

**Education as a Fundamental Right:**  
**Exploring the Need For a Constitutional Protection for Children in**  
**the United States**

Laura Londoño Pardo

Advisor: Professor William Garfinkel  
April 25, 2017

## Table of Contents:

### **Abstract**

#### **Section I: Introduction**

- I. What is a child?
- II. Children and Education
- III. Contemporary Concerns
  - a. Virginia Statute
- IV. Goals and Scope of Paper

#### **Section II: Historical Analysis**

- I. Compulsory Education
  - a. Thomas Jefferson's Influence
  - b. Beyond Jefferson – Compulsory Education Statutes
- II. State-Level Fundamental Right to Education
- III. SCOTUS Acknowledge: Absence of a Right to Education

#### **Section III: Case Studies**

- I. Yoder
  - a. Background
  - b. A Selective & Opportunistic Framing of “Children”
  - c. Opinion
  - d. Douglas Dissent
  - e. Implications
- II. Tinker
  - a. Background
  - b. Contextualizing Children's Rights
  - c. Implications
- III. The Importance of the Question at Hand

#### **Section IV: Educational Imperative Until the Age of 16**

- I. The Fundamental Nature of Education and its Lack of Protections

#### **Section V: Establishing a Constitutional Right**

- I. 16
- II. Ratification Process
- III. Constitutional Amendment vs. Federal Bill

#### **Section VI: Conclusion**

- I. Shortcomings and Possible Criticisms

## **Abstract:**

The provision of schooling, and parental responsibilities to enroll children in school, are enduring elements of America's political culture since its foundation. However, the United States does not grant its citizens a fundamental right to education. Courts, legislatures, and government officials have failed to protect children's rights to its access. This has, in turn, created a system in which young Americans have limited grounds upon which to defend their access to education in the face adults and coalitions with competing interests. This report will explore the status and consequences of this missing protection, ultimately defending a Constitutional right to education.

## **I. Introduction:**

### **I. What is a child?**

The American notion of childhood is vastly undefined. The United States legally acknowledges childhood as a period that "lasts until a person reaches the general age of majority, which is now eighteen in nearly all states."<sup>1</sup> This acknowledgement generally took place after the passage of the 26<sup>th</sup> Amendment, granting U.S. citizens the right to vote at the age of 18.<sup>1</sup> However, "throughout most of the nation's history, the age was twenty-one, the age at which feudal English common law determined that a boy could handle the weight of a full suit of armor in battle."<sup>1</sup> This legacy begs questions regarding the seemingly arbitrary nature of American definitions of childhood, and how it intersects with the law.

Though U.S. citizens legally reach majority at the age of 18, it is widely acknowledged that, "different courts and legislatures have been willing to give some new rights to children, while denying them to others," given that, "to date, neither legislature nor courts have developed a coherent philosophy or approach when addressing questions relating to children's rights."<sup>1</sup> People widely acknowledge inconsistencies with regard to "majority," frequently disputing the

---

<sup>1</sup> Abrams, Douglas E., Sarah H. Ramsey, and Susan V. Mangold. *Children and the Law: Doctrine, Policy, and Practice*. St. Paul, MN: West Academic, 2014. Print.

legal age involved with drinking, voting, marriage, being drafted for war, and becoming emancipated, among other things.

In addition to legal and politically relevant delineations, religion and other cultural “formal practices” or “divisions” exist to connote majority. Among them, “the permission to marry, departure from the parental home, [and the] assumption of the responsibility to provide for oneself” define this threshold in the United States.<sup>2</sup>

For these reasons, the age at which childhood ends—along with its privileges and limitations—is highly contested, and substantially variable, depending on the time, place, and context under which it is being defined.

Where does this leave kids? Modern cultural conceptions of childhood, stemming from John Locke’s early definitions, would argue that protecting children from adult privileges, and outlining and enforcing their limitations, saves them from a general lack of knowledge and moral sense.<sup>2</sup> This creates a standard in which adults—be it parents or the state—are generally assumed to be more capable from a stance of “knowledge” and “moral sense.” This inherently creates a dynamic between parents, the state, and the child with regard to children’s rights and their best interests.<sup>2</sup>

This report will argue that such a dynamic is problematic given the power it grants adults over current, and future, interests of children—particularly in the realm of education. It will discuss the burdensome imposition that such dynamic places on their defined rights, *and* those yet to be recognized, thus defending the need of increased positive rights for children.

---

<sup>2</sup> Archard, David. *Children: Rights and Childhood*. Abingdon, Oxon: Routledge, Taylor & Francis Group, 2015. Print.

## II. Children and Education

American definitions of childhood meet the realm of education at state and federal levels. The United States experiences a cultural and legal paradox between the obligations to provide children with an educational foundation upon which they can embark on their own path and pursuit of happiness, and a lack of concrete means with which to enforce accountability in granting these rights. Politics, special interests, bureaucracy and traditions contribute to this disparity.

The absence of a fundamental right to education has been reconciled with a loose obligation on behalf of parents to ensure that their children are enrolled in school, in most states, until the age of sixteen.<sup>23</sup> Case and statutory law have unanimously given precedence to parent's rights to direct the upbringing of their children in this arena and others.<sup>3</sup>

Perhaps this deference would be unproblematic if the voices of parents and other adults unanimously advocated for the best interest of, and converged with, the voice of the child—specifically with regard to factors that define children beyond the scope of their childhood like education.

