fall primarily into three main categories:

- (a) Establishment Clause cases which establish the right to be free from even a hint of school-sponsored or teacher-encouraged religion in the public schools, *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980);
- (b) Cases which define the rights of students in the public schools, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *Board of Education v. Mergens*, 496 U.S. 226 (1990); and
- (c) Cases which prohibit racial discrimination within the public schools, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

⁹ See, e.g., *Herndon v. Chapel Hill-Carrboro City Board of Education*, 89 F.3d 174 (4th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 949 (1997); *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996); *Mozert v.*

This article explores the historical roots of parental rights in education, and then demonstrates that Professors Uerling and Strobe are quite correct when they declare parental rights in public education to be "almost extinct." Next, it examines the stark contrasts between the rights of public school parents and those of parents who choose private and home schooling. Finally, this article suggests that since the constitutionality of educational choice, including choices involving religious schools, has been established beyond any legitimate question, public school advocates and courts should rethink their position concerning parental rights within public education lest they contribute to the demise of the very system which they seek to save from the "subversive" influence of those committed parents who give both students and tax dollars to the schools.

Parental Rights in Education: *Pierce* and its Progeny

Most parental rights in education cases -- including those with a Free Exercise Clause component -- involve parents seeking an alternative for their own child which differs from a rule of general applicability controlling the education of other children. The Supreme Court doctrine which ostensibly controls this area of law is predicated on two decisions -- one of them old (twenty-six years) and the other *very* old (seventy-three years).

Almost no other area of constitutional law depends on a decision from the 1920s for its most important doctrinal pronouncement. Parental rights advocates necessarily place nearly singular reliance on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), for the Supreme Court's articulation of their theory. Only *Wisconsin v. Yoder*, 406 U.S. 205 (1972), has added any material weight to the theory in the past three-quarters of a century. And, despite the revisionist dicta of Justice Scalia in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990), *Yoder* was primarily a free exercise of religion case, with a thin parental rights overlay.¹⁰

Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985); *Curtis v. School Committee of Falmouth*, 420 Mass. 749, 652 N.E.2d 580 (1995), *cert. denied*, 516 U.S. 1067 (1996); *Citizens for Parental Rights v. San Mateo County Board of Education*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1st Dist. 1975), *appeal dismissed for want of substantial federal question*, 425 U.S. 908 (1976), *reh'g. denied*, 425 U.S. 1000 (1976).

¹⁰ See, e.g., *Yoder*, 406 U.S. at 214-15. Cf. *Dept. of Human Resources v. Smith*, 494 U.S. 872, 881 (1990) (Justice O'Connor's concurrence in the judgment in *Smith*, which criticizes the majority's interpretation of *Yoder* and other so-called "hybrid rights" cases). It is clear that the *Yoder* Court viewed its decision as compelled by the Free Exercise Clause:

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes

Given *Employment Division v. Smith's* evisceration of the Free Exercise Clause as a stand-alone source of protection from generally-applicable governmental rules that violate religious conscience, *Pierce* is of even greater significance.¹¹ In *Pierce*, the Governor of Oregon defended his state's rule of general applicability -- that all children must attend public schools -- by defining the question with reference to a group of cases concerning the right of parents to make curriculum choices for their own children within the public schools.

The exact question involved in the present case has never been passed upon by any American court. Perhaps the cases which come the nearest to touching the questions involved in this case are those on the question of whether the school authorities have the right to exclusive control over the list of studies to be taken by pupils in the public schools or whether the parents have a limited right of selection. The decisions on this question are in hopeless conflict. In New Hampshire (*Kidder v. Chelis*, 59 N.H. 473); Indiana (*State v. Webber*, 108 Ind. 31, 8 N.E. 708) and Iowa (*State v. Mizner*, 50 Ia. 145) it has been held that the power of the public is exclusive, while in

with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

406 U.S. at 214–15.

¹¹ See *Smith*, 494 U.S. at 881-82. The right of parents to direct the education of their children was specifically listed by the Scalia majority in *Smith* as one of the "hybrid" situations, along with freedom of speech or press, which would permit the continued use of fundamental rights analysis for free exercise claims. 494 U.S. at 881-882. If this "hybrid rights" analysis was anything other than an effort, after the fact, to explain away decisions which were otherwise inconsistent with the Court's new, government-deferential free exercise test, then its meaning is far from clear. The religious component of the claim would appear to add nothing to the legal analysis, at least with respect to freedom of press and speech cases. This is so because these are universally recognized as independent, fundamental constitutional rights and therefore require use of the "compelling interest" test even in the absence of any religious motivation. As will be discussed below, the courts have not been quite so consistent in treating the right of parents to control the upbringing and education of their children as fundamental and therefore subject to strict scrutiny, but the inclusion of this right in the discussion of hybrid rights in *Smith*, alongside these unchallenged First Amendment freedoms, clearly supports the conclusion that it is also a fundamental right.

