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PRIVACY RIGHTS, SCHOOL CHOICE, AND THE NINTH AMENDMENT

*Lawrence Lee Oldaker**

I. INTRODUCTION

From its seventeenth-century Puritan New England inception, the nation's system of public schools has been called upon to provide an ever-expanding array of academic and non-instructional services. This near-monopolistic governmental activity has drawn continuous social commentary from its beginning to the present day. On one side, a stable, majority following has supported public school programs through the years. Others have challenged basic public education purpose, process, and achievement. Educational reform activities are occurring with increasing intensity at federal, state, and local levels.

School improvement plans in the 1970s and 80s called for higher educational outcomes without general agreement on specific proposals to correct low performance. The 1983 "A Nation at Risk" study created anxious stirrings within the educational community and exposed discernible gaps between the rhetoric and the realities of meaningful change in school programming.¹

Later, a second generation of critics moved to improve conditions in the national education colossus by decentralizing policy making and control, especially in the larger school units. In the wings, a third wave of reformers decried the futility of top-down managerial adjustment and championed parental choice among schools.²

This latest ground swell to improve American education centers on the adoption of consumer values in choosing schools. To many, the notion of competition for pupil enrollment would

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1. For an illustrated scenario of why reforms fail, see MYRON LIEBERMAN, *PRIVATIZATION & EDUCATIONAL CHOICE* 14-21 (1989). A thoughtful analysis of the pervasive complexities in reforming school administration training programs appears in Daniel L. Duke, *The Rhetoric and the Reality of Reform in Educational Administration*, Phi Delta Kappan, June 1992, at 764-770.

2. G. ALFRED HESS, JR., *Basis for Restructuring Schools*, in *SCHOOL RESTRUCTURING, CHICAGO STYLE* (1991).

reward exemplary programs, highlight promising community innovations, and force alterations in undesirable operations. School choice advocates include President George Bush and Education Secretary Lamar Alexander, who introduced the "America 2000" legislative plan to affect six reform goals for education set forth in the 1989 Charlottesville, Virginia conference on education. The federal initiatives, unveiled two years later would place a "heavy emphasis on 'parental choice,' a euphemism for vouchers for private and parochial schools."³

As our Congress debates the legislative merits of school choice in the "America 2000" measure, related questions surface concerning the rights of parents, the governance of education, and the constitutional implications of reform incentives coming from the federal executive branch. Among serious civic issues to be resolved are the following:

(1) Do parents have a natural right of privacy in selecting the manner in which they raise children?

(2) Is education one of these rights, thereby giving credence to parental school selection?

(3) Are the Federal Constitution's Ninth Amendment⁴ unenumerated rights the appropriate authority for school choice plans?

(4) If the choice issue becomes a Ninth Amendment issue, what are the implications for traditional school governance?

(5) Should choice in schooling be viewed as an emerging Ninth Amendment right, how can public education as a Tenth Amendment⁵ function coexist under two constitutional amendments?

The purpose of this paper is to address these queries by exploring the foundations of rights-theory relative to the constitutional laws that govern our contemporary public school systems. Responses to these questions should contribute to the general understanding of the political forces reshaping the nation's schools.

3. Nick Pennington, *Don't Look to Congress for Systemic Reform Plans*, THE SCHOOL ADMINISTRATOR, June 1992, at 24.

4. The Ninth Amendment states "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

5. The Tenth Amendment states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

II. THE ENDURING CONCEPTS OF RIGHTS

In pre-recorded times, kindred families made significant social compacts. Individuals willingly surrendered natural rights to gain protection from harm and to benefit from the collective labor of a larger group. Important agreements were reached to confirm the social order's leader, to determine the relationships of rights and responsibilities among those in the group, and to organize the community for the common good. Once adopted, this conduct was perpetuated as memories, customs, and traditions by leaders and storytellers. Much later, written languages aided philosophers and scholars in recording their thoughts and in sharing their ideas with others about the merits of their society. Through the ages, many philosophers went beyond merely describing their social orders to prescribing "utopian" relationships based on their perception of an ideal society.