Unfortunately, however, this is not always the case. Though the best interest of the child is inherently debatable in the realm of education—and medicine, among other things—it is very rarely weighed or considered. More importantly, it universally lacks the power to trump other interests, with those of parents at the forefront. This is extremely problematic because of the disadvantages that this hierarchy impose on children given the knowledgeable, competitive, and technologically advanced nature of today's world.

---

<sup>3</sup> "Pierce v. Society of Sisters." *Oyez*. Justia Supreme Court Center, n.d. Web. 24 Apr. 2017.

### III. Contemporary Concerns

Because of the aforementioned lack of a fundamental right to education, thousands of children suffer consequences throughout the United States. Evidence of such consequences can be drawn from the side effects of Virginia's compulsory education statute.

#### a. Virginia Statute

Virginia's compulsory education statute follows the framework of education statutes in other states; it requires that parents or guardians send their children to school, be it a "private, denominational, or parochial education pre-kindergarten program."<sup>4</sup> The statute is unique, however, in its language pertaining to excuses and exemptions. It states that, "any pupil who, together with his parents, by reason of bona fide religious training or belief is conscientiously opposed to attendance at school," is exempt from the requirements of the statute, excluding "essentially political, sociological or philosophical views or a merely personal moral code."<sup>4</sup>

The language of this statute might calm red flags given that it mentions the religious belief of the child. However, "the Virginia Supreme Court has indicated that there are some ages below which children presumably lack the capacity to form religious beliefs of their own," thus giving complete agency to parents in removing their children from school.<sup>5</sup>

In addition to the moral questions that the language and implementation of this statute bring about, data regarding children in Virginia demonstrates the severity of its implications. In the 2010-2011 school year, nearly 7,300 students were "taken out of school by the religious exemption."<sup>5</sup> Approximately 73% of these exemptions involved elementary school aged children—those who the Virginia Supreme Court determined to "lack the capacity to form

---

<sup>4</sup> "Title 22.1. Education." *Compulsory Attendance Required; Excuses and Waivers; Alternative Education Program Attendance; Exemptions from Article*. N.p., n.d. Web. 24 Apr. 2017.

<sup>5</sup> Tschiderer, Christine, Henry Sire, Allison Lansell, and Stephanie Moore. "7,000 Children and Counting: An Analysis of Religious Exemptions from Compulsory Education School Attendance in Virginia." (n.d.): n. pag. Child Advocacy Clinic, University of Virginia Law School, Sept. 2012. Web. 24 Apr. 2017.

religious beliefs of their own.”<sup>5</sup> This data is concerning due to the fact that these children, and their advocates, are left without legal grounds on which to dispute the actions of adults in determining the outcomes of their futures.

Beyond examples such as the Virginia education statute, children face inequity in schools, safety hazards on school property, and an inability to advocate against their parents voices in seeking to stay in school after eighth grade.<sup>6</sup> This report will explore cases involving those aspects, more concretely illuminating the need for different outcomes that can be reached through a Constitutional protection.

#### **IV. Goals and Scope of this Paper**

This report will explore the status and consequences of a missing right to education. It will first examine the historical background of education, its provision, and its protections at the state and federal levels. It will then proceed to examine judicial precedent, paying specific attention to double standards set by several hallmark cases. It will then analyze several of these legal standards, seeking to contextualize the inconsistencies and lack of protections in cases involving children’s rights and their best interests. This analysis will culminate in an argument for increased protections for children in education-related cases.

This report will ultimately defend the imperative need for a positive Constitutional protection for children in the realms of schooling and education. It will conclude by tangibly considering the possibility of a fundamental right to education—both as a Constitutional amendment, and as a federal bill.

---

<sup>6</sup> See *Rodriguez, Lopez, and Yoder*.

## II. Historical Analysis

### **I. Compulsory Education**

#### **a. Thomas Jefferson's Influence:**

President Thomas Jefferson was one of the founding figures in the realm of American education, and the original voice behind compulsory legislation in this area. As Founding Father and president, he established a legacy regarding the imperative notion of schooling and its access. President Jefferson frequently tied the value of education with the fundamental notion of freedom. Among famous words from President Jefferson in this realm, he was famously quoted saying, "If a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be."<sup>7</sup>

Beyond verbal acknowledgements of the inextricable ties between a capable society and an "enlightened" people, President Jefferson set out to pass bills in order to ensure education provisions in his home state, and throughout the United States. Thomas Jefferson's 1779 "Bill for the More General Diffusion of Knowledge" concretely established a tradition of education as a method through which to establish a competent society capable of partaking in the American Dream. From its conception, however, the bill lacked actionable means by which to ensure educational access and resources to all children.<sup>8</sup>

The Bill for the More General Diffusion of knowledge failed to provide a positive proscription of rights, protections, and educational responsibilities to its young people. Though it mentioned districts, schools, tutors "to be supported by the hundred," visitors, and parents, along with their rights and entitlements, the bill failed to explicitly protect children and the ability of *all* students to be granted access to these resources.<sup>8</sup> Instead, it placed the onus on counties and officials within them, proscribing that they establish a means to provide an elementary education

---

<sup>7</sup> "Thomas Jefferson on Politics & Government." N.p., n.d. Web. 21 Apr. 2017.

<sup>8</sup> Smith, George H. "Thomas Jefferson on Public Education, Part 1." *Libertarianism.org*. N.p., n.d. Web. 14 Apr. 2017.



to children within said counties. Children, their voices, and their best interests were absent in Jefferson's language.