Illinois (*School Trustees v. People*, 87 Ill. 303); Oklahoma (*School Board District v. Thompson*, 24 Okla. 1); and Wisconsin (*Morrow v. Wood*, 35 Wis. 59) some right of control has been held to belong to the parent.

Landmark Briefs of the Supreme Court, at vol. 23, pp. 53-54.

Although the Supreme Court did not directly address the argument or cases raised in the Governor's brief, the *Pierce* Court framed the issue in a way that appears to implicate both parental rights and state authority within the context of public education.

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390 [other cites omitted], we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, 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. 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.¹²

This passage not only declares that parents have an affirmative, fundamental constitutional right to direct the education of their children; it also contains the important pronouncement that states do not have the power to standardize children. There can be no doubt that coercive standardization was the goal of the Oregon law challenged in *Pierce*. As is customary with laws enacted by voter initiative, an official statement by the sponsors of the ballot measure was published to state its purposes and goals. This statement said:

Do you believe in our public schools?

Do you believe they should have our full, complete and loyal support?

What is the purpose of our public schools, and why should we tax ourselves for their support?

Because they are the creators of true citizens by common education, which teaches those ideals and standards upon which our government rests.

¹² 268 U.S. at 534-35.

Our nation supports the public school for the sole purpose of self-preservation.

The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through our public schools.

We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.

Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product -- a true American.

The permanency of this nation rests in the education of its youth in our public schools, where they will be correctly instructed in the history of our country and the aims of our government, and in those fundamental principles of freedom and democracy, reverence and righteousness, where all shall stand upon one common level.

When every parent in our land has a child in our public schools, then and only then will there be a united interest in the growth and higher efficiency of our public schools.

Our children must not under any pretext, be it based on money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life, as they are taught. If they are so divided, we will find our citizenship composed and made up of cliques, cults and factions, each striving, not for the good of the whole, but for the supremacy of themselves. A divided school can no more succeed than a divided nation.

Appendix B, Brief of Society of Sisters, *Landmark Briefs of the Supreme Court*, at vol. 23, pp. 358-59.

In the late 1800s and at the beginning of this century, coercive standardization of children was rejected by the Supreme Court in *Pierce* and *Meyer*, dealing with efforts to bar or restrict private education, and by the state supreme courts of California, Colorado, Illinois, Nebraska,

Oklahoma, Vermont and Wisconsin in the context of parents' rights to "opt their children out" (to use a contemporary term) of certain public school classes and programs.¹³ In fact in *Meyer*, the Court seized the occasion to denounce what may be properly understood as the intellectual roots of the "it takes a village to raise a child" philosophy.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest, and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.¹⁴

At the time, it was the culturally conservative and religiously Protestant elements of society that were generally aligned with the forces of the coercive standardization of children.¹⁵ Exceptionally hostile to the world view of Catholic immigrants, outspoken supporters of this view sought to use universal public education as a tool to create a homogenized, Protestant society. The courts interposed the Constitution as a liberal -- as that term has been classically defined -- bulwark against mandated uniformity. As we shall see in the next section, the world has been turned upside down. Conservatives and Protestants are the most frequent protestors from the efforts inside public schools to coerce standardization of children. Today's "liberals" and the courts have sided not with the

¹³ See *Hardwick v. Bd. of Sch. Trustees*, 205 P. 49 (1921) (including a short *per curiam* opinion of the California Supreme Court, *en banc*, concurring in the Court of Appeals' decision); *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610 (1927); *Trustees of Schools v. People*, 87 Ill. 303 (1877); *Rulison v. Post*, 79 Ill. 567 (1875); *State v. School District No. 1*, 31 Neb. 552, 48 N.W. 393 (1891); *State v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914); *Sch. Bd. Dist. No. 18 v. Thompson*, 24 Okla. 1, 103 P. 578 (1909); *Guernsey v. Pitkin*, 32 Vt. 224 (1859); *Morrow v. Wood*, 35 Wis. 59 (1874).

¹⁴ 262 U.S. at 401-02.

¹⁵ Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1196-1200 (1997).

historical understanding of the Constitution, but with the ideology of Plato and Sparta.

Indeed, The Rights of Public School Parents *Are* Rapidly Becoming Extinct

The right of parents to choose alternatives for their own children inside the public schools was frequently recognized until relatively recently. The early cases, as a general rule, did not mention the United States Constitution at all; they were simply based on common-law rights of parents.

