

COMPULSORY ATTENDANCE AND PARENTAL RIGHTS: *THERE ARE LIMITS*

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Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms.¹

INTRODUCTION

This article provides a brief historical overview of the development of state compulsory attendance laws, examines Constitutional limitations on such regulations, and considers the impact of these state requirements on certain fundamental rights and interests of parents, including, among other things, the free exercise of their religion, and the care, custody and control of their children.

In colonial America, organized systems of public education as we understand them today, did not exist. Rather, “there was a patchwork pattern of town schools partially supported by parental contributions, church schools, ‘pauper schools’ and private schools.”² Nevertheless, since the American

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¹ *Brown v. Bd. of Educ. of Topeka Kansas*, 347 U.S. 483, 493 (1954).

² Michael A. Rebell, *The Campaign for Fiscal Equity, Adequacy Litigation: A New Path To Equity?*, 141 PLI/NY at 225 (May 12, 2004).

Revolutionary War, education and the acquisition of knowledge always have been recognized as important objectives to pursue.³ In 1787, the prevailing view was that “[r]eligion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”⁴

The founding fathers of America viewed education as a vehicle for developing a new “home grown” republican character that would be devoted to an American culture.⁵ In this regard, Thomas Jefferson believed that a certain level of education was vital to equip all citizens with the necessary skills to perform their civic duties and exercise their liberties effectively, in order to preserve the nations newly obtained freedom and independence.⁶ Some further argued that education was crucial to prepare the American people to become self-reliant citizens.⁷ John Adams considered education and knowledge to be fundamental “to raise the lower ranks of society nearer to the higher”⁸ and that such was a matter of “national concern and expense” to insure that these civic republican and egalitarian ideals were achieved.⁹

The Colony of Massachusetts was home to some of the earliest common schools when in 1647, the Colony passed legislation mandating all communities with at least fifty households to establish a common school to teach reading and writing.¹⁰ In the nineteenth century, the democratic ideal of

³ *Meyer v. State of Nebraska*, 262 U.S. 390, 400 (1923) (Court held state statute that prohibited teaching foreign language in public and parochial schools violated parents’ constitutionally protected liberty interest in educating their children and the instructor’s right to teach modern languages). The acquisition of useful knowledge is encompassed within the liberty interest of the Due Process Clause of the Fourteenth Amendment. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, (1972).

⁴ *Meyer*, 262 U.S. at 402, quoting the *Ordinance of 1787*.

⁵ Rebell, *The Campaign for Fiscal Equity, Adequacy Litigation: A New Path To Equity?*, 141 PLI/NY at 223 (May 12, 2004), citing Cremin, 1980, p.3.

⁶ *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

⁷ *Id.* at 221.

⁸ Rebell, *The Campaign for Fiscal Equity, Adequacy Litigation: A New Path To Equity?*, 141 PLI/NY at 223.

⁹ *Id.* Many of the New England State constitutions, which were drafted in the eighteenth century, contained education clauses that recognized the relationship between education and knowledge and these civic republican and egalitarian ideals. *Id.* at 223-24.

¹⁰ Victoria J. Dodd, *Practical Education Law for the Twenty-First Century*, § 1.05 at 9 (Carolina Academic Press 2003).

providing education to all citizens, in part, fueled a significant education reform initiative.¹¹ The common school movement was an initiative designed to educate children living within a particular geographic area, for rich and poor children, without regard to class or ethnicity.¹² These local common schools were to be funded through taxes and, ideally, were to equal private schools in the quality of education provided.¹³ Yet, despite these noble ideals, early public education, especially in rural areas, consisted of the most rudimentary curricula, often in ungraded schools for merely three months per year.¹⁴

Despite the substantial gains in access to education during the common school movement, not everyone embraced these ideals.¹⁵ Some argued that common schools would destroy the socially cohesive benefit of the class system, while others objected to the use of taxes to fund the common school system and questioned whether tax funds could maintain free public schools.¹⁶ In the midst of sharp political disputes over the creation and maintenance of public schools, first a few, and then a majority of states, began incorporating education clauses in their constitutions.¹⁷ These educational clauses frequently guaranteed free public education to all children in the state.¹⁸

DEVELOPMENT OF COMPULSORY ATTENDANCE LAWS IN AMERICA

Pursuant to police powers, that states “may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected.”¹⁹ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

¹¹ Rebell, *The Campaign for Fiscal Equity, Adequacy Litigation: A New Path To Equity?*, 141 PLI/NY at 224.

¹² *Id.* at 225, citing Cremin 1980, p. 138.

