

**COMMON CORE AND NORTH CAROLINA:
PART V—A THREAT TO PARENTS’ RIGHTS**
The North Carolina Institute for Constitutional Law¹
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Common Core will bring significant changes to the way performance is tested, and thus curriculum is set, for grades K-12 and how parents may (or, more aptly, may not) influence, monitor and control their children’s education. Changes in curriculum and standardized testing aligned to Common Core raise questions about the input of parents, if any, in the wake of Common Core’s aftermath. This memorandum is the last in a multi-part series about Common Core.² This paper builds upon the factual and legal analysis laid out in prior memoranda by the North Carolina Institute for Constitutional Law. This paper explains the constitutional rights of parents to parent their children and describes some of the constitutional questions which arise from North Carolina’s rush to adopt Common Core.

The Fourteenth Amendment and the Constitutional Rights of Parents

Historical Review of Parents’ Rights to Raise their Children. Almost 90 years ago in *Meyer v. Nebraska*, a schoolteacher was convicted under a state statute banning the teaching of foreign languages in school when he was caught teaching German to a ten-year-old student. The Court ruled the statute unconstitutional and explained that the “liberty” protected by the Fourteenth Amendment includes the right of parents to “establish a home and bring up their children” and the right of parents “to control the education of their own.”³ The Court held that what type of education a child receives is up to his or her parents--not the government.

Two years later in *Pierce v. Soc’y of Sisters*, two private schools sued the State of Oregon over a statute requiring parents to send their children to public school. The court affirmed *Meyer* by ruling the Oregon statute unconstitutional, opining that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of

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² Additional articles regarding the constitutional right of parents to parent their children are in development. Check back to ncicl.org for future publications.

³ *Meyer*, 262 U.S. 390, 399 (1923).

children under their control.”⁴ Justice McReynolds went on to say “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.*”⁵

The Court again confirmed the existence of parents’ rights articulated in *Meyer and Pierce* in 1944 in *Prince v. Massachusetts*. The Court explained, “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.”⁶ In *Prince*, however, the Court made it clear that the rights of parents are not beyond state control. “Acting to guard the general interest in youth’s well being, the state as *parens patriae*⁷ may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.”⁸

Since *Prince*, the Court has repeatedly recognized the fundamental right of a parent to make decisions concerning the care, custody, and control of their children;⁹ however, the Court has not articulated a bright-line rule or standard of review of infringements upon the right or role of parents raising their children. In 1972, the Supreme Court declared a

⁴ *Pierce*, 268 U.S. 510, 534-35 (1925).

⁵ *Id.* 268 U.S. at 535 (emphasis added).

⁶ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)

⁷ “*Parens patriae* is Latin for “parent of his or her country.” Black’s Law Dictionary (9th ed. 2009).

⁸ *Id.*

⁹ See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements’” (citation omitted)); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); *Parham v. J. R.*, 442 U.S. 584 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child.”); *Washington v. Glucksberg*, 521 U.S. 702, 720 (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[t] ... to direct the education and upbringing of one’s children.” (citing *Meyer and Pierce*)); *Troxel*, 530 U.S. at 66 (“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.”).

compulsion school attendance law inapplicable to Amish children to attend school past the age of 14.¹⁰ The Court explained, “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”¹¹

One of the Court’s most recent affirmations of a parent’s more general interest in the “care, custody, and control” of their child was *Troxel v. Granville* in 2000. There, the Court invalidated a Washington state statute that gave state courts broad discretion to override a parent’s choice concerning the visitation of third parties. Justice O’Connor’s plurality opinion stated “the liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹²

Troxel has continued the recognition of a parent’s right to control the upbringing of their children but has also added to its enigma. The case was decided by a plurality with four judges joining the judgment, two concurring and three dissenting. In his concurrence, Justice Thomas argued that parents’ rights are fundamental and he would apply strict scrutiny (the strictest standard of review), which neither Justice O’Connor’s plurality opinion or Justice Souter’s concurrence mentioned. Justice Thomas observed, “The opinions of the plurality, Justice Kennedy, and Justice Souter expressly recognize such a right [to rear their children, including the right to determine who shall educate and socialize them], but curiously none of them articulates the appropriate standard of review.”¹³ In his concurrence, Justice Souter acknowledged the discrepancies saying the court’s decisions “have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.”¹⁴ The lack of a firm agreement among the Justices lead both Justice Scalia and Justice Kennedy to highlight the existing discrepancies concerning the rights of parents in their respective dissenting opinions.

¹⁰ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹¹ *Id.*

¹² *Troxel*, 530 U.S. at 65.

¹³ *Id.*, 530 U.S. at 80 (Thomas, concurrence).

¹⁴ *Id.*, 530 U.S. at 78.

While *Meyer* and *Pierce* and their progeny have provided a constitutional foundation for some type of parental rights, the scope of those rights remains unclear. The Court has shown that when a reasonable parenting decision is infringed upon by unreasonable state action, as in *Meyer*, *Pierce*, *Yoder*, and *Troxel* the Court will uphold the parent's right. So far the only cases in which the Supreme Court has affirmatively supported the right is when access to education is infringed by State action. This is not, however, to say that in America's evolving jurisprudence, there will never be occasion for the Court to rule on the scope of parental rights beyond those addressed in prior cases.