In California, the Supreme Court affirmed a Court of Appeals decision holding that parents opposed to dancing could keep their children out of dance classes in the public schools.¹⁶ The Court of Appeals stated:

Has the state the right to enact a law or confer upon any public authorities a power the effect of which would be to alienate in a measure the children from parental authority? May the parents thus be eliminated in any measure from consideration in the matter of the discipline and education of their children along lines looking to the building up of the personal character and the advancement of the personal welfare of the latter? . . .

Indeed, it would be distinctively revolutionary and possibly subversive of that home life so essential to the safety and security of society and the government which regulates it, the very opposite effect of what the public school system is designed to accomplish, to hold that any such overreaching power existed in the state or any of its agencies.¹⁷

The Illinois Supreme Court held that a public school must honor a parent's request to exempt his child from an otherwise mandatory bookkeeping class,¹⁸ saying:

Law-givers in all free countries . . . have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions. The State has provided . . . a common school education, but leaves it to parents and guardians to determine the extent to which they will render it available to the children under their charge.¹⁹

¹⁶ *Hardwick v. Bd. of Sch. Trustees*, 205 P. 49, 54 (1921).

¹⁷ *Id.* at 54.

¹⁸ *Rulison v. Post*, 79 Ill. 567 (1875).

¹⁹ *Id.* at 573.

In a consistent ruling, just two years later this same court required a public high school to admit a student who, in accordance with his father's wishes, had not studied grammar at the level otherwise required for such admission.²⁰ The court based its decision on the fact that all taxpayers pay for the public schools; therefore, each taxpayer should be free to choose his child's curriculum:

Every tax payer contributes to its maintenance, and there should be no arbitrary regulation to prohibit the enjoyment of its benefits, in equal degree by all. . . .

. . . . The powers and duties of the trustees being . . . to decide what branches of study shall be taught in the high school, what text-books shall be used, and to prescribe necessary rules and regulations for the management and government of the school, *but not to decide what particular branches of study, of those decided to be taught, shall be pursued by each pupil.*²¹

The Nebraska Supreme Court also ordered the enrollment of a student whose father asked that she be excused from studying grammar, saying: Now, who is to determine what studies she shall pursue in school, -- a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child.²²

The Supreme Courts of Oklahoma and Wisconsin upheld the rights of parents to exempt their children from classes in singing²³ and geography,²⁴ respectively, with the latter court saying:

And how it will result disastrously to the proper discipline, efficiency and well being of the common schools, to concede this paramount right to the parent to make a reasonable choice from the studies in the prescribed course which his child shall pursue, is a proposition we cannot understand. . . .

But these powers and duties [of the school board] can be well fulfilled without denying to the parent all right to control the education of his children.²⁵

²⁰ See, e.g., *Trustees of Schs. v. People*, 87 Ill. 303 (1877).

²¹ *Id.* at 306–07 (emphasis added).

²² See, e.g., *State v. Sch. Dist. No. 1*, 31 Neb. 552, 48 N.W. 393, 395 (1891).

²³ See *Sch. Bd. Dist. No. 18 v. Thompson*, 24 Okla. 1, 103 P. 578 (1909).

²⁴ See *Morrow v. Wood*, 35 Wis. 59 (1874).

²⁵ *Id.* at 66.

As the Wisconsin Supreme Court stated in its recent decision upholding the Milwaukee school choice plan:

This conclusion is not inconsistent with Wisconsin tradition or with past precedent of this court. Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children. *See, e.g., Yoder; Wisconsin Indus. Sch. for Girls v. Clark County*, 103 Wis. 651, 79 N.W. 422 (1899); *accord Pierce; Meyer*. This court has embraced this principle for nearly a century, recognizing that: "parents as the natural guardians of their children [are] the persons under natural conditions having the most effective motives and inclinations and being in the best position and under the strongest obligations to give to such children proper nurture, education, and training." *Wisconsin Indus. Sch. For Girls*, 103 Wis. at 668-69, 79 N.W. 422.

Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602, 621 (1998) [internal citations edited].

In Vermont, the Supreme Court rejected a student's request, unsupported by his parents, to be excused from writing compositions in school, but did so based upon the trial court's finding "that if the father of the plaintiff had requested the teacher not to require the plaintiff to write compositions, he would have been excused therefrom" ²⁶

Perhaps the most significant of these early state-court cases, decided just two years after the United States Supreme Court's decision in *Pierce*, was the Colorado case of *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610 (1927). The *Vollmar* case, in a fascinating preview of the 1960s "school prayer" decisions, dealt with a state law requiring the daily reading of the King James Version of the Bible in public school classrooms. The plaintiffs were staunch Roman Catholics who believed that the King James Version was an incomplete and inaccurate translation of Scripture, and that it was harmful for anyone to read the Bible without explanation by a priest or authorized teacher. The court noted that parents have a right under the Fourteenth Amendment "to have their children taught where, when, how, what, and by whom they may judge best," ²⁷ citing *Meyer* and *Pierce*, and therefore held "that the right of the parents to select, within limits, what their children shall learn, is one of the liberties guaranteed by the Fourteenth Amendment to the national Constitution, and of which, therefore, no state can deprive them." ²⁸ The public school

²⁶ *Guernsey v. Pitkin*, 32 Vt. 224, 226-27 (1859).