¹³ *Id.*

¹⁴ *Brown v. Bd. of Educ.*, 347 U.S. at 490.

¹⁵ Rebell, *The Campaign for Fiscal Equity, Adequacy Litigation: A New Path To Equity?*, 141 PLI/NY at 225, citing Cremin 1980, p. 138.

¹⁶ *Id.*

¹⁷ *Id.* at 226.

¹⁸ Dodd, *Practical Education Law for the Twenty-First Century*, § 1.05 at 9.

¹⁹ *Meyer v. State of Nebraska*, 262 U.S. 390, 399-400, 401 (1923).

respectively, or to the people.”²⁰ Since the regulation of education is not one of the powers delegated to the federal government under the Tenth Amendment of the federal constitution, that right resides among the extensive rights reserved to the states.²¹ Pursuant to these reserved police powers, a state has the right to establish laws to protect the public health, safety, morals and welfare of its citizens.²²

Further, state police powers include the authority “to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity.”²³ In protecting the welfare of its citizens, a state may, by statute, set minimum standards for educational instruction and require school attendance.²⁴ Generally, state compulsory attendance regulations are held valid provided that such laws are neither overbroad nor unconstitutionally vague. States also may enact regulations to enforce compulsory attendance laws through civil and criminal proceedings.²⁵

In addition to general police powers, states may assume their role in *parens patriae* (literally, father of a country) to enact compulsory attendance laws.²⁶ *Parens patriae* is an ancient doctrine under which states have an obligation “to protect, care for, and control citizens who cannot take care of themselves.”²⁷ Under the doctrine of *parens patriae*, the state is legally responsible for protecting the interests of and caring for the insane and minor

²⁰ U.S. CONST. amend. X.

²¹ See, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995) (rejecting Congress’ attempt to regulate gun possession in school zones under the Commerce Clause); Russell Dennis, *The Role of the Federal Government in Public Education in the United States*, <http://www.departments.bucknell.edu/edu/ed370/federal.html> (last visited 07/05/05).

²² See, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995); BLACK’S LAW DICTIONARY, at 1156.

²³ BLACK’S LAW DICTIONARY, at 1156.

²⁴ See, generally, *Meyer v. State of Nebraska*, 262 U.S. 390; *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁵ *Id.*

²⁶ See BLACK’S LAW DICTIONARY at (6th ed. 1990).

²⁷ See Natalie Loder Clark, *Parens Patriae And A Modest Proposal For The Twenty-First Century: Legal Philosophy And A New Look At Children’s Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000) (relying upon philosophy and arguing that the modern approach to child rearing is that exercise of the state *parens patriae* power should be limited”).

children who are abused or neglected by their natural parents.²⁸ According to the U.S. Supreme Court, “[a] parent’s rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.”²⁹ These limitations are not only the result of how parenthood is defined but also from the Court’s assumption that “a parent’s interests in a child must be balanced against the State’s long-recognized interests as *parens patriae*.”³⁰

As the Court declared decades ago in *Brown v. Bd. of Education*, educating its young citizens is one of the most important roles of state government today.³¹ Additionally, the Court has stated that the governmental objective “to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate.”³² Consequently, since education is deemed essential for the development of individuals and the welfare of society, states may exercise their general police powers and their role in *parens patriae* to require children of certain ages to attend school.

In 1837, Massachusetts became the first state to create a department of education and establish a compulsory education program.³³ Compulsory education, including “[c]ompulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states.”³⁴ Towards the end of the nineteenth century, public school systems expanded significantly, in part, through state legislative enactment of compulsory education laws.³⁵

Compulsory education laws vary from state to state and may mandate and regulate by statute attendance for children within a certain age range,

²⁸ BLACK’S LAW DICTIONARY, at 1114 (6th ed. 1990).

²⁹ See *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

³⁰ *Id.*, citing *Reno v. Flores*, 507 U.S. 292, 303-04 (1993); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Parham v. J.R.*, 442 U.S. 584, 605 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

³¹ *Brown v. Bd. of Educ.*, 347 U.S. at 493.

³² *Meyer v. State of Nebraska*, 262 U.S. at 402.

³³ Dodd, *Practical Education Law for the Twenty-First Century*, § 1.05 at 9.

³⁴ *Brown v. Bd. of Educ. of Topeka Kansas*, 347 U.S. at 489, n. 4, citation omitted.