Hammurabi, Plato, Aristotle, Cicero, St. Thomas Aquinas, and other ancient and medieval scholar-philosophers believed that society was governed by reason and strong, natural codes.⁶ Natural law and governance continued to be a dominant theme among European thinkers contemplating the ideal citizen under a central government. St. Thomas Aquinas⁷ envisioned natural laws as being eternal, unchangeable, universal, distinguishable from civil laws, and emanating from God. This concept became the unifying force that (1) made the Justinian code⁸ cohesive and (2) supported the individual's corporate union with others in common social institutions, notably the Church of Rome. This fusion of classical and Christian thought provided a rational blend of state and church.⁹ For a time, rights-theorists and their probing questions regarding the source and placement of natural rights were quieted.

6. Fourteenth century Moslem historian-philosopher Ibn Khaldoun contributed to the eventual development of the social sciences with an insistence that human relationships were governed by natural laws that guided past actions and predicted future social directions. The credit afforded Khaldoun, as well as the discussions on natural law, has been deleted from the 1981 edition of this praiseworthy sociology text. See MELVIN L. DEFLEUR ET AL., *SOCIOLOGY: HUMAN SOCIETY* 4-5 (1973).

7. 2 Saint Thomas Aquinas, *The Basic Writings of Saint Thomas Aquinas* 748-89 (Anton C. Pegis, ed., 1945).

8. 2 S.P. Scott, *The Civil Law* (1973). Justinian was the Byzantine emperor who codified the Roman law.

9. Peter J. Stanlis, *The Philosophic Content and Historical Importance of Natural Law*, in EDMUND BURKE AND THE NATURAL LAW 3-13 (1986).

After Roman political influence decreased in Europe, Henry de Bracton, English ecclesiastic and judge, used natural law concepts in merging civil and common law in England. His treatment of the subject had no rival until the classic legal *Commentaries* of Sir William Blackstone were circulated and discussed five centuries later.¹⁰ Continuing with the natural law and natural rights theme in England, the formalist-philosopher Thomas Hobbes was convinced these laws and rights were separate entities. He believed that the rights of nature were attached to individuals, who may exercise them or rightfully cede them to the sovereign.¹¹ Viewed widely as a materialist, Hobbes favored an absolute monarchy with power and rights descending from above. Edmund Burke, one of England's most prolific legal scholars, believed that natural law was embodied in the customs of the land but were transmitted through legal precedence and procedures. To Burke, these laws and rights were products of convention, not attributes of birthright.¹² However, Jeremy Bentham refused to consider the existence of rights beyond the government. Bentham dismissed natural and imprescriptible rights as "rhetorical nonsense, nonsense upon stilts."¹³

In contrast to the authoritarian Hobbes, John Locke favored the more liberal interpretation that natural rights were developed from natural laws because individuals and societies have a moral duty to preserve the non-transferable rights of life, liberty and sovereignty, and preservation.¹⁴ According to Locke, reason guided each person out of harm's way and protected everyone against encroachment from one another. This rational social contract grew out of the tradition of natural law and, in part, required each person to give up a degree of independence for the betterment of all. This is also a strong theme in Blackstone's writings. These natural, individual rights and the ability of the collective citizenry to restrict and support governmental powers, as envisioned by common law, Locke, and Blackstone,¹⁵ found their way into the English Bill of Rights (1689), the American Declaration of Independence

10. *Id.* at 10-11.

11. MICHAEL FREEDEN, RIGHTS 12-14 (1991).

12. *Id.* at 16-17.

13. *Id.* at 18-19.

14. *Id.* at 14-16.

15. For an excellent commentary on European enlightenment, natural rights, and common law leading to American independence, see ROBERT S. PECK, THE BILL OF RIGHTS & THE POLITICS OF INTERPRETATION 23-33 (1992).

(1776), the Virginia Declaration of Rights (1776), the U. S. Constitution (1789), and the federal Bill of Rights (1791).¹⁶

At the Constitutional Convention of 1787, held in Philadelphia to amend the Articles of Confederation, the assemblage had authorization from the state legislatures to adopt a new form of government. In drafting the proposed federal constitution, our colonial fathers omitted the concepts of natural rights and natural laws, thereby creating the potential unwanted consequences of (1) not obtaining state ratification of the pact or (2) holding a second convention to reconsider the individual rights issue.¹⁷ To avoid either of these possibilities, the politically-entrenched Federalists were forced to support the addition of a bill of rights, which would take the form of amendments. In staunch opposition to a "dangerous" declaration of individual rights, Alexander Hamilton expressed his opinion that such a pretext of protections for citizens would be unenforceable and unneeded since "the Constitution is itself . . . A BILL OF RIGHTS."¹⁸