²⁷ *People ex rel. Vollmar v. Stanley*, 255 P. 610, 613 (1927).

²⁸ 255 P. at 613-614.

Bible-reading program was permitted to continue, but objecting parents were given an "opt out" right for their children.²⁹

From the 1930s through the 1960s, few cases focused on the issue of parents' rights. However, giving it at least passing mention was the 1944 case of *Prince v. Massachusetts*,³⁰ which involved the street-corner sale of religious publications by a young Jehovah's Witness. Here, the Court held that the Constitution did not prohibit a state from regulating this type of "child labor" even against the wishes of the child's guardian, but made a point of reaffirming the importance of the *Pierce* doctrine of parents' rights in less commercial contexts.³¹ The overall lack of case law during this period may be attributed to a number of factors, including a general acceptance of the rights of private schools, the virtual non-existence of home education as an option, and a nearly-universal public consensus that the generic Protestant world view of the public schools was not only acceptable but desirable.

In sharp contrast to the earlier cases, in those of the 1970s, 1980s and 1990s, proponents of parents' rights found themselves faring very poorly in the public education context. Part of the problem was uncertainty on the part of the courts as to whether the right enunciated in *Pierce* should be protected, under contemporary Fourteenth Amendment terminology, as a "fundamental right" requiring the highest protection of strict scrutiny, or only as a general "liberty interest" which could be defeated by a government showing of "rational basis." A recent discussion by the Fourth Circuit points to this analytical difficulty.

*Meyer, Pierce, and Tokushige*³² all use the language of rational relationship review. But all three were decided before the Court developed the current tiered framework -- when it used only the "traditional" standard of scrutiny -- so they provide no dispositive guidance on which standard applies. Strict scrutiny of infringements on fundamental rights was first suggested in 1961. And it was not expressly embraced by a majority of the Court until 1971.

²⁹ *But see* State ex rel. Andrews v. Webber, 108 Ind. 31, 8 N.E. 708, 713 (1886); State v. Mizner, 50 Iowa 145, 152 (1878); Kidder v. Chellis, 59 N.H. 473, 476 (1879). (There were cases from a smaller number of jurisdictions suggesting that parents do not have the right to remove their children from offensive public school classes, so in those jurisdictions a parent might have faced a choice like that which usually applies today: permitting the child to take the class, or removing the child from the public schools entirely.).

³⁰ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

³¹ See cases cited *supra* note 9.

³² *Farrington v. Tokushige*, 273 U.S. 284 (1927), (involving the right of foreign-language schools to exist in the Territory of Hawaii).

The Court came close to deciding which standard protects parental rights in education in *Wisconsin v. Yoder*, in which it overturned convictions of Amish parents for removing their children from school before age sixteen. . . . 406 U.S. 205, 207, 234. Because religious concerns were central to the *Yoder* petitioners' position, the Court did not decide specifically whether the parental rights standing alone, in nonreligious contexts, are "fundamental" in the constitutional sense, or whether heightened scrutiny applies.³³

In the absence of such an interpretation from the Supreme Court,³⁴ many lower courts have decided that the right of parents to control their children's education, especially in the public school context, is merely a low-level "liberty interest" that can be overcome by a public school's showing that its rules are not irrational.³⁵ Indeed, the public schools have overcome parents' interests in most of these cases, and overcome them with a vengeance. Adding fuel to the funeral pyre of parents' rights has been the fact that the majority of the families seeking relief from school policies and practices have been conservative, born-again Christians, a group whose sincere religious beliefs have not elicited strong expressions of empathy or support from many school officials or judges.

Courts' reasons for denying parents' rights in public schools have varied. It is almost impossible, in the absence of an obvious Establishment Clause violation, for parents to cause the complete removal of offensive materials from the public school curriculum. Even the parents in the Supreme Court's landmark *Pierce* and *Yoder* decisions did not seek to change public education generally, but only to exempt their own children from some of its rules. Yielding relatively certain victory for the states,

³³ *Herndon v. Chapel Hill-Carrboro City Board of Education*, 89 F.3d 174, 178 (4th Cir. 1996) (citations and internal quotations deleted); *see also*, *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525, 533 (1st Cir. 1995) ("the *Meyer* and *Pierce* cases were decided well before the current "right to privacy" jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny. . . .").

³⁴ *See* n.11, *supra*, and accompanying text.