³⁵ Rebell, *The Campaign for Fiscal Equity, Adequacy Litigation: A New Path To Equity?*, 141 PLI/NY at 226.

curricula, transportation, and other parameters of public schools.³⁶ For example, state compulsory education laws typically require children between the ages of a minimum of five to a maximum of eighteen years, to attend school.³⁷ Although early compulsory education laws sought to require attendance at public schools alone, after the U.S. Supreme Court's decision in *Pierce v. Society of Sisters*, *infra*, it is clear that children may attend nonpublic schools to satisfy the requirement.³⁸ Further, certain states require children to attend kindergarten before entering first grade.³⁹ Children between the ages of sixteen and eighteen who are not full-time students may be directed to supplement their education in special continuance schools.⁴⁰ A majority of compulsory attendance laws provide exemptions under certain circumstances such as physical and mental health of the child, domestic violence, child who is married or pregnant, and a child who graduates prior to the maximum age required by the attendance laws.⁴¹

Currently parents also may comply with mandatory school attendance laws by sending their children to private, parochial, or under certain circumstances, or both public and private schools.⁴² Today, home schooling is an option available for parents to comply with compulsory attendance laws, if they choose not to send their children to public schools and cannot afford to send their children to private schools.⁴³ Increasingly, parents are opting for

³⁶ See, generally, Ralph M. Gerstein and Lois Gerstein, *Education Law: An Essential Guide for Attorneys, Teachers, Administrators, Parents and Students*, 657-701 (Lawyers & Judges Publishing Co. 2004).

³⁷ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (finding unconstitutional Oregon law compelling attendance in public school for children between ages eight and sixteen years). See also Gerstein, *Education Law: An Essential Guide for Attorneys, Teachers, Administrators, Parents and Students*, 657-701; Dodd, *Practical Education Law for the Twenty-First Century*, § 1.06 at 10-11.

³⁸ *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (finding unconstitutional Oregon law compelling attendance in public school alone for children between ages eight and sixteen years).

³⁹ See, generally, Gerstein, *Education Law: An Essential Guide for Attorneys, Teachers, Administrators, Parents and Students*, 657-701.

⁴⁰ Dodd, *Practical Education Law for the Twenty-First Century*, § 1.06 at 11.

⁴¹ See, generally, Gerstein, *Education Law: An Essential Guide for Attorneys, Teachers, Administrators, Parents and Students*, 657-701.

⁴² *Id.*

⁴³ See, generally, *id.*; Dodd, *Practical Education Law for the Twenty-First Century*, §§ 6.01-6.04 at 159-167.

home education for various reasons, including religious objections to aspects of secular curricula, the quality of public education, inadequate educational programs for gifted and other special needs children, and safety concerns.⁴⁴ Some simply prefer the flexibility home education affords to pursue the child's interest in performing arts or to accommodate the transitory nature of military and diplomatic families.⁴⁵

The underlying purpose of home school laws is to balance the right of parents to direct their children's education with the state's interest in insuring that each of its young citizens receives a good education.⁴⁶ Home schooling plans must comply with state requirements, which vary by state.⁴⁷ Among the requirements for home education laws are (1) notice of intent to home school, (2) curricula or outline of study, (3) standardized test scores, (4) annual assessment of academic progress and (5) contemporaneous documentation of educational activities.⁴⁸ Failure to comply with state requirements for home schools may make the parents liable for educational neglect and may subject them to supervision of juvenile court or youth and family services agency.⁴⁹

Generally, failure to comply with compulsory education laws may lead to civil and criminal penalties.⁵⁰ A student who willfully refuses to attend school is truant and may be subject to a truancy petition.⁵¹ Since a truancy petition is a civil matter, due process does not require appointment of counsel at initial truancy hearings.⁵² Under certain circumstances, truancy hearings may

⁴⁴ See, generally, Gerstein, *Education Law: An Essential Guide for Attorneys, Teachers, Administrators, Parents and Students*, 657-701; Dodd, *Practical Education Law for the Twenty-First Century*, §§ 6.01-6.04 at 159-167.

⁴⁵ See, generally, Gerstein, *Education Law: An Essential Guide for Attorneys, Teachers, Administrators, Parents and Students*, 657-701.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, generally, Dodd, *Practical Education Law for the Twenty-First Century*, § 1.06 at 11; Gerstein, *Education Law: An Essential Guide for Attorneys, Teachers, Administrators, Parents and Students*, at 658.

⁵¹ *Matter of Welfare of B.A.B.*, 572 N.W.2d 776 (Minn. Ct. App. 1998); *In re Perkins*, 969 P.2d 1101 (Wash. App., Div. 1 1999).