In a move to help create a more comprehensive constitution, convention delegate George Mason, author of the Virginia Declaration of Rights in the Virginia Constitution of 1776, was unsuccessful in convincing the assembly to accept a bill of rights before convening. Mason's Virginia Declaration was the nation's first human rights document, the model for all subsequent declarations. He had correctly surmised that the American people wanted individual protection from intrusive governmental acts.¹⁹ Staunch Federalist James Madison sensed the mood of his countrymen and, after conferring with Hamilton and corresponding with rights-supporter Thomas Jefferson in France, drafted the Bill of Rights for Congressional consideration and passage. The ten-amendment addition was accepted by the people and affixed to the Constitution in 1791, two years after the states had approved the original document.²⁰

Following the nation's ratification of the new compact as a cornerstone of law and order, legal challenges in the federal

16. *Id.* at 329-58.

17. See, Gary Will *Introduction*, in *THE FEDERALIST PAPERS OF ALEXANDER HAMILTON, JAMES MADISON AND JOHN JAY* vii-xxvii (Bantam Books 1982).

18. *THE FEDERALIST* NO. 84 (Alexander Hamilton).

19. Albert P. Blaustein and Carol Tenny, *Understanding "Rights" and Bills of Rights*, 25 U. Rich. L. Rev. 411-13 (1991).

20. Peck, *supra* note 15, at 55-82.

structure began to surface. Initially, most of the friction was limited to conflicts over powers exercised by each of the three branches of government. Shortly thereafter, a profound political shock wave was felt in the young country when an *individual* citizen brought suit against a neighboring state in the third session of the new U. S. Supreme Court.²¹ The constitutional framers simply had not planned for a *person* to sue a state in federal court when they crafted the judicial clauses.²² As an afterthought, Congress took immediate action to protect the states' sovereign powers by hurriedly fashioning and adopting the Eleventh Amendment which limits the scope of federal courts in addressing state matters.²³ Thereafter, individual citizens were directed to the state courts for relief in matters lacking a federal question. Challenges to governmental action did not become commonplace until after the Civil War when plaintiffs were aided by the passage of three Reconstruction Amendments,²⁴ the enactment of civil rights statutes,²⁵ and the adoption of new congressional powers limiting the reach of state action.²⁶

The number of persons seeking federal court protection from governmental acts has increased dramatically in this century. This increase was aided by the Supreme Court's development of the "incorporation" doctrine, which applied the Bill of Rights to the states. The Court's application of incorporation through the Fourteenth Amendment was the

21. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

22. "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain . . ." U.S. CONST. art. III, § 1. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made . . . ; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects." U.S. CONST. art III, § 2, cl. 1.

23. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." U.S. CONST. amend. XI. For a history of the amendment and its application in educational matters, see Lawrence Lee Oldaker and David L. Dagley, *The Eleventh Amendment, Its History and Current Application to Schools and Universities*, 72 EDUC. LAW REP. 479, 479-487 (1992).

24. U.S. CONST. amends. XIII, XIV, and XV.

25. See 42 U.S.C. §§ 1971-1981 for the five Civil Rights Acts signed into law between 1866 and 1875.

26. U.S. Const. amend. XIV, § 5.

basis for constitutional analysis in cases involving state statutes which restricted free speech,²⁷ religious expression,²⁸ religious establishment,²⁹ racially segregated schools,³⁰ family privacy and birth control,³¹ and abortion.³² This movement has caused spirited debates between libertarians who support jurists looking to sources outside of the Constitution to enforce unwritten natural rights and others who seek evidence of the framers' original intent in perceiving judicial limits. The more liberal activists press central government agencies for help in protecting perceived natural law rights to life, liberty, property, and especially since the 1960s, the modern law dimension of privacy. Conservative "Originalists" favor limiting judges by citing the plan of the convention and the precise wording of the Constitution and written statutes.³³

While the concept of natural rights permeates American society, the critical issue is how courts identify and authorize unenumerated human rights. In the United States today a conservative Supreme Court under the leadership of Chief Justice William Rehnquist is a highly visible focal point of this debate. The Rehnquist Court demonstrates the propensity for applying conservative interpretations to the law and reversing the holdings of the more-activist Warren and Burger Courts.