³⁵ *See, e.g., Herndon, supra* note 35, at 179; *Immediato v. Rye Neck School District*, 73 F.3d 454, 461 (2d Cir. 1996); *Kampfer v. Gokey*, 955 F. Supp. 167, 171-172 (N.D.N.Y. 1997) ("[T]he right to privacy encompasses some activities of child rearing and education. However, those rights are strictly limited." The Court found that a parents' rights claim did not even raise a justiciable federal claim so as to sustain subject matter jurisdiction.). *Compare* *People v. DeJonge*, 442 Mich. 266, 501 N.W.2d 127, 134 (1993) (combination of parents' rights and free exercise rights requires strict scrutiny as a fundamental right under *Smith*) *with* *People v. Bennett*, 442 Mich. 316, 501 N.W.2d 106, 112-116 (1993) (parents rights without religion claim are not fundamental; require only rational basis test). Outside the public school context, these two preceding cases were decided by the Michigan Supreme Court on the same day.

are those cases in which parents already have an opt-out right, but seek to limit the programs or materials to which other parents' children will be exposed.³⁶

Even where the parents' request was not for a general change to the public school program, but only an opt-out for their children, courts have found a variety of reasons for denying them. Some courts hold that the right of parents to control the education of their children is a non-fundamental liberty interest, so "rational basis" scrutiny applies and, in practical effect, the government always wins.³⁷ A number of courts have ruled that if there is no "coercion" or "compulsion" on the student, neither parents' rights nor free exercise rights are even implicated.³⁸ Even if one assumes that this principle has some arguable applicability in the cases where an effective opt-out exists,³⁹ it is frightening to discover that it has been used as a justification supporting public school programs of questionable educational value. According to the court, although offensive to the students and their parents, such programs, for which no opt-out is available, "only" force children to read and discuss offensive materials, without "coercing" them to believe the truth of those materials!⁴⁰ Obviously, if this is all that the concept of "coercion" means, it offers no help at all to students and parents.

The Sixth Circuit's *Mozert* decision⁴¹ is particularly troublesome.⁴² There, thirteen students were expelled or suspended from public schools for refusing to read textbooks that both the students and their parents claimed violated their religious beliefs. In fact, the school district stipulated that the books did indeed contravene the religious beliefs held by both the parents and students.

During deposition, the Superintendent of Hawkins County Public Schools was asked whether he thought it was better for children to be allowed be exempted from reading texts that were religiously offensive, or to be forced to read such books while "kicking and screaming." He replied that he thought that kicking and screaming would be better for the

³⁶ See *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985); *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311 (8th Cir. 1980); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1st Dist. 1975).

³⁷ See, e.g., text accompanying note 36.

³⁸ See *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994); *Curtis v. Sch. Comm.*, 420 Mass. 749, 652 N.E.2d 580, 586-587 (1995).

³⁹ See generally note 36.

⁴⁰ *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1069 (6th Cir. 1987); *Ware v. Valley Stream High School Dist.*, 545 N.Y.S.2d 316, 319 (App. Div. 1989).

⁴¹ *Mozert*, note 42.

⁴² It is appropriate to disclose that the lead author of this article was also lead counsel for the parents and students who were the plaintiffs in *Mozert*.

students, and that reading material that violated their religious convictions would build character and self-discipline.⁴³

Decisions such as *Mozert* are difficult to reconcile with the zealous protection granted to students who object to religious observances in public schools which they or their parents find offensive.⁴⁴ In the minds of religious parents, at least, the coercion faced by their children when confronted with the alternatives of reading religiously offensive texts or being expelled from school is at least as great as that of a "coercive" moment of silence from which objecting students in Alabama were protected after being told that prayers could be offered during the silence.⁴⁵

Other courts find that the government's "compelling interest" in seeing that students receive an education gives public schools justification to override parents' rights in almost any context, even if those rights are "fundamental."⁴⁶ The United States Court of Appeals for the First Circuit held in *Brown*, in one of the most outrageous of the modern cases, that parents do not have the right "to dictate the curriculum at the public school to which they have chosen to send their children"⁴⁷ -- even though the parents' requested "dictatorial" action was merely excusing their own children from a sexually explicit assembly -- and suggested that parents' rights were not violated because, unlike in *Yoder*, they could not show that the school's action "threatened their entire way of life."⁴⁸ This is truly an extreme standard by any measure.

One federal district court suggested that providing an opt-out for students whose religious beliefs were infringed by school programs would violate the Establishment Clause,⁴⁹ and stated that because the children were young, they probably would not notice that their family's religious

⁴³ Brief of Appellees at 76, *Mozert v. Hawkins County Pub. Schools*, 765 F.2d 75 (6th Cir. 1985) (No. 84-5317) (citing the deposition of Bill Snodgrass).