⁵² *In re Perkins*, 969 P.2d 1101 (Wash. App., Div. 1 1999).

result in orders directing the student to attend the current school or a different school.⁵³

Imposition of criminal penalties, most often misdemeanors, require proof beyond a reasonable doubt that a parent, guardian or other legally responsible adult knowingly failed to ensure that the child under their charge attended school.⁵⁴ Educational neglect, a felony, is a more serious charge that requires proof that the child failed to attend school resulting in the child's failure to acquire the educational training and knowledge.⁵⁵

Additional procedures that may apply in criminal cases include the prerequisites that (1) a school official contacts and attempts to meet with the parent or other individual who is legally responsible for ensuring that the child attended school, (2) the child is provided with an opportunity for educational counseling to address the child's truancy issues, (3) the child must be evaluated to determine whether the child has any learning disabilities that must be addressed, and (4) an investigation conducted into whether the child's truancy is related to social problems that need to be resolved.⁵⁶

Modern public education is an organ of the state and embodies not only the civic republican and egalitarian ideals of the founding fathers, but also serves as a vehicle by which the state socializes its citizens.⁵⁷ These public school students are taught the substance in the curriculum that is supplemented with other life and socialization skills such as respect for authority, the ability to work independently and as a team, and sharing resources.⁵⁸ Increasingly, public schools have begun to address moral issues that fall within the area of parental rights and responsibilities such as sex education, substance abuse and tolerance for diversity.⁵⁹

PARENTAL RIGHTS REGARDING EDUCATION OF CHILDREN

Historically, father possessed the absolute right and responsibility to the custody, care and services of his children.⁶⁰ This presumption primarily was

⁵³ *Id.*

⁵⁴ *Hamilton v. State*, 694 N.E.2d 1171 (Ind. Ct. App. 1998).

⁵⁵ *Id.*

⁵⁶ *State v. White*, 509 N.W.2d 434 (Wis. Ct. App. 1993).

⁵⁷ *Wisconsin v. Yoder*, 406 U.S. 205; Dodd, *Practical Education Law for the Twenty-First Century*, § 1.04 at 8.

⁵⁸ *Id.*

⁵⁹ Dodd, *Practical Education Law for the Twenty-First Century*, § 1.04 at 9.

based upon the paternal preference rule in English common law⁶¹ but also existed in ancient Roman law.⁶² Father also possessed absolute authority to make decisions relating to the child's medical, religious and educational matters.⁶³ The basis of this feudalistic paternal preference rule is a natural and legal presumption that father as "the author of their being feels for them tenderness which will secure their happiness more certainly than any other tie on earth,"⁶⁴ as well as the law of private property.⁶⁵ By early nineteenth century, however, courts began to reject the harshness of the paternal preference rule, in part, as a result of the rule's complete disregard of a fit mother's right to nurture her child.⁶⁶

After rejecting the paternal preference rule, courts began to apply the tender years' presumption in custody disputes and awarded mother custody of young children, usually less than seven years of age.⁶⁷ The underlying rationale for the tender years' presumption is that mothers are better suited for nurturing infants and very young children.⁶⁸ Subsequently, courts rejected all gender classifications, including the tender years' presumption, as the determining factor in custody disputes between parents on the basis that, among other reasons, such a presumption violates the Equal Protection Clause of the

⁶⁰ See *Ex parte Devine*, 398 So.2d 686, 688 (Ala. 1981).

⁶¹ See *id.*

⁶² See Cynthia Starnes, *Swords In The Hands Of Babes: Rethinking Custody Interviews After Troxel*, 2003 WIS. L. REV. 115, 119-120 (2003).

⁶³ See Danaya C. Wright, *The Crisis of Child Custody: A History of the Birth of Family Law in England*, 11 COLUM. J. GENDER & L. 175, 184 (2002).

⁶⁴ See *Ex parte Devine*, 398 So.2d at 688. When father lost custody of his child permanently, frequently, it was for some economic reason that benefited the child. See Wright, *supra* n. 100, at 184.

⁶⁵ See Wright, *supra* n. 102, at 184.

⁶⁶ See *Ex parte Devine* at 689, quoting, W. Forsyth, A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS IN CASES OF DIFFERENCE BETWEEN PARENTS OR GUARDIANS 66 (1850).

⁶⁷ See, e.g., *Ex parte Devine*, 398 So.2d at 689, citing *Helms v. Franciscus*, 2 Bland Ch. 544 (Md. 1830). In England, "by a series of statutes culminating with Justice Talfourd's Act, 2 and 3 Vict. C. 54 (1839), Parliament affirmatively extended the rights of mothers, especially as concerned the custody of young children." *Id.*

⁶⁸ See *Ex parte Devine*, 398 So.2d at 689.