This shift in judicial philosophy was evident in the clash of Libertarian-Originalist's values which surfaced during the late-1987 Senate Judicial Committee hearings on the nomination of Robert Bork to the high court. At issue was the candidate's perception of the judicial role when addressing the grievances of individuals against perceived governmental wrongs, thus giving rise to the question of unenumerated natural rights. Judge Bork's nomination was rejected, in part, because of his reservations about incorporating standards of

27. *Gitlow v. New York*, 268 U.S. 652 (1925); see Todd Brewster, *First & Foremost*, LIFE, Fall 1991, at 61; MELVIN I. UROFSKY, *A MARCH OF LIBERTY, A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 642 (1988).

28. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

29. *Everson v. Board of Education*, 330 U.S. 1 (1947).

30. *Brown v. Board of Education*, 347 U.S.483 (1954).

31. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

32. *Roe v. Wade*, 410 U.S. 113 (1973).

33. For superior commentaries on these contrasting concepts, see Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) and Helen K Michael, *The Role of Natural Law in Early American Constitutionalism: Did The Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C.L. REV. 421 (1991).

equal protection not enumerated in constitutional and statutory laws. Bork has said, “[t]he clash over my nomination was simply one battle in this long-running war for control of our legal culture.”³⁴ Later, in 1991, Circuit Court Jurist Clarence Thomas was approved for membership on the Court as successor to retiring justice Thurgood Marshall. Thomas survived the committee’s stern questioning about his views on personal liberties (especially the natural right to privacy and women’s right to obtain an abortion) as expressed in his law school discussions and in his earlier writings.

In spite of the present Court’s pronounced movement to the “right,” its direction remains uncertain because future presidential elections carry the fresh executive’s duty to nominate members to federal benches. Every court has had members near career’s end. Since Justices Byron White, Harry Blackmun, and John Paul Stevens are all over seventy, the next President is likely to replace one or more of the jurists and to redefine the Court’s balance once more.³⁵

III. CONTEMPORARY MOVEMENT TOWARD EDUCATIONAL CHOICE

In our nation’s educational systems, there exists an enormous enterprise actively involving more than half of the nation’s population, including such broad categories as students, parents, employees, and governors of school policies. To add to the complexities of this diverse involvement, aside from that of interested taxpayers and private fund supporters, each level of public or private, scholastic or collegiate organization has its own distinctive client-interest groups. Unifying all of these interests in promoting change in education, for whatever purpose, has defied the efforts of reformers for decades.

Researchers John Chubb and Terry Moe found the institutions of educational governance at fault for not solving educational problems because “they are also fundamental causes of the very problems they are supposed to be solving.”³⁶ After reviewing how students learn in school, Chubb and Moe ranked three factors that influence achievement in the classroom: (1) student ability, (2) school organization, and (3)

34. ROBERT BORK, *THE TEMPTING OF AMERICA* 2 (1990).

35. *The Talk of the Town*, *THE NEW YORKER*, July 13, 1992, at 23-24.

36. John E. Chubb and Terry M. Moe, *The Root of the Problem*, in *POLITICS MARKETS & AMERICA’S SCHOOLS* 18 (The Brookings Institution ed., 1990).

family background.³⁷ The selection of the second factor (school organization) as the major focus in proposing educational reform heightened national interest in how society delivers services to children. Specifically, the attention directed at the quality of school structure suggested that allowing them to compete for demand would nourish the best, foster innovation, and inspire the whole—a notion Nobel laureate economist Milton Friedman advanced nearly forty years ago. Friedman thought schools were better in the past when parents had more influence in classroom matters. He maintained that his “voucher plan” would have broken the monopolistic role of government in financing and managing the growing public school network. The economist favored giving all families the same control over their children’s schooling that affluent families enjoy by providing them with a choice of school programs and a voucher to defray the cost of educational services.³⁸ These concepts appear to be reflected in a recent Gallup/Phi Delta Kappa poll indicating that Americans overwhelmingly support school choice, national testing, and radical reform measures as means of attaining higher scholastic standards.³⁹

Commentators are skeptical of these reform measures. Specifically, Michael Fullan and Matthew Miles claim that few educational policy makers really know what the change process means.⁴⁰ Little change has occurred since the mid-80s with the exception of advancing the privatization concept. To spur the nation to combat ignorance, discomfort, and other educational maladies, Chester Finn proposed reform to get us out of the “dumbth,” a word he coined to define a new and unprecedented form of mental incapacitation which threatens to swamp our efforts to restore a competitive, spirited, and rational society.⁴¹ Finn’s urgency suggests the need for forceful measures and reminds that all revolutions are disruptive, though not all revolutions are necessarily violent.⁴²

This call for revolutionary action to improve schools was furthered by President Bush when he stated: “To those who

37. *Id.* at 140.