⁴⁴ See *supra*, n.8 (a). This discussion should not be read as an endorsement of the "school prayer movement" by the authors of this article. Precisely because the authors object to coercion of conscience, they are deeply troubled by many proposals to restore prayer services or classroom devotional exercises to the public schools.

⁴⁵ See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

⁴⁶ *Fleischfresser*, *supra* note 40, at 690; *Ware*, *supra* note 42, at 320-21; *Citizens for Parental Rights*, *supra* note 38, at 83. This, of course, is in stark contrast to the normal constitutional rule that the "compelling interest" test, if it applies, requires the government to show such an imperative interest not merely at the general level, but with regard to its refusal to exempt a sincere religious believer from the specific requirement in question. See *Yoder*, *supra* note 9, at 221.

⁴⁷ 68 F.3d at 533.

⁴⁸ *Id.* at 539.

⁴⁹ *Davis v. Page*, 385 F. Supp. 395, 401 (D.N.H. 1974).

convictions were being violated anyway.⁵⁰ Another federal trial court seemed quite perplexed by the "novel" notion that parents have a fundamental right to control the education of their children.⁵¹ One way or another, nearly all of the federal and state courts that have considered parents' rights in the public school context in the last thirty years have come to the same sobering conclusion: schools win; parents lose.⁵²

The Relative Safety of Private and Home Education

In contrast with the dismal record of parents' rights cases in the public school context, the rights of parents in the realm of private schooling and home schooling have been vindicated and protected to ever-increasing levels with the passage of time. In the early 1980s, as the modern home education era was just beginning, most of the states had very restrictive home school laws. Common provisions included teacher degree and certification requirements, extensive mandated reporting, frequent standardized testing, unbridled discretion of local school officials to approve or deny the right to home school, and even mandatory return of children to the public school system if certain conditions were not met. Notably, most of that has changed in the past fifteen years.

The litigation record has not been a uniform success, as will be demonstrated below. The courts' confusion over and erosion of the fundamental rights enunciated in *Pierce* and *Yoder* have impacted decisions in the area of private and home schools as well as public schools. However, with regard to home education, the obvious equity and common sense of permitting parents to teach their own children with minimal government interference is sufficiently powerful that, even in those cases where the courts have ruled against home schoolers' rights, legislative changes to protect those rights have consistently occurred shortly thereafter. Thus, there has been a steady march of court or legislative victories for home schoolers.

⁵⁰ *Id.* at 405 ("The Davis children are very young. It is difficult to argue or believe that they are presently aware of the distinction between worldly and spiritual music. If they can hear music with their parents, then they can hear music in the schools.").

⁵¹ See Cornwell, *supra* note 38, at 342 ("No authority is cited in support of this novel proposition, and this Court knows of no such constitutional right.").

⁵² The list of cases with the opposite result is quite short. In *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972), a student with religious objections to military service was allowed to opt out of mandatory ROTC training in a public high school. The court noted that alternate physical education facilities were available only 100 yards away from the school. In *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979), students were exempted from mandatory physical education classes because of their religious objections to "immodest apparel." Finally, in *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (App. Div. 1993), parents were permitted to opt their children out of a public school condom distribution program, but only because the court interpreted the program to involve the provision of health services rather than mere exposure "to ideas or a point of view with which they disagree or find offensive." 606 N.Y.S.2d at 266.

- In 1983, the Wisconsin Supreme Court ruled that that state's compulsory attendance law was "void for vagueness insofar as it fails to define a private school." *Wisconsin v. Popanz*, 112 Wis. 2d 166, 332 N.W.2d 750, 756. The Wisconsin legislature followed up that ruling with a new home school statute. Wis. Stat. Ann. § 115.001(3g) (1997).
- The Supreme Court of Georgia found Georgia's compulsory attendance law to be "unconstitutionally vague" as applied to home schoolers in 1983. *Roemhild v. Georgia*, 251 Ga. 569, 308 S.E.2d 154, 159. The Georgia Legislature responded by enacting a home school statute that same year. Ga. Code Ann. § 20-2-690(c) (1998).
- The Virginia Supreme Court, by contrast, ruled against home schoolers. *Grigg v. Commonwealth*, 224 Va. 356, 297 S.E.2d 799 (1982). The Virginia legislature responded by enacting a home school statute in 1984. Va. Code Ann. § 22.1-254.1 (1998).
- Similarly, Florida's intermediate court of appeals ruled against home educators in *State v. Buckner*, 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985), but the Florida legislature responded promptly by enacting a home school statute. Fla. Stat. Ann. § 232.02(4) (1997).
- In 1983, the Court of Appeals of New Mexico ruled against home schoolers. *State v. Edgington*, 99 N.M. 715, 663 P.2d 374 (N.M. Ct. App. 1983). In 1985, the New Mexico legislature legalized home schooling. N.M. Stat. Ann. § 22-1-2(V) (1998).
- Then-Governor William Jefferson Clinton signed a new Arkansas home school statute in 1985 (Ark. Stat. Ann. § 6-15-501 (1997)), which followed a negative decision by the Arkansas Supreme Court in *Burrow v. Arkansas*, 282 Ark. 479, 669 S.W.2d 441 (1984).
- Two federal district courts struck down Missouri's compulsory attendance law as applied to home schoolers, one holding that "this statute represents a prime example of legislation which yields an unacceptable amount of discretion to officials charged with its enforcement." *Ellis v. O'Hara*, 612 F. Supp. 379, 381 (E.D. Mo. 1985). The Missouri legislature responded by enacting a home school statute in 1986. Mo. Ann. Stat. § 167.031(2) (1997).
- The Minnesota Supreme Court ruled that Minnesota's requirement that private and home school teachers have qualifications "essentially equivalent" to public school teachers was too vague to serve as a basis for criminal conviction, and therefore was an unconstitutional violation of due process. *State v. Newstrom*, 371 N.W. 2d 525, 533 (Minn. 1985). The