In addition to impracticable legislation with regard to children's ability to claim their right to the "diffusion of knowledge," Jefferson went further; he established a precedent of deference to the voices of parents and adults over those of children with regard to education. He explicitly states that children "shall be taught... as their parents, guardians, or friends... shall think proper."<sup>9</sup> Jefferson simultaneously set up a hierarchy within children at large, placing "the boys... [possessing] most promising genius and disposition" at the top with regard to access to education beyond "grammar school."<sup>9</sup>

Casting a critical eye at Jefferson's propositions is not difficult from the perspective of a 21<sup>st</sup> century advocate. In today's world, scholars, politicians, and laymen would immediately wonder about the consequences and implications of such propositions, especially given the progress that American society has enjoyed in the realms of equal protection, gender equity, anti-discrimination efforts, and the "diffusion of knowledge."<sup>7</sup>

This skepticism is coupled with the understanding that substantial changes in society, technology, and dissemination of information have given today's people perspective in these realms, thus allowing them to look at the previous status quo through a critical lens. This understanding, then, also relieves President Jefferson from some judgment and punitive scrutiny given the time elapsed since the drafts of his bills.

If, however, President Jefferson is relieved from his lack of attention to the aforementioned elements (equal protection, etc.) due to the relevance of time, and the evolving nature of American priorities and ideals, this same acknowledgement must be awarded to

---

<sup>9</sup> "Founders Online: 79. A Bill for the More General Diffusion of Knowledge, 18 Jun ..." *National Archives and Records Administration*. National Archives and Records Administration, n.d. Web. 21 Apr. 2017.

advocates who now assert that the United States is not doing enough to protect children in today's world. The weight of evolving times must stand equally relevant in understanding President Jefferson's lack of protection for children *and* the imminent need to remedy its consequences.

In attempting to reconcile with this disparity, this report will aggregate arguments that demonstrate the societal, legal, and Constitutional evolution involving children's rights to education since Jefferson's time. This analysis will demonstrate that there is an imminent need to make change, both at federal and state levels, at this point in time.

### **b. Beyond Jefferson – Compulsory Education Statutes**

Compulsory education laws were established throughout the United States in accordance with Thomas Jefferson's legacy. In 1852, Massachusetts was the first state to pass such a law, demanding that parents having "any child under his control between the ages of eight and fourteen years" send "such child to some public school within the town or city in which he resides," adding an exception for children that might have otherwise, "been furnished with the means of education for a like period of time."<sup>10</sup> \*

The content of the 1852 Massachusetts statute alerts 21<sup>st</sup> century readers of the aforementioned relevance of time elapsed, given language pertaining to age, school type, and possible exemptions. We will now briefly examine the ways in which the Massachusetts statute evolved since its conception in order to further understand the evolution of education-related rights over the course of the past several centuries.

The 1852 Massachusetts statute most notably changed in its exceptions. The original phrase granted an exemption for children who had otherwise "been furnished with the means of

---

<sup>10</sup> "Massachusetts Compulsory Attendance Statutes from 1852-1913." *Massachusetts Compulsory Attendance Statutes from 1852-1913*. MHLA, 2012. Web. 24 Apr. 2017.

education for a like period of time,” became increasingly stringent as the statute was revised in 1889, 1906, and 1913.<sup>10</sup> By 1913, this exception applied only to students who may have been, “otherwise instructed in a manner approved in advance by the superintendent or the school committee.”<sup>10</sup>

Evaluating the changes that the Massachusetts statute underwent illuminates two trends: society’s increased value and prioritization of education, and the increased power harnessed by the state in seeking to match these evolving standards. These 20<sup>th</sup> century trends are relevant in evaluating how the Massachusetts compulsory education statute might continue to change, molding to contemporary value-shifts in society.

Perhaps more importantly, however, they are determining in assessing the malleability of the state-parent-and-child hierarchy. In this case, the progress of the statute grants the state greater control in this regard as it places the onus of determining the standard of education that must be provided to children, in addition to the responsibility of evaluating if such standard is being met, in the government’s hands. This demonstrates that the state-parent-child dynamic is not set in stone, and that the role of education within society is apt to change.

Beyond Massachusetts, compulsory education statutes were established throughout the United States. Statutes differed in exact provisions, conditions, and accountability measures. Though one could do a comparative analysis of these statutes through examining state-by-state differences, Massachusetts serves as an example from which to understand the state’s role, and ability to change, with regard to legal education requirements and provisions.

## **II. State-Level Fundamental Right to Education**

In addition to compulsory education laws, some states move closer to granting their citizens a positive right to education. States attempt to do so with varying gradations of education

provisions. These provisions range from constitutionally ensuring “a system of common schools” in California, to detailed language that provides for “normal schools, industrial schools, and Universities,” in addition to “a uniform public school system” in Arizona.<sup>11</sup>

Contrary to the intuitive correlation between detailed language in state education provisions and an increased acknowledgement of a fundamental right to its access, however, these statutes do not necessarily represent the state’s willingness to defend such rights in front of the judiciary. In fact, though California’s education provision language is among the most limited in detail, it is among the most progressive states in the field of education. In 1971, the Supreme Court of California “declared education a fundamental right” in its holding in *Serrano v. Priest* (1971).<sup>12</sup>

State-level acknowledgements of a “fundamental right” to education, such as the recognition by the California Supreme Court in *Serrano*, are limited in scope and ubiquity. At this point, such “rights” rely on “equal-protection-focused education litigation” that is “limited in its ability to guarantee the right to education.”<sup>12</sup> Children in all states, thus, are in need of further protections.