38. ROSE AND MILTON FRIEDMAN, *FREE TO CHOOSE* 155-188 (1990).

39. Dennis P. Doyle, *America 2000*, PHI DELTA KAPPAN, Nov. 1991, at 186.

40. Michael G. Fullan and Matthew B. Miles, *Getting Rreform Right: What Works and What Doesn't*, PHI DELTA KAPPAN, June 1992, at 745.

41. CHESTER E. FINN, JR., *WE MUST TAKE CHARGE* 12 (1991).

42. *Id.* at 239.

want to see real improvement in American education, I say: There will be no renaissance without revolution. We who would be revolutionaries must accept responsibilities for our schools. It's time we held our schools—and ourselves—accountable for results."⁴³

After setting the nation's sights on the six ambitious national education goals, President Bush addressed the centerpiece of "America 2000" by hinting that parents have natural rights and these rights include school choice. President Bush stated

We can encourage educational excellence by encouraging parental choice. The concept of choice draws its fundamental strength from the principle at the very heart of the democratic idea. Every adult American has the right to vote, the right to decide where to work, where to live. *It's time parents were free to choose the school that their children attend.*⁴⁴

At face value, this last statement seems to claim a "natural" right to privacy for parents to select the manner in which they raise children and prepare them for the world of work, an ideological return to an English common law theme. Should this claim become a serious consideration; is educational choice one of these natural rights? The President's legislative proposals to the Congress did not expand this line of reasoning. As school choice measures are being considered in Congress and in state legislatures, it is uncertain if the nation's parents and guardians have embraced the unenumerated right that has been suggested is theirs. Regardless of the political issue of rights, some commentators⁴⁵ contend that individual choice may have positive consequences.

U. S. House of Representatives Bill No. 4324, the Neighborhood School Improvement Act, is similar to Senate Bill No. 2. Both of these Bush Administration proposals, in part, requested funds to establish America 2000's "535 lighthouse schools" and to provide incentive money to demonstrate the effectiveness of educational choice programs involving private schools. Congress favored much broader reforms than those of merely assisting one school system in each congressional district. Senate and House action on the measures specifically deleted

43. DEPARTMENT OF EDUC., AMERICA 2000, AN AMERICAN STRATEGY SOURCEBOOK 3-4 (1990) (President Bush's Remarks).

44. *Id.* at 5-6 (emphasis added).

45. Mark G. Yudof, et al., Educational Policy and the Law 427 (1992).

monetary requests for choice programs that included private schools. It is clear that there is a willingness to debate the issue of choice, and it will continue to be hotly contested within the Washington Beltway as well as in each state.⁴⁶

Education Secretary Alexander, who supports America 2000 proposals with bedrock conviction, has professed that private school choice, admittedly a controversial issue, will soon become an accepted fact of national life. In noting Alexander's resolve, however, researcher George Kaplan conducted a prolonged and fruitless search to find a trace of Alexander's past allegiances to choice, either as governor or university president.⁴⁷

Paul Jung, president of the American Association of School Administrators, criticized the narrow political agenda of vouchers and testing as a prelude to a national curriculum, a potential that will surely arouse contemporary antifederalists embracing the Constitution's Tenth Amendment reserve powers clause. Equally skeptical of the administration's proposal, veteran urban educator Judith Harper suggested that voucher plans would perpetuate existing inequalities and be especially hurtful to inner-city children and minorities that would have few true schooling alternatives from which to choose. Harper singled out the ones operating in Milwaukee,⁴⁸ the first educational choice plan to involve non-public schools and to be challenged in court.