Fourteenth Amendment.⁶⁹ Thus, in deciding child custody issues, courts seek to promote the best interest of the child.⁷⁰ Currently, absent evidence of neglect or abuse, both parents have the right to the care, custody and control of their children,⁷¹ a right superior to the state.

The U.S. Supreme Court acknowledges that the right of an individual to procreate is both a natural right and a constitutional right.⁷² Similarly, the right of parents to direct the upbringing of their children is both a natural and constitutionally protected right.⁷³ Regarding the natural right to direct raise one's child, some argue that the right is among the "certain unalienable Rights" provided in the Declaration of Independence with which all human beings are "endowed by their Creator."⁷⁴ The argument here is that man-made law cannot

⁶⁹ See Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291, 296-98 (Spring 2003), citing Sanford N. Katz, "That They May Thrive" Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption, 8 J. CONTEMP. HEALTH L. & POL'Y, 123, 126 (1992). See also *Ex parte Devine*, 398 So.2d 686 (finding the tender years presumption to be a violation of the Fourteenth Amendment); *Johnson v. Johnson*, 564 P.2d 71 (Alaska 1977) (rejecting the tender years presumption as an impermissible criterion in custody and requiring court to engage in best interest analysis). In rejecting the tender years' presumption, some courts have adopted the primary caretaker presumption that overwhelmingly results in mothers being awarded custody their children. See, e.g., Wright, *supra* n. 102.

⁷⁰ See ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ("ALI Principles of Family Dissolution") § 1(a) (2002), as adopted and promulgated by The American Law Institute, Washington, D.C. (May 16, 2000). Given the broad discretion of courts in custody determinations, criticisms of the best interests test include (1) the lack of predictability, (2) opportunity to apply test to express biases, e.g., race, religion, unconventional behaviors, and (3) creation of unrealistic standard for courts. *Id.* See also Thomas Foley, Student Note, *Extending Comity To Foreign Decrees In International Custody Disputes Between Parents In the United States and Islamic Nations*, 41 FAM. CT. REV. 257, 259 (April 2003).

⁷¹ Jessica C. Cox, Chalk Talk, *Parental Rights and Responsibilities Of Control Over Children's Education*, 26 J.L. & Educ. 179, 180 (1997).

⁷² *Troxel v. Granville*, 530 U.S. 57, 77 (2000) (held state statute granting grandparents and other third parties right to seek visitation and custody unconstitutional violation of parent's Fourteenth Amendment rights.), Souter concurring and Scalia dissenting.

⁷³ *Troxel v. Granville*, 530 U.S. at 77, Scalia, J., dissenting.

⁷⁴ The Declaration of Independence, <http://www.ushistory.org/declaration/document/index.html> (last visited July 4, 2005). Consistent with the period in which it was penned, the Declaration of Independence expressly refers to rights of men, rather than all human beings.

abridge God given rights.⁷⁵ Thus, parents have a God given right to direct the upbringing of their children with which the state may not substantially interfere.

Regarding the constitutional dimensions of the parent-child relationship, the Fourteenth Amendment provides in pertinent part as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁷⁶

The U.S. Supreme Court has “long recognized that a parent’s interests in the nurture, upbringing, companionship, care and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment” of the U.S. Constitution.⁷⁷ In a case involving the constitutional parameters of a parent’s right to direct the upbringing of their children, *Prince v. Massachusetts*, the U.S. Supreme Court confirmed the superior position parents enjoy: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁷⁸

This constitutionally protected right frequently is characterized as a liberty interest.⁷⁹ The U.S. Supreme Court has stated that the right of parents to direct the upbringing of their children “is perhaps the oldest of the fundamental liberty interests recognized by this Court.”⁸⁰ By definition, fundamental rights are “rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution.”⁸¹ In family law matters, fundamental rights and fundamental liberty frequently are used interchangeably.⁸²

⁷⁵ *Troxel v. Granville*, 530 U.S. at 77, Scalia, J., dissenting.

⁷⁶ U. S. CONST. amend. XIV, § 1.

⁷⁷ *Troxel v. Granville*, 530 U.S. at 77, Souter, J., concurring.

⁷⁸ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

⁷⁹ *Meyer v. State of Nebraska*, 262 U.S. at 399-400.

⁸⁰ *Troxel v. Granville*, 530 U.S. at 65.

⁸¹ BLACK’S LAW DICTIONARY, at 674 (6th ed. 1990).

⁸² Bryan A. Garner, editor, BLACK’S LAW DICTIONARY Series, A Handbook of Family Law Terms, at 265-266 (West 2001).