### **III. SCOTUS Acknowledgement: Absence of a Right Education**

Though several states did, in fact, adopt the tradition that every child has a fundamental right to education, the federal government moved the opposite direction in the latter half of the 20<sup>th</sup> century.

Arguably most straightforward in propagating this determination is the decision in *San Antonio Independent School District v. Rodriguez* (U.S. 1973). In this case, the San Antonio

---

<sup>11</sup> Parker, Emily. "50-State Review." *Education Commission of the States* 5.3 (2016): n. pag. Education Commission of the States. Web. 24 Apr. 2017.

<sup>12</sup> Gordon, Ann. "California Constitutional Law: The Right to an Adequate Education." *BMS: Bulletin of Sociological Methodology / Bulletin De Méthodologie Sociologique* No. 118 (2013): 100-06. Web. 24 Apr. 2017.

Independent School District challenged a property tax-based funding scheme on the grounds that it failed to protect poor districts.<sup>13</sup> The question before the Court asked whether or not “Texas’ public education finance system violated the Fourteenth Amendment’s Equal Protection Clause by failing to distribute funding equally among its school districts.”<sup>13</sup>

The Court found that it did not, in fact, violate the Equal Protection Clause, specifically rejecting an examination of the system under strict scrutiny because of the absence of constitutional protections for education.<sup>14</sup>

In *Rodriguez*, Judge Powell warned against allowing the Court to become a “super-legislature” through “fluctuating” with regard to judicial scrutiny “depending on a majority’s view of the importance of the interest affected.”<sup>14</sup> Though admitting that, “Nothing this Court holds today in any way detracts from our historic dedication to public education,” the “grave significance of education both to the individual and to our society” was not enough to justify allowing the Court to become a “Super-legislature.”<sup>14</sup>

The Court’s assertions in *Rodriguez* communicate the recognition that there is no federal right to education to this day. This decision goes beyond this acknowledgement; it demonstrates the imminent need for positive legislation granting children the right to an education given the fact that the Court has a duty to be objective, and to err on the side of avoiding taking on a “legislative role,” regardless of the values of its component justices.<sup>14</sup>

### **III. Case Studies: Children and the First Amendment**

This report will now analyze case law particular to the topics of children’s rights and education. This will provide a practical framework from which to evaluate the effects of

---

<sup>13</sup> "San Antonio Independent School District v. Rodriguez." *Oyez*. Justia Supreme Court Center, n.d. Web. 24 Apr. 2017.

<sup>14</sup> "San Antonio Independent School District v. Rodriguez." *LII / Legal Information Institute*. Cornell University Law Center, n.d. Web. 24 Apr. 2017.

statutory law on real outcomes for children. It will also provide the groundwork from which to later evaluate the ways in which a statutory acknowledgement of a fundamental right to education could produce different—ideally more adequate—results for children and their futures.

## **I. Yoder**

Among seminal cases pertaining to children’s rights, education, the first amendment, and how these aspects are reconciled with the interests of parents and the state, *Wisconsin v. Yoder* (U.S. 1972) is perhaps the most defining. *Yoder* delineates a hierarchy between these competing interests.

In proceeding with this analysis, this analysis will disentangle the interests of these three actors in seeking to further understand the fundamental rights of children, and the possibility of including education among such rights. After establishing its legacy, we will place *Yoder* into conversation with *Tinker*, seeking to understand the limitations of progressive case law in the absence of additional positive rights.

### **a. Background**

In late 1969, two members of the Old Order Amish Church—in addition to a member of the Conservative Amish Mennonite Church—were prosecuted on the basis of Wisconsin’s compulsory education statute. **Error! Bookmark not defined.** The Amish parents refused to send their children to school after they had completed the eighth grade, arguing that, “high school attendance was contrary to their religious beliefs.

In this case, the Court unanimously determined that “individual’s interests in the free exercise of religion under the First Amendment outweighed the State’s interests in compelling school attendance beyond the eighth grade,” thus rendering Wisconsin’s compulsory education

statute unconstitutional. This was determined solely on the basis of the parents' rights to direct the upbringing of their children within the framework of religion and schooling.<sup>15</sup>

### **b. A Selective & Opportunistic Framing of “Children”**

Wisconsin v. Yoder provides an opportunity to critically analyze the ways in which adults selectively, and arguably opportunistically, view and utilize children. More specifically, the language used in oral arguments and the majority opinion shows an inconsistency between casting children as individuals incapable of inherently possessing and exercising rights without their parents in some circumstances, and also depicting them as people who can and should exercise and demand their rights in others.

William Ball, the defense attorney presenting the case for the Yoder and Miller families, was one of the main individuals to operate this duality. Towards the beginning of his oral argument, Ball stated that in the case of Frieda Yoder, there was, “only one year of schooling... involved because she was fifteen years and five months old on the day the criminal complaint was brought against her father.”<sup>17</sup> In this argument, Ball framed Frieda Yoder in the light of a young adult, emphasizing the closeness of her age to sixteen (an age that we will later reexamine given that it possesses statutory relevance in progressing towards the age of majority.) Ball relied on the argument that older children are people who can, and should exercise their rights, and that proximity to majority is a valuable measure in this regard.