Milwaukee parents challenged Herbert J. Grover,⁴⁹ Superintendent of Public Instruction of the State of Wisconsin, because he was perceived to be frustrating the legislative will to implement the Milwaukee Parental Choice Program (MPCP), which would permit children from low-income families to attend nonsectarian private schools. According to the Wisconsin statute, the MPCP would create public funding for kindergarten through twelfth grade children from low-income families residing within the Milwaukee city limits to attend any nonsectarian private school in the city at no charge to the student. Each child was to receive a tuition grant limited to \$2,500 while attending an approved private school, if the enrolling institution demonstrated that it met at least one of the following standards: (1) it had at

46. John F. Jennings, *Major Education Bills in Congress*, PDK LEGISLATIVE NEWSLETTER, Jun 1992, at 3-4.

47. George Kaplan, *Lamar Alexander and the Politics of School Reform*, PHI DELTA KAPPAN, June 1992, at 754.

48. Judith A. Harper, *Where in the World Is Lamar Alexander?*, PHI DELTA KAPPAN, June 1992, at 762-3.

49. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992).

least 70% of the pupils in the program advancing one grade each year, (2) it had an attendance of 90% or more for the participating program students, (3) it had at least 80% of the program pupils demonstrating significant academic progress, or (4) it had at least 70% of the families of pupils in the program meet parent involvement criteria established by the private school. Further stipulations regulating participation in the MPCP addressed family income level, residency, public school membership prior to participation, health and safety code compliance, and nonsectarian private school assurances of nondiscrimination.⁵⁰ The program was acknowledged to be experimental, limiting membership to 1,000 pupils at a cost of \$2.5 million to the State of Wisconsin. Each private school could enroll no more than 49% of its students from the MPCP.⁵¹

The Wisconsin Supreme Court realized the importance of the MPCP to the state and its significance to the nation as well. In crafting judicial approval of the choice plan, the court displayed a degree of pride in Wisconsin's "innovation and willingness to lead the nation in its attempts to further improve the quality of education and life."⁵² The decision turned aside charges (1) that the MPCP violated state constitutional private/local legislation clauses by embracing more than one subject;⁵³ (2) that the MPCP's participating nonsectarian private schools violated the state's school uniformity clause that ensures comparable equity among the public schools,⁵⁴ and (3) that the experimental program lacked a public purpose.⁵⁵ In concluding that the Milwaukee choice program passes constitutional scrutiny in all issues, the opening and closing sentences of Justice Ceci's concurring opinion indicates the tenor of the court's decision. He said, "Let's give choice a chance!"⁵⁶

IV. THE NINTH AMENDMENT AND OTHER CONSTITUTIONAL QUESTIONS

Despite sustained criticism that the reform effort is not a single panacea to public school ills,⁵⁷ the Milwaukee educational

50. *Id.* at 463.

51. *Id.* at 464.

52. *Id.* at 462-63, n. 2.

53. *Id.* at 465-73.

54. *Id.* at 473-4.

55. *Id.* at 474-7.

56. *Id.* at 477-8.

57. Julie K. Underwood, *Choice is Not a Panacea*, 71 ED. LAW REP. 599 (1992).

choice plan has been given a chance. In light of this, several issues must be addressed. Does education qualify for fundamental protection under federal constitutional law? Will the Federal Constitution's Ninth Amendment unenumerated rights powers grant legitimacy to school choice plans? Should choice in schooling be viewed as an emerging Ninth Amendment issue, how will education coexist under other constitutional amendments? These questions must be examined in light of the Supreme Court's decisions concerning present day school operations.

Social fervor surrounding the identification and requested enforcement of natural school rights appears more intense in some eras and less important in others. Although there is a current, pronounced willingness by individuals to press central governmental agencies for help in seeking protection of these perceived natural rights, few have advanced the theory that education is such an unenumerated right. Unspecified rights are difficult to identify, analyze, and apply to general populations, especially when human behaviors differ so widely. One precept maintains that substantive due process or rights protected under the Ninth Amendment, not expressly found in the literal words of the constitution, must be widely recognized in our history and basic values. A federal district court in Kentucky ruled that the right to a free, public education was not such a fundamental right rooted in history. The court's reasoning went on to speculate that a state could even abolish its school systems, if done in a nondiscriminatory manner.⁵⁸ In expressing skepticism about the fundamental nature of education, Barbara Stengel openly confessed an absence of "love for the natural law/natural rights theory in general and certainly no sense that there is, in any way, a right to education apart from particular social and legal circumstances." However, she proceeded to structure an analysis of "right to education" as an often-used and an equally-understood phrase reflecting a manner of speech and a description of subjective, personal experiences.⁵⁹

Apart from the comment by President Bush⁶⁰ supporting the possibility of school choice being a natural and sheltering right, in 1984 Chester Nolte advanced a theory that, in the future, students may have a "right to know" included in the

58. *Petrey v. Flaughner*, 505 F. Supp. 1087 (D.C. Ky. 1981).