Minnesota legislature responded by enacting a home school statute in 1987. Minn. Stat. Ann. § 120.101 (1997).

- A federal district court ruled against home schoolers in New York, *Blackwelder v. Safnauer*, 689 F. Supp. 106 (N.D.N.Y. 1988), but the very next day the New York Board of Regents issued regulations authorizing home education. New York Official Compilation of Codes, Rules and Regulations, Title 8, § 100.10 (1997).
- North Carolina was permitted by the Fourth Circuit to prosecute home schoolers in *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), but the North Carolina legislature enacted a new home school statute in 1988. N.C. Gen. Stat., §§ 115C-547 through 115C-565 (1997).
- In 1987, the Supreme Judicial Court of Massachusetts found home education to be constitutionally protected, and the Court created guidelines and procedures to ensure the rights of parents to educate their own children in their own homes. *Care and Protection of Charles*, 399 Mass. 324, 504 N.E.2d 592 (Mass. 1987).
- A federal district court ruled the Pennsylvania statute to be unconstitutionally vague in *Jeffery v. O'Donnell*, 702 F. Supp. 516 (M.D. Pa. 1988). The Pennsylvania legislature unanimously enacted a new home school statute later that same year. Pa. Stat. Ann. Title 24, § 13-1327.1 (1997).
- The North Dakota Supreme Court refused to recognize a parent's right to educate a child at home in seven different cases,⁵³ but the North Dakota legislature finally enacted a home school statute in 1989. N.D. Cent. Code § 15-34.1-06 (1997).
- When the Supreme Judicial Court of Maine ruled against home schoolers in 1988, *Blount v. Dept. of Educational and Cultural Services*, 551 A.2d 1377 (Me. 1988), the Maine legislature responded by legalizing home schooling. Me. Rev. Stat. Ann., Title 20-A, § 5001-A(3)(A)(3) (1997).
- When the Ohio Supreme Court ruled against the Schmidt family in *Ohio v. Schmidt*, 29 Ohio St. 3d 32, 505 N.E.2d 627 (1987), the Ohio State Board of Education responded by legalizing home schooling in 1989. Ohio Admin. Code §§ 3301-34-01 to 3301-34-06 (1998).
- The New Hampshire Department of Education attempted to triple the regulations on home schoolers in 1989, and the New Hampshire legislature responded by legalizing home schooling in 1990. N.H. Rev. Stat. Ann. § 193-A (1997).

⁵³ See *Birst v. Sanstead*, 493 N.W.2d 690 (N.D. 1992); *Van Inwagen v. Sanstead*, 440 N.W.2d 513 (N.D. 1989); *State v. Toman*, 436 N.W.2d 10 (N.D. 1989); *State v. Dagley*, 430 N.W.2d 63 (N.D. 1988); *State v. Melin*, 428 N.W.2d 227 (N.D. 1988); *State v. Anderson*, 427 N.W.2d 316 (N.D. 1988); *State v. Lund*, 424 N.W.2d 645 (N.D. 1988).