On the other hand, Ball later referred to the minor in question in the opposite light when asserting that the religion of the parents was to be respected and honored primarily as the Amish families raised their children. He stated that, “...when you take a child from Amish life... and place him in a high school, he is naturally going to be exposed to those values which his parents’

---

<sup>15</sup> "Meyer v. State of Nebraska." *Oyez*. Justia Supreme Court Center, n.d. Web. 24 Apr. 2017.

religion rejects.” Here, Ball stripped children of their own First Amendment rights by highlighting those of their parents, arguably setting up parents as the absolute right-holders. He simultaneously perpetuates John Locke’s caricature of a child as a “small individual” who needs to be protected from the “adult” world.<sup>2</sup>

In referencing the same children in these dichotomous ways, Ball reached opposing legal and emotional appeals in order to further his points at various portions of his oral argument. This rhetoric is problematic given the fact that it set the children, and their rights, as malleable factors for the sake of winning a case on behalf of the National Committee for Amish Religious Freedom.

### **c. Opinion**

Beyond the scope of the question and the rhetoric of the oral arguments in *Yoder*, the Court’s opinion is critical in delineating the balance of the state-parent-and-child hierarchy. In this case, the Burger Court set the interest of the parents at the forefront, followed by those of the state. The best interest and voice of the child were not evaluated.

Justice Burger drafted the majority opinion in *Wisconsin v. Yoder*. This opinion is often criticized on several fronts, ranging from Justice Burger’s idealization of the Amish, to his lack of enthusiasm in the face of explaining “precisely how states could safeguard religion without appearing to establish it.”<sup>16</sup> However, Justice Burger’s commentary on education, the First Amendment, and the voice of children in the face of these aspects is critical in exploring the role of education as a fundamental right, and how it stands with regard to the interests of parents and the state.

---

<sup>16</sup> Peters, Shawn Francis. *The Yoder Case Religious Freedom, Education, and Parental Rights*. Lawrence, Kan.: U of Kansas, 2003. Print.



Perhaps the most definitive argument in Justice Burger's majority opinion is his argument that, "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society," citing *Pierce v. Society of Sisters* (U.S. 1925), *Ginberg v. New York* (U.S. 1968), and *Meyer v. Nebraska* (U.S. 1923) among other cases.

In making this statement, Justice Burger's rhetoric comes into conversation with that of Justice Powell in *Rodriguez*. In *Rodriguez*, Justice Powell mentions "the grave significance of education both to the individual and to our society," using nearly the same words to describe education as Justice Burger uses to describe "the values of parental direction of the... upbringing... of their children."<sup>14</sup>

However, the two justices differ with regard to the implications that these "high values" project onto judicial interpretations. According to Justice Powell, quoting a previous opinion by Justice Harlan, "virtually every statute affects important rights," adding that, "if the degree of judicial scrutiny of state legislation fluctuated depending on a majority's view of the importance of the interest affected, we would have gone, 'far toward making this Court a super-legislature.'"<sup>17</sup>

Using this rhetoric, Justice Burger's assessment of "important rights" and their protections can be called into question. One could argue that Justice Burger moves in the direction of "making this Court a super-legislature" in *Yoder* with regard to parents' rights through his assertion that the "values of parental direction" are important enough to trump the Wisconsin statute beyond the scope of judicial scrutiny.<sup>17</sup>

Similarly, the rhetoric of Justice Burger's argument stating that, "a State's interest in universal education, however highly we rank it, *is not totally free from balancing process when it*

*impinges on fundamental rights and interests,*” could be applied to *Rodriguez* conversely. The Texas state and taxpayer interests behind the “property tax-based funding scheme” could be more heavily scrutinized, perhaps reaching a different outcome under such a “balancing process” that might more heavily acknowledge interests in the realm of education.<sup>14</sup>

Though these inconsistencies do not invalidate the decision made in either of these cases, they illuminate the subjectivity of certain emphases presented by the justices, specifically the use of terms such as “high value” and “grave significance.” Thus, in commenting on the balance of power in the state-parent-and-child hierarchy, Justice Burger’s assertion about the tradition of deferring to the voice of parents in cases involving children, and their rights, can be called into question.

#### **d. Douglas Dissent**

The Court reached a unanimous decision in *Yoder*; however, several justices concurred and dissented, or abstained. Among them, Justice Douglas’ dissent furthered the conversation over the state-parent-and-child hierarchy, and the voice of the child in particular.

Though Justice Douglas agreed with the validation of the Amish way of life in Justice Burger’s majority opinion, his dissent made ground in disentangling the rights of children and those of their parents. He stated that, “I disagree with the Court’s conclusion that the matter is within the dispensation of parents alone,” adding that, “the difficulty with this approach is that... the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-aged children.”<sup>17</sup>

In calling these factors into question, Justice Douglas acknowledged the rights of the Amish children in question. He exhumed the fact that “respondents’ motion to dismiss in the trial

---

<sup>17</sup> “*Wisconsin v. Yoder*.” *LII / Legal Information Institute*. N.p., n.d. Web. 21 Apr. 2017.

court expressly asserts not only the religious liberty of the adults, but also that of the children, as a defense to the prosecutions,” given that it was, “beyond question that the parents have standing as defendants in a criminal prosecution to assert the religious interests of their children as a defense,” contrary to the respondents’ assertions.<sup>17</sup>

In so demonstrating, Justice Douglas further illuminated the limitations of William Ball’s rhetoric given the opportunistic inclusion and dismissal of the children’s rights and voices. He demonstrated, through a different lens, that depending on which image of the child became more favorable to the respondents’ case at different points in time, the children were framed either as citizens possessing rights, or as defenseless property of their parents. Justice Douglas argued that this was problematic due to its lack of consistency and its determining nature.