In a recent case involving the rights of grandparents to increased visitation with their grandchildren over the objections of the custodial parent, the Court reviewed constitutional jurisprudence on parental rights to raise their children and concluded as follows: “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the *fundamental right* of parents to make decisions concerning the care, custody, and control of their children.”⁸³ Thus, the Court has characterized parents’ right to direct the upbringing of their children as both a fundamental interest and a fundamental right.

Although the full extent of what this liberty interest guarantees has not been defined precisely, at a minimum, . . . it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁸⁴

Here, among the constitutionally protected rights identified is the right to establish a home and raise one’s children. The U.S. Supreme Court recognizes that this right also encompasses the right of parents to determine the direction of their child’s education and religious beliefs.⁸⁵ This right of parents to choose their child’s education and religious beliefs is made applicable to states pursuant to the First and Fourteenth Amendments.⁸⁶ Although the right of parents to direct the education and religious upbringing of their children is superior, that right is not limitless.⁸⁷ States, however, may not arbitrarily or substantially interfere with this guaranteed liberty interest in the parent-child relationship and the parent’s right to direct the child’s education.⁸⁸

⁸³ *Troxel v. Granville*, 530 U.S. at 66 (emphasis added), citing, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing right of parents to care, custody and management of children); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (confirming primary role of parent in upbringing of children in America).

⁸⁴ *Meyer v. State of Nebraska*, 262 U.S. at 399 (emphasis added).

⁸⁵ *Id.* at 400.

⁸⁶ *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁷ *Troxel v. Granville*, 530 U.S. 57.

⁸⁸ *Meyer v. State of Nebraska*, 262 U.S. at 400-02.

It also has been suggested that parental rights to raise their children enjoy protection under the Ninth Amendment of the Constitution.⁸⁹ The Ninth Amendment of the U.S. Constitution provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁹⁰ The argument here is that the right of parents to direct the upbringing of their children is among the unenumerated rights that are retained by the people.⁹¹ Consequently, states lack authority to interfere with parental rights to raise their children.⁹²

WHERE ARE THE LIMITS?

“The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned.”⁹³ Generally, federal law establishes the floor for the level of protection afforded individuals; states, however, are free to provide greater constitutional protection to their citizens.⁹⁴ For example, the state constitution of Kentucky grants their citizens a fundamental right to education.⁹⁵ Although there is no federal constitutional right to a public education, states that grant its citizens a right to a free public education may not impose conditions on access to education that infringe on the free exercise of First Amendment rights.⁹⁶ Where the boundaries are on issues of state compulsory attendance laws and parental rights to direct their child’s

⁸⁹ Daniel E. Witte, 1996 BYU L. REV. 183, 188-89, 206-14 (1996) (arguing that the Ninth Amendment is an independent source of protection of parental rights based upon theories of public policy, original intent and natural law).

⁹⁰ U.S. CONST. amend. IX.

⁹¹ *Troxel v. Granville*, 530 U.S. at 91, Scalia dissenting..

⁹² *Id.* at 91-92.

⁹³ *Meyer v. State of Nebraska*, 262 U.S. at 402 (1923). Pennsylvania compulsory education laws require the curricula to be taught in English. Gerstein, *Education Law: An Essential Guide for Attorneys, Teachers, Administrators, Parents and Students*, at 695, citing 24 P.S. § 13-1327.

⁹⁴ Dodd, *Practical Education Law for the Twenty-First Century*, § 1.02 at 6 and § 4.02-§ 4.10 at 113-127.

⁹⁵ See, e.g., Kentucky, Ky. Const. Sec. 183.

⁹⁶ *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-35 (1973); Dodd, *Practical Education Law for the Twenty-First Century*, § 4.01 at 111-12; Cox, *Chalk Talk, Parental Rights and Responsibilities Of Control Over Children’s Education*, 26 J.L. & Educ. at 184.

education depends primarily on whether the asserted parental right is characterized as a fundamental right versus a liberty interest, balanced against the state's interest.⁹⁷

In *Wisconsin v. Yoder*, the Court found a state statute compelling students to attend school beyond the eighth grade to violate the First Amendment rights of the Old Order Amish.⁹⁸ The Court acknowledged the strong interest of the state in universal compulsory education but reasoned that the interest, though high, was not absolute.⁹⁹ “[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”¹⁰⁰ Consequently, state interference with First Amendment religious freedoms is subject to strict scrutiny, i.e., that the regulation is narrowly tailored to serve a compelling state interest and that there is no less restrictive alternative.¹⁰¹

Thus, where state compulsory education laws substantially interfere with parents' Fourteenth Amendment liberty interests to direct the upbringing of their children in combination with parents' legitimate claim of infringement on their First Amendment religious freedoms, then courts are more likely to apply heightened scrutiny and find such statutes invalid.¹⁰² Absent infringement on a parent's fundamental right, particularly those involving religious freedoms, or absent a constitutional provision or state statute declaring the right of parents to direct the education of their children constitutes a fundamental right, courts will apply a rational basis test to state compulsory attendance regulations.