The Right of Parents to Supervise Their Children's Education. As described above, parents have a constitutional right to control the upbringing of their children, especially when it comes to education. The U.S. Supreme Court has invalidated state laws banning the teaching of languages other than English,¹⁵ prohibiting parents from sending children to private schools,¹⁶ and requiring Amish parents to send their children to school beyond the eighth grade against their religious convictions.¹⁷ In each instance, the Court based its decision either in part or in whole on the parental right to "establish a home and bring up children," which falls within the liberty protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.¹⁸

The Supreme Court has closely guarded this parental right. For example, in striking the Oregon law that banned teaching foreign languages in *Pierce*, the Court wrote: "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."¹⁹ As quoted above, the Court continued: "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."²⁰ In declaring Wisconsin's compulsory education law inapplicable to Amish adolescents aged 14 and above, the Court wrote, "the values of parental direction of the

¹⁵ *Meyer v. Nebraska*, 262 U.S. 390, supra.

¹⁶ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) supra.

¹⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) supra.

¹⁸ *Meyer v. Nebraska*, 262 U.S. at 399.

¹⁹ *Pierce v. Society of Sisters*, 268 U.S. at 535.

²⁰ *Id.*

religious upbringing and education of their children in their early and formative years have a high place in our society.”²¹ It concluded by stating, “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.”²² Thus, case law demonstrates that parents have a constitutional right to direct the upbringing and education of their children.

How Common Core Runs Contrary to Parental Rights and Student Privacy

Loss of Parental Control Over Curriculum and Assessments. Common Core is problematic for parental rights because it stops parents from being able to influence the curriculum or assessments to be administered to their children. The National Governor’s Association (NGA) and Council of Chief State School Officers (CCSSO), both Washington, D.C. based private non-profit organizations, control the Common Core and hold a copyright of the standards.²³ In order to adopt Common Core, states were required to accept the standards verbatim, and only have the option to supplement content not to exceed 15 percent of the total curriculum.²⁴ The Partnership for Assessment of Readiness for College and Careers (PARCC) and the Smarter Balanced Assessment Consortium (SBAC), both of which are private non-profits, will control student assessments.²⁵ In addition to federal

²¹ *Wisconsin v. Yoder*, 406 U.S. at 213-14.

²² *Id.* at 232-33. In other contexts, the Court has struck a balance between parental authority and legitimate state interests. For example, in 1944, the Court upheld a state child-labor prohibition as it applied to a 9-year old girl who was soliciting at the direction of her Jehovah’s Witnesses parents. *Prince v. Massachusetts*, 321 U.S. 158 (1944). However, in 1979 the Court ruled that parents attempting to commit a child to an institution need only submit to a screening by a doctor or neutral fact finder, rather than the notice and hearing generally required, except in cases of emergency, to commit an adult. *Parham v. J.R.*, 442 U.S. 584 (1979).

²³ <http://www.corestandards.org/public-license>.

²⁴ John Kendall, et al., State Adoption of the Common Core State Standards: the 15 Percent Rule 1, McREL, March 2012, http://www.mcrel.org/~media/Files/McREL/Homepage/Products/01_99/prod17_15PercentRule.ashx.

²⁵ Common Core FAQ. North Carolina is a “governing state” member of SBAC and field-tested assessments for the organization during the 2012-13 school year. <http://www.smarterbalanced.org/about/member-states/#north-carolina>.

funding provided to PARCC and SBAC,²⁶ significant financing has been provided by private non-profits such as the Bill & Melinda Gates Foundation, among others.²⁷ The known ties these organizations have to private *for-profit* companies only add to concerns that private interests will control educational policy, while states and parents are rendered impotent.²⁸

Given that the Common Core Standards are copyrighted by a nongovernmental entity and must be adopted in whole, parental involvement in Common Core is virtually nonexistent. Financial ties through the No Child Left Behind grants and the Elementary and Secondary Education Act waivers, detailed in NCICL's paper on the topic, "Common Core's History and Structure," strongly suggest that parents (and voters in general) will not be able to have meaningful influence over the education their children receive. Now the power over curriculum and assessments will reside in a distant, privately funded cartel of non-governmental organizations, which are insulated both in terms of geography and political accountability from most parents.²⁹ Whatever the proper scope of parental authority in education may be, this arrangement surely breaches it, and threatens to swallow it whole.

CONCLUSION

²⁶ About PARCC, Partnership for Assessment of Readiness for College and Careers, <http://www.parcconline.org/about-parcc>; 31-State Consortium Awarded RTTT Assessment Grant, Smarter Balanced Assessment Consortium, Sept. 2, 2010, <http://www.smarterbalanced.org/news/31-state-consortium-awarded-rttt-assessment-grant/>.

²⁷ Emmett McGroarty and Jane Robbins, Controlling Education from the Top: Why Common Core is Bad for America, A Pioneer Institute and American Principles Project White Paper No. 87, at 15, May 2012, <http://americanprinciplesproject.org/preserve-innocence/2013/controlling-education-from-the-top-2013-report/>.

²⁸ *Id.* at 16. For example, Microsoft has made investments in a Barnes and Noble division working on curriculum while the Gates Foundation has collaborated with the Pearson Foundation, which is connected to British publisher Pearson PLC, to create online courses.

²⁹ Chief Justice John Roberts wrote in *Nat'l Fed'n of Indep. Bus. v Sebelius* that by establishing a system of federalism, "The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." 132 S. Ct. 2566, 2578 (2012) (quoting Federalist No. 45 (James Madison)). By not only removing curriculum from the state and local level to the federal level, but also adding an additional impediment by handing curriculum assessment control to unelected bodies of non-governmental entities, Common Core represents an even greater threat to parental rights.

The federal courts have recognized a right for parents to control the upbringing of their children, including the direction of their education. Confusion exists however because in the time since that right was first recognized, the courts have yet to define the precise scope of that right. Although the full scope of the right to parent remains in doubt, there is no doubt that parents are vitally interested in the education of their children. Further, there is little doubt that Common Core, its structure, history and funding leave little, if any, room for parents.