#### **e. Implications**

Having closely analyzed the ways in which evolving compulsory education statutes reflected the changing values of society in Section II, the Court’s unanimous decision in *Yoder* calls into question the relevance of this “evolution,” or progress. If, in fact, the United States reached a degree of forward progress by the mid 20<sup>th</sup> century, how was it possible that the state failed to uphold such values in the early 1970’s in coming to a decision in *Yoder*?

## **II. Tinker**

We will proceed by examining *Tinker v. Des Moines* (U.S. 1969) in grappling with the questions of society’s progress in the realm of children’s rights and education, and legal responses to such progress. *Tinker* will provide the context from which to study children’s rights within educational settings, particularly their freedom of speech protections under the First Amendment.

## **a. Background**

In late 1965, a group of students from Des Moines created a coalition to demonstrate their opposition to the Vietnam War within their community. In doing so, they decided to wear black armbands throughout the holiday season—school hours included. In response, school officials created a policy against the particular armbands, subjecting violators to suspension. The students were sent home when they refused to remove their armbands.<sup>18</sup>

In this case, the Court determined that the school policy did, in fact, violate the students' First Amendment rights.<sup>18</sup> Justice Fortas famously stated in the Court's opinion that it, "has been the unmistakable holding of this Court for almost 50 years," that students do not, "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>19</sup> Justice Fortas furthered that argument beyond the scope of the classroom, stating that, "a students rights... do not merely embrace during classroom hours."<sup>19</sup>

## **b. Contextualizing Children's Rights**

Attempting to understand the discrepancies between the decisions in *Tinker* and *Yoder* involves a deeper analysis of the issues that came before the Court—both with regard to the nature of the problem, and the language of the question before the Court.

In exploring *Tinker* vs. Des Moines, what some would call "the first real children's rights case," beyond its face value, it is important to acknowledge two major points. First, that, "the Court has a long tradition of zealous protection of first amendment rights."<sup>20</sup> Second, one must realize that, "the views of the children in *Tinker*, in fact, mirrored the views of their parents."<sup>20</sup>

These two acknowledgements affect the scope of *Tinker*'s legacy given that they place

---

<sup>18</sup> "Tinker v. Des Moines Independent Community School District." *Oyez*. N.p., n.d. Web. 21 Apr. 2017.

<sup>19</sup> "Tinker v. Des Moines Independent Community School District 393 U.S. 503 (1969)." *Justia Law*. N.p., n.d. Web. 21 Apr. 2017.

<sup>20</sup> Davis, Samuel M., and Mortimer D. Schwartz. *Children's Rights and the Law*. Lexington, MA: Lexington, 1987. Print.

limitations on the true First Amendment rights of children. Particularly, one can speculate “whether the Court would [have been] as protective of children’s rights if their views were contrary to parental wishes.”<sup>20</sup>

We can concretely consider the consequences of a hypothetical difference between the views of the parents and children within the context of *Tinker*. Perhaps if the parents in this case had different views pertaining to American involvement in the Vietnam war—maybe if they were adamant supporters of the war and wanted the upbringing of their children to concentrate on nationalism and respect for the military—the Court may have been less likely to acknowledge that “Students in school as well as out of school are ‘persons’ under our Constitution... possessed of fundamental rights which the State must respect.”<sup>20</sup> Such an assumption would be sound given precedent established by *Meyer* and *Pierce* involving the superior nature of parental interests in the face of the law.<sup>20</sup>

In *Tinker*, the most consequential effect of a different holding due to differences in the voices of the parents and their children would have been the children’s inability to wear certain kinds of armbands in school—and to do so without fear of being dismissed from attending class.

The’s priority over the voice of the parents, however, presents more problematic consequences in cases involving school access rather than quality, specifically when turning to cases such as *Yoder*. Rather than potentially limiting a group of children’s ability to wear politically-charged wristbands to school, this lack of rights separation dealt with a child’s ability to continue to go to school after eighth grade, not only affecting their day to day life as children, but the potential of their futures.

### **c. Implications**

The Court's opinion in *Tinker* is important within the scope of children's rights and education given that it acknowledges that 16-year-olds hold personal rights in the face of educational administrators, their parents, and other adults. This is particularly important given that the holding is based on the First Amendment rights of the children, independent from those of their parents. This acknowledgement becomes relevant in analyzing compulsory education statutes, state provisions of education, and the voice of the child. Unlike the holding in *Yoder*, the court's decision in *Tinker* reflects the changing values of society studied in Section II of this analysis.

### **III. The Importance of the Question at Hand**

In attempting to reconcile the Court's decisions in *Yoder* and *Tinker*, the analysis in the previous section alludes to the importance of the question as it comes before the Court. One can argue that these two cases deal with similar factors pertaining to children's rights and access within schools. However, the fact that *Yoder* presents a question pertaining to the actions of the children's parents, and *Tinker* presents a question pertaining to the actions of the children themselves produces two fundamentally different outcomes that clash.

These differences in outcomes—however detrimental they are to outcomes for children—are not enough to argue that the Court erred in either decision. With this being said, they illuminate an imminent need for a Constitutional protection in the realm of education.

At this point, it is relevant to consider how a fundamental right to education would have affected these two different outcomes, regardless of the language in the question. Though such a right would have most certainly produced the same outcome in *Tinker*, a fundamental right to education would have likely skewed the outcome in *Yoder*.

#### **IV. Educational Imperative For Children Until the Age of 16**

##### **I. The Fundamental Nature of Education & Its Lack of Protections**

There is compelling evidence of the evolving importance of education within judicial contexts in examining statutes and case law as they change over time. Over the past 100 years, language akin to Justice Douglas' dissent in *Yoder* has built substance pertaining to the fundamental nature of education within the scope of the Court. The dissenting opinions in *Rodriguez* are relevant in this regard.