In protecting parents' fundamental liberty interest in educating their children, the Court has used somewhat of a rational relation test to determine whether the state's interference with the parent-child relationship is arbitrary or is “without reasonable relation to some purpose within the competency of the state to effect.”¹⁰³ Some commentators argue that if a parent's right to direct the education and religious beliefs of their children is a fundamental right, courts must apply strict scrutiny to determine whether the state can demonstrate

⁹⁷ Dodd, *Practical Education Law for the Twenty-First Century*, § 6.05 at 167.

⁹⁸ *Wisconsin v. Yoder*, 406 U.S. at 214.

⁹⁹ *Id.* at 214-15.

¹⁰⁰ *Id.* at 215.

¹⁰¹ *Id.*; Dodd, *Practical Education Law for the Twenty-First Century*, § 6.05 at 167.

¹⁰² 406 U.S. 205; Victoria J. Dodd, *Practical Education Law for the Twenty-First Century*, § 6.05 at 167.

¹⁰³ *Meyer v. State of Nebraska*, 262 U.S. at 399-400.

that the legislation served a compelling state interest and that there are no less restrictive means to accomplish the state objectives.¹⁰⁴

Parental right to raise their children and direct their religious beliefs are superior to state interests. To the extent that parents possess natural and constitutionally protected rights to direct the upbringing and religious beliefs of their children, the corresponding right of states to regulate in this area is necessarily limited. A principal source of limitation is the Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court has held that the Fourteenth Amendment Due Process Clause “guarantees more than fair process.”¹⁰⁵ Importantly, the Due Process Clause also encompasses “a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’”¹⁰⁶

“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.”¹⁰⁷ Generally, absent a determination that parents are unfit to properly care for their children, states have no basis to interfere with parental decisions in child rearing.¹⁰⁸ “[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”¹⁰⁹

Although constitutional jurisprudence recognize the right of states to compel school attendance, that right, however, is not limitless, nor are the interests of the parents in the direction of their children’s education without limits.¹¹⁰ “A parent’s rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.”¹¹¹ Similarly, a state’s legitimate interest in

¹⁰⁴ *Lange-Kessler v. Dept. of Educ., of the State of N.Y.*, 109 F.3d 137 (2d Cir. 1997); *Troyer v. Town of Babylon*, 483 F. Supp. 1135 (E.D.N.Y. 1980), *aff’d*, 628 F.2d 1346 (2d Cir.), *judgment aff’d*, 449 U.S. 988 (1980).

¹⁰⁵ *Troxel v. Granville*, 530 U.S. at 65, quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 65, quoting *Pierce v. Society of Sisters*, 268 U.S. at 535.

¹⁰⁸ *Id.* at 68, citing *Reno v. Flores*, 507 U.S. at 292, 304 (1993).

¹⁰⁹ *Troxel v. Granville*, 530 U.S. at 72-73.

¹¹⁰ *Wisconsin v. Yoder*, 406 U.S. 205.

¹¹¹ *Troxel v. Granville*, 530 U.S. at 88 (Stevens, J., dissenting).

educating its young citizens must not violate parental rights to free exercise of their religion.¹¹²

In *Pierce v. Society of Sisters*,¹¹³ the U.S. Supreme Court affirmed the right of parents to direct the education and religious beliefs of their children. In *Pierce*, two schools, one sectarian and one nonsectarian, sought an injunction to prevent state officials from enforcing the Oregon Compulsory Education Act of 1922 (the “Act”), prior to its effective date.¹¹⁴ The Act mandated that normal children, between the ages of eight and sixteen years, attend a public school through eighth grade in the district where the child resided.¹¹⁵ The sectarian school argued that the injunction should be granted because the Act violated constitutional rights of parents to choose the schools in which their children will receive appropriate secular and religious training, of the child to influence the parents’ choice of a school, of schools and teachers ability to engage their professions and businesses.¹¹⁶

The nonsectarian school argued that enforcement of the Act would destroy its business and cause its property to depreciate significantly in value, in violation of the corporations Fourteenth Amendment rights, and that the Act constituted an “arbitrary, unreasonable, and unlawful interference” with their property interests.¹¹⁷ The Court held that Oregon’s Compulsory Education Act “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control,” in violation of interests protected by the Fourteenth Amendment.”¹¹⁸ The Court further stated that such “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.”¹¹⁹ Thus, state compulsory attendance laws may not limit compliance solely to public school attendance.