- Lower Iowa courts had convicted a number of home schoolers, but the Iowa legislature recognized the right to home school in 1991. Iowa Code Ann. §§ 299A.1 through 299A.10 (1997).
- Home schoolers in Tennessee lost in the trial court and the state court of appeals in *Crites v. Smith*, 826 S.W.2d 459 (1991), but the Tennessee legislature responded by amending the home school statute in 1994, giving virtually the same relief requested in that case -- and more. Tenn. Code Ann. § 49-6-3050 (1997).
- In 1991, the South Carolina Supreme Court in *Lawrence v. State Board of Education*, 306 S.C. 368, 412 S.E.2d 394 (1991), struck down a state law requiring parents to pass a teachers' test. The legislature amended South Carolina Code § 59-65-45 in 1992.
- Michigan was notorious for prosecuting and convicting home schoolers, and lower courts had ruled in every case against the DeJonge family, but the Michigan Supreme Court finally recognized a religious liberty right to home school in *People v. DeJonge*, 442 Mich. 266, 501 N.W.2d 127 (1993). On the same day, however, the Court denied such a liberty to non-religious home schoolers. *People v. Bennett*, 442 Mich. 316, 501 N.W.2d 106 (1993). The Michigan legislature corrected this inconsistency by extending the right to all home educators in 1996. Mich. Comp. Laws Ann. § 380.1561(3)(f) (1997).

Following this article is an Appendix summarizing the state laws governing home education in each of the fifty states. Parents throughout the United States now enjoy the right to home school, and in most jurisdictions the restrictions that remain are at most a nuisance rather than a real impediment to home education.

Conclusion

The presence of a safe harbor for parents' rights -- in private schools and, especially, in home schools -- makes public school antagonism to the legitimate concerns of parents especially unpalatable. Ongoing efforts to close this safe harbor by repressing home schooling will not work politically, and will not eliminate the desire that inherently burns in the hearts of parents to see their children raised and educated in a way that conforms with their fundamental values and beliefs, without government-imposed homogenization.

A thorough examination of the constitutional status of school choice is beyond the scope of this article. For present purposes, it is enough to state categorically that the battle has been won. The Supreme Court's recent

Establishment Clause decisions⁵⁴ leave no room for serious doubt on the proposition that a properly structured voucher or school choice plan that allows parents to decide where the educational dollars will be spent, with no government coercion either in favor of or in opposition to schools with various traditional and non-traditional religious world views, is clearly constitutional. There are a few anti-school-choice advocates who continue to proclaim loudly that this is an open question that could be resolved by the Court against the constitutionality of non-discriminatory school funding, but their arguments are based on wishful thinking rather than analysis.⁵⁵ The availability of school choice programs -- allowing parents to direct not only their children but also their tax dollars into private and home schools -- is now only a matter of time and political will.⁵⁶ Parents who continue to be frustrated over their inability to have any effective voice in their children's education -- their inability even to maintain such minimal control as the right to opt their children out of offensive assemblies with sexually explicit content⁵⁷ -- will have ever-increasing opportunities to "vote with their feet" by taking their children and their resources elsewhere.

Moreover, as has been established time and time again by studies and analysis,⁵⁸ parental involvement is the key to educational success. Parents must remain involved on terms that enable them to be willing participants, not unwilling captives.

If public schools care about children, about keeping them in the public schools and about providing them with the best possible educational opportunities, they will have to begin treating parents with greater respect and far greater concern for their rights and legitimate interests. The elitist "we're the professional educators so we know what's best" attitude must become a thing of the past. Teachers and school administrators need to

⁵⁴ See, *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dept. of Services*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

⁵⁵ Even many opponents of school choice, and commentators who harbor doubts about its wisdom, have come to realize that the federal constitutional battle is over. See, Dr. Frank Kemerer, Regents Professor of Education Law and Administration, University of North Texas, *Constitutionality of School Vouchers*, paper presented at the 43rd Annual Conference of the Education Law Association, Seattle, Washington, Nov. 20-22, 1997. See also Education Law Association, *supra*, n.3. ("In sum, it appears that a majority [of the Supreme Court] will uphold against an Establishment Clause challenge a publicly-funded voucher program that channels money to parents and gives them a wide variety of public and private schools, including those that are sectarian, from which to choose.")

⁵⁶ However, many advocates for private and home schools, including the authors of this article, have expressed strong policy reservations about vouchers because of the likelihood that government dollars will come with government regulatory strings attached. See *Grove City College v. Bell*, 465 U.S. 555 (1984). Tax credits are clearly the more desirable vehicle for school choice.

⁵⁷ See *Brown*, 68 F.3d at 525.

⁵⁸ *Brown*, *supra* note 6, at 534.

bring parents back into the heart of educational decision-making, even if the courts continue to grant schools the pyrrhic victories that they seek, defying common sense and the longstanding common-law and constitutional principles of parents' rights.

APPENDIX

**HOME SCHOOL LAWS OF THE UNITED STATES BY
STATE/TERRITORY**

This summary does not constitute the giving of legal advice

Last revised August, 1998

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Home School Legal Defense Association, P.O. Box 3000, Purcellville,
Virginia 20134-9000