In his dissent in *Rodriguez*, Justice Brennan goes as far as declaring that, "there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment," referencing the fact that "as the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."<sup>14</sup> Justice Brennan argues for an implicit fundamental right to education.

Though Justice Brennan's dissent in isolation seems to go beyond the doctrine of the time, the rhetoric in Justice White and Justice Marshall's dissents supports the imperative need to reconsider the possibility of a positive right to education.

Beyond the scope of *Rodriguez*, several Supreme Court justices affirm the imperative nature of education within, and beyond, the context of cases before them. In his dissent in *United States v. Lopez* (U.S. 1995), Justice Breyer provides a Commerce Clause argument for the ability of the Court to regulate education. He states that, "given the effect of education upon interstate and foreign commerce," Congress acted within its capacity in passing the Gun-Free School

Zones Act.<sup>21</sup> In *Plyler v. Doe* (U.S. 1982), the majority opinion asserts the value of education in “maintaining the fabric of our society,” stating that, “although education is not a ‘fundamental right,’ the deprivation of education takes on “an inestimable toll on the social, economic, intellectual, and psychological wellbeing of the individual, and poses an obstacle to individual achievement.”<sup>21</sup>

Though various courts have continuously asserted that there is no defined fundamental right to education, and that it is not their right to define it, viewing these arguments in an aggregate fashion shows compelling evidence in favor of formally establishing that right from the standpoint of the judiciary.

### **Establishing a Constitutional Right:**

Due to society’s increased value of education, its imperative significance to individuals, and judicial acknowledgements of its importance explored until this point, this report will now consider what the passage of such a right might look like within the United States.

#### **I. 16**

As previously explored, “The End of Childhood” is an often-disputed subject; case law varies with regard to the point in time in which children can be treated, or tried, as adults, and at which their privileges as children come to an end.<sup>22</sup> However, the age stipulations of Wisconsin’s 1969 Compulsory school attendance statute disputed in *Yoder*, among most others, are arguably unsurprising given the relevance of the age of sixteen in both state and federal statutes.

---

<sup>21</sup> Breyer. *United States v. Lopez*, 514 U.S. 549 (1995). Justia Supreme Court Center, 26 Apr. 1995. Web. 25 Apr. 2017.

<sup>22</sup> Bainham, Andrew, Stephen Gilmore, Neville S. Harris, and Kathryn Hollingsworth. *Children: The Modern Law*. Bristol: Family Law, 2013. Print.



Over the course of the past fifty years, the age of sixteen has delineated the point at which individuals can be obligated to attend school in over half of the states,<sup>23</sup> giving it substantial legal weight in the realm of education. It has also marked the age at which young people can consent to hetero and/or homosexual intercourse,<sup>22</sup> and at which they can “understand the nature and consequences of” and “consent to” medical treatment as mature minors,<sup>24</sup> among other things. These legal milestones delineate sixteen as an age in which society recognizes some degree of majority—similar to the ages of 18 and 21.

In considering a Constitutional protection of a right to education, the age of sixteen is adequate within this context, given that it protects children from alternate interests during the most vulnerable stages of their development. However, this age also serves as a relevant cap given limited resources; the United States does not have the funds to guarantee all citizens access to education beyond these years, perhaps for students who enter college at an early age. Moving forward in considering the passage of a fundamental right to education, this report will assume that such right would extend to citizens until the age of 16 for these reasons.

## **II. Ratification Process**

Article V of the U.S. Constitution defines the process by which it can be amended.<sup>25</sup> After being proposed by Congress or a constitutional convention, the proposed amendment is sent to the states, where it must be ratified by three-fourths of the states.<sup>25</sup>

In this case, the ratification process of a positive right to education for all children until the age of 16 would likely be weighed by the states with regard to existing legislation pertaining to compulsory education, and relevant case law associated with an implied right to education for

---

<sup>23</sup> "State Compulsory Education Laws." *Findlaw*. N.p., n.d. Web. 19 Apr. 2017.

<sup>24</sup> Macedo, Stephen, and Iris Marion Young. *Child, Family, and State*. New York: New York UP, 2003. Print.

<sup>25</sup> "Constitutional Amendment Process." *National Archives and Records Administration*. National Archives and Records Administration, n.d. Web. 24 Apr. 2017.

children, as in California. Though the outcomes of a ratification process cannot be concretely predicted, society's evolving values, progressive statutory law, and judicial recognitions of a need for a positive right to education provide the basis from which to consider the effective passage of a Constitutional amendment.

### **III. Constitutional Amendment vs. Federal Bill**

As previously mentioned, the formal process of recognizing a positive right to education for American children under the age of sixteen can be accomplished through an amendment to the U.S. Constitution or through the passage of a federal bill. Though different in many regards, the more stringent ratification process of a Constitutional amendment defines the reasons why it would create a more adequate protection for children.

The higher thresholds of the Constitutional ratification process represent the positive effects of arriving at a right that cannot be easily superseded; it also illuminates the difficulties associated with establishing a positive right through this method. A federal bill could be an adequate alternative depending on the political climate of the country at the time of proposition, particularly because it only requires a majority among states.

In considering a federal bill, the Individuals with Disabilities Education Act serves as an example and a framework from which to predict the effectiveness of such a bill. The IDEA ensures "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."<sup>26</sup> This act provides children with disabilities a positive right to education, and serves as an example from which to consider an act providing all children under the age of sixteen with such a right.