¹¹² *Wisconsin v. Yoder*, 406 U.S. 205.

¹¹³ 268 U.S. 510 (1925).

¹¹⁴ *Id.* at 529-30.

¹¹⁵ *Id.* at 536 n.1. The Act provided an exclusion for children who are “abnormal, subnormal or physically unable to attend school.” *Id.*

¹¹⁶ *Id.* at 532. The sectarian school, the Society of Sisters of the Holy Names of Jesus and Mary, was founded in 1880 to establish interdependent primary and high schools, junior colleges and orphanages to provide secular education, as well as religious and moral instruction consistent with the tenets of the Roman Catholic Church. *Id.*

¹¹⁷ *Id.* at 533-34, 536. The nonsectarian school, Hill Military Academy, was founded in 1908 as a for profit corporation to provide elementary, college preparatory and military training to boys between the ages of 5 and 21 years. *Id.* at 533-34.

¹¹⁸ *Id.* at 534-35.

In deciding *Pierce*, the Court relied on a case it decided two years earlier, *Meyer v. Nebraska*.¹²⁰ In *Meyer*, a parochial school teacher was convicted for violating a state compulsory education law that prohibited teaching foreign languages.¹²¹ In overturning the conviction, the Court determined that the statute violated the Fourteenth Amendment liberty interests of the teacher to freely engage in his occupation and of parents to direct their children's education by hiring the teacher to teach their children a foreign language.¹²² The Court further determined that neither a public emergency, nor a health and welfare concerns was evident to justify the statutes.¹²³ Thus, state regulation of school curricula must have, at a minimum, a rational relation to the state's interest in protecting the health, safety and welfare of its citizens.

The authority of states to compel children to attend school through compulsory education laws has withstood numerous constitutional challenges.¹²⁴ Absent state infringement on First Amendment free exercise rights, courts typically apply a rational basis test to state compulsory attendance laws.¹²⁵ Under the rationale basis test, states merely need to show that laws are rationally related to a legitimate government objective. Here, states may assert that the legislation falls within their general police powers to protect the health, safety and welfare of their citizens or may assert their role *in parens patriae*. For example, parents who object to vaccinations based on religious beliefs may be prosecuted under state compulsory attendance laws requiring vaccinations.¹²⁶ Encompassed within the compulsory attendance laws is not only the requirement that the parent send the child to school, but also the parent should instruct the child to obey all proper school rules and regulations.¹²⁷

¹¹⁹ *Id.* at 535.

¹²⁰ *Meyer*, 262 U.S. 390 (1923).

¹²¹ *Id.* at 396-97.

¹²² *Id.* at 399-401.

¹²³ *Id.* at 401-03.

¹²⁴ *Meyer v. State of Nebraska*, 262 U.S. at 399-400, 401; *Pierce v. Society of Sisters*; *Wisconsin v. Yoder*; Dodd, *Practical Education Law for the Twenty-First Century*, § 1.04 at 9 and § 1.06 at 11.

¹²⁵ *Meyer v. State of Nebraska*, 262 U.S. at 399-400, 401.

¹²⁶ *Cude v. State*, 377 S.W.2d 816 (Ark. 1964); *State v. Drew*, 192 A. 629 (N.H. 1937); *Vonnegut v. Baun*, 188 N.E. 677 (Ind. 1934).

¹²⁷ Cox, Chalk Talk, *Parental Rights and Responsibilities Of Control Over Children's Education*, 26 J.L. & Educ. at 179 (1997).

Frequently, absent from the debate concerning the tension between state compulsory attendance laws and parental rights are the rights of children as individuals. Some argue that the right to an education is a right that belongs to the child, whether the interest is characterized as a fundamental right or a liberty interest.¹²⁸ Here, the argument is that children are human beings entitled to individual rights, and not mere chattels of their parents.¹²⁹ Where states declare that education is a fundamental right, some argue further that recognizing a fundamental parental right to control the direction of the child's education is incompatible with the child's fundamental right to receive an education.¹³⁰

CONCLUSION

There are significant tensions between state compulsory education laws and parental rights to educate and direct the upbringing of their children, including religious beliefs. Parental rights to the care, custody and control of their children, and to direct their religious belief are protected by the First and Fourteenth Amendment. Although states have the authority to enact compulsory attendance laws, absent a compelling state interest, those laws may not substantially interfere with the parents' fundamental rights, particularly the right to free exercise of their religion.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*