---

<sup>26</sup> *Center for Parent Information and Resources*. N.p., n.d. Web. 25 Apr. 2017.

The U.S. Department of Education analyzed the effects of the IDEA 35 years after its conception. It noted increased interventions, additional access to general education programs by children with disabilities, higher graduation rates among these students, and increased post-secondary programs in addition to employment.<sup>27</sup> These tangible effects illuminate the prospects of a bill providing all students a positive right to education at a federal level, giving weight to its passage in the face of a failed Constitutional amendment.

### **VI. Conclusion:**

Today, there is no fundamental right to education in the United States. This makes the United States one of few first-world countries that does not secure children's rights to its access.<sup>28</sup> America's evolving values, modern applications of Constitutional rights, and aggregate case law evaluated holistically, however, demonstrate an imminent need for such a positive right.

Perhaps more compelling than society's "readiness" and willingness to accept a positive right to education are the consequences of not doing so. It is true that *most* children in the United States are not limited by their parents' decisions to remove them from school, thus curtailing their future outcomes. However, the fact that "most" children are not disadvantaged in this way does not invalidate the experiences of those who are.

Saloma Miller Furlong, a woman "shunned" from the Amish community for leaving and seeking an education, is an outspoken critic of parental discretion over children's education, specifically within Amish communities. In her memoir, she writes:

*"I will never forget how much I longed to return to school after I had earned my eighth grade diploma, signaling the end of school, spelling THE END. When my younger*

---

<sup>27</sup> Posny, Alexa. "Thirty-five Years of Progress in Educating Children With Disabilities Through IDEA (PDF)." (n.d.): n. pag. U.S. Department of Education, Nov. 2010. Web. 25 Apr. 2017.

<sup>28</sup> Lurie, Stephen. "Why Doesn't the Constitution Guarantee the Right to Education?" *The Atlantic*. Atlantic Media Company, 16 Oct. 2013. Web. 25 Apr. 2017.

*siblings returned to school in the fall, I went to my room and cried, my desire to go back was so keen... I did see the day coming when I could no longer return to school. Like all other Amish children, I knew eighth grade would be the end of my school days. Just by progressing through the eight grades, I brought on the end. And there was nothing I could do about that. In Amish words, 'This is the way it is.' No questions asked and no discussion. This was not a rule in the church, so it wasn't even debatable."*

*"...The rules that apply to parents in the mainstream culture for educating their children and for preventing child labor do not apply to the Amish — as if they are innocents and won't do their children any harm by depriving them of an education."*<sup>29</sup>

*~Saloma Miller Furlong*

Furlong's experiences and perspective illuminate the possible effects of acknowledging a positive right to education beyond the scope of society's acceptance of such a right, and alternative outcomes in seminal education-related cases. It is the duty of the United States to create a system in which young Americans have grounds upon which to defend their access to education when faced with adults and coalitions with competing interests.

## **I. Shortcomings and Possible Criticisms**

This report defends the assertion that the absence of a constitutional right to education supports a system in which young Americans have limited grounds upon which to defend their access to it. One of the main criticisms of such an argument is the idea that this isn't an enormous problem in the United States; one could argue that the number of children that would benefit from such a change is limited. The conclusion of this report addresses this criticism.

---

<sup>29</sup> Miller Furlong, Saloma. "Saloma Miller Furlong, Author and Speaker." *About Amish Malalas Message Comments*. N.p., n.d. Web. 25 Apr. 2017.

Furthermore, this report is limited in scope given the quantity and type of evidence that it utilizes. More specifically, this report uses three states' compulsory education statutes to speak about this this type of legislation more generally, and uses approximately ten cases to derive arguments from existing case law. One could argue that three states are not representative of 50 diverse jurisdictions, and that additional cases may have changed the grounds upon which to criticize judicial decisions in arguing for a constitutional right to education.

However, this report samples the most relevant evidence understanding these limitations, and seeks to analyze multiple policy propositions in order to account for them. More importantly, it proscribes a positive right that does not inherently limit and/or change the legal fabric of the United States. Given this acknowledgement, the aforementioned criticisms do not invalidate the scope of the propositions of this report.

---

\*

#### **1852 - An Act Concerning the Attendance of Children at School**

Be it enacted by the Senate and the House of Representatives

Section 1. Every person who shall have any child under his control between the ages of eight and fourteen years, shall send such child to some public school within the town or city in which he resides, during at least twelve weeks, if the public schools within such town or city shall be so long kept, in each and every year during which such child shall be under his control, six weeks of which shall be consecutive.

Section 2. (Describes fine of \$20 for truancy)

Section 3. It shall be the duty of the school committee in the several towns or cities to inquire into all cases of violation of the first section of this act, and to ascertain of the persons violating the same, the reasons, if any, for such violation and they shall report such cases, together with such reasons, if any, to the town or city in their annual report; but they shall not report any cases such as are provided for by the fourth section of this act.

Section 4. If, upon inquiry by the school committee, it shall appear, or if upon the trial of any complaint or indictment under this act it shall appear, that such child has attended some school, not in the town or city in which he resides, for the time required by this act, **or has been otherwise furnished with the means of education for a like period of time**, or has already acquired those branches of learning which are taught in common schools, [also describes physical incapacity or poverty as being valid excuses for absence from school] shall not be held to have violated the provisions of this act.

Section 5. It shall be the duty of the treasurer of the town or city to prosecute all violations of this act.