59. Barbara Senkowski Stengel, *JUST EDUCATION, THE RIGHT TO EDUCATION IN CONTEXT AND CONVERSATION* 4-5 (1991).

60. DEPARTMENT OF EDUC., *supra*, note 43.

unenumerated rights protected by the Ninth Amendment of the Constitution.⁶¹ Nolte referred specifically to the *Tinker* acknowledgment that students are “persons” under the Constitution.⁶² He further speculated that they may obtain court protection in receiving instruction and selecting written materials as a part of their right under Justice Douglas’ penumbra theory,⁶³ an unexplored aspect of constitutional law until the Supreme Court broached the topic in 1965.

Virtually ignored in the first two hundred years of U.S. Constitutional law, the Ninth Amendment was first given effect in *Griswold v. Connecticut*,⁶⁴ an opinion that overturned a Connecticut statute as an unconstitutional invasion of marital privacy. In the opinion of the court, and somewhat aside from the topic under appeal, the constitutional importance of education was affirmed. Justice Douglas stated

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or language. Yet the First Amendment has been construed to include certain of those rights. By *Pierce v. Society of Sisters*, the right to educate one’s children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, the same dignity is given the right to study the German language in private school. In other words, the state may not, consistently with the spirit of the First Amendment, limit the spectrum of available knowledge.⁶⁵

A concurring opinion in *Griswold* written by Justice Goldberg and supported by Chief Justice Warren and Justice Brennan, completed the first identification of ninth amendment constitutional rights.

My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court’s opinion, and by the language and history of the Ninth Amendment . . . I add these words to emphasize the relevance of that Amendment to the

61. Chester Nolte, *The Student’s Need to Know What is Out There: An Emerging Ninth Amendment Right*, 15 EDUC. LAW REP. 1043 (1984).

62. *Id.* at 1045.

63. *Id.* at 1047-49.

64. 381 U.S. 479 (1965).

65. *Id.* at 482.

Court's holding: The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.⁶⁶

In continuing the judicial exploration of the *Griswold* theme, a 1972 Supreme Court ruling extended the penumbra of the Ninth Amendment to protect the sexual privacy of unmarried couples.⁶⁷ This ruling caused critics to complain that the high court improperly expanded the sanctity of the marital bedroom into a general right to shelter sexual relations for unwedded couples as well.⁶⁸ The most widely discussed privacy rights ruling occurred one year later as the Court's majority extended the protection to include the right of women to terminate their pregnancy by surgical abortion. Fewer rulings in the history of American jurisprudence have generated as much fervent and widespread controversy as *Roe v. Wade*.⁶⁹ It confronted deeply religious and highly personal convictions.

Setting aside the flag-burning confrontations, *Roe* may be second only to the *Brown* school desegregation in social impact and comparable to the school prayer curbs in *Murray*.⁷⁰ Further, *Roe* was the high water mark of the privacy rights decisions and has been embraced by liberal activists but denounced by the more conservative legal scholars. Its full "liberty" application has been limited by subsequent rulings,⁷¹ yet it has not been completely overturned by the Rehnquist Court in the face of strong criticism by Justice Scalia⁷² and vocal critics not seated on the Court.

Applying fundamental rights to protect privacy rights in the sex-related cases discussed above did not afford protection for a Georgian who engaged in homosexual sodomy⁷³ within the confines of his bedroom. In the opinion of the court, the reach of

66. *Id.* at 486-89.

67. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

68. *Peck*, *supra* note 15, at 302.

69. 410 U.S. 113 (1973).

70. Harry H. Wellington, *Interpreting the Constitution* 114 (1990).

71. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 U.S.L.W. 2276 (CA 3 No. 90-1662) (Oct. 21, 1991).

72. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (Scalia, J., concurring).

73. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

the freedoms established in the *Pierce* and *Meyer* educational cases and the *Griswold-Eisenstadt-Roe* trilogy bore no resemblance to the constitutional claim of homosexuals seeking protection to engage in acts of sodomy.⁷⁴ Three justices in strong dissent claimed the case was not about “a fundamental right to engage in homosexual sodomy” as the Court declared; rather, the case was about “the most comprehensive of rights and the right most valued by civilized men, namely, ‘the right to be let alone.’”⁷⁵

The recent decisions of the Court indicate a growing majority of the members sitting on the present Court are beginning to limit the incorporation of “liberty” interests and privacy rights as a standard to be applied by federal courts in judging state action, thus leaving petitioners to seek protection within the liberties expressed in their state constitutions. The expansive judicial role attractive to activist judges eager to apply unenumerated rights to contemporary issues before the courts may be diminishing. The problematic task of identifying those rights remains.⁷⁶

Beyond the decreasing chances of asserting a Ninth Amendment natural rights claim to education or school choice, further considerations should be directed to state laws. Since the Tenth Amendment was also intended to operate in tandem with the Ninth to protect the unenumerated rights of the states and their people against federal encroachment,⁷⁷ state governments which operate public systems through their executive branch are the logical place to seek favor in requesting the desired school program. Since the U.S. Constitution fails to mention public education as an explicit duty of the federal government, the operation of schools has always been relegated to the states. All states have “incorporated in the education articles of their constitution that part of republican theory which holds education essential to self-government”⁷⁸] States have assumed the duty to educate in their constitutions and have assumed the

74. *Id.* at 190-9.

75. *Id.* at 199 (citing the dissenting opinion of Justice Louis Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928)).

76. For further readings regarding Ninth Amendment history, see Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990); Sol Wachtler, *Judging the Ninth Amendment*, 59 FORDHAM L. REV. 597 (1991).

77. Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implication for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1239 (1990).

78. Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 97-98 (1989).

practical financial responsibility for schools as well.⁷⁹

It is important to note, in reflecting on Federalist philosophy, that several states had constitutional documents guaranteeing citizen rights prior to the Philadelphia constitutional convention. Perhaps the founders had visions of states solving their provincial issues when structuring our system of federalism in the constitution. As the protectionist shadow of the Supreme Court lessens, state law emerges as an important legal area to seek protection for individual rights and responsibilities.

V. CONCLUSION

Natural, self-preserving behavior that protected pre-literate families was important for survival. With the growth of organized communities, many of these individualistic forms of protection were discarded or willingly surrendered to a sovereign power. Compacts that were created to address social and economic needs reflected on the roles of those leaders responsible for the care of others and the rights of individual members within the community. Although societies vary greatly, most have retained elements of natural rights for personal protection, growth, and survival. The issue of natural rights and laws, considered to be essential in sustaining life, continually surfaces when individuals feel threatened by the actions of others or by the governing body. Our federal constitution, as well as the written compact in each state, specifies certain rights and responsibilities that regulate behavior within the commonwealth. From time to time an issue will surface that is not expressly covered among the list of safeguards that protect individuals. When this happens, those claiming shelter from intrusive action may claim a fundamental or natural right as a shield from perceived harm.

Parents raising their children and providing for their education become upset when schools, for whatever existing or imagined reasons, conflict with or fail to satisfy family objectives. The current tumult surrounding public education demonstrates widespread dissatisfaction. Increasing numbers of households with children in school are resentful of the slow progress of reform measures to attain increased academic achievement and financial efficiencies. Although private schools have been in

79. *Id.* at 98.

operation since colonial days, the use of non-public schools as leverage to force public school improvements has created heated controversy. Responding to public school critics, a growing number of governmental officials have proposed a plan for educational choice that includes financial support for any student to attend a non-public as well as a public school.

Reflecting on an early common law heritage, we are now forced to consider whether natural or fundamental rights to liberty and privacy form the basis of a successful constitutional claim of support for the educational choice plans being considered in Congress and in state legislatures. A review of judicial trends that incorporate Bill of Rights protection in state action and that acknowledge the existence of unenumerated constitutional rights suggests that federal intervention in state matters is decreasing. The current judicial posture under federal laws leads to the conclusion that students do not have a natural right to education, nor do their parents have a natural right to school choice. The attractiveness of Ninth Amendment doctrine does not support either proposition. This element of federalism relegates questions of public education and the issue of school choice to the states, both through the expressed design of the Tenth Amendment and the inclusion of education as an innate function of the state legislatures. The first school choice plan to be challenged rightfully appeared in a state court system, where state constitutional and statutory laws were weighted relative to the specifics of the choice plan. The precise wording of each state constitution and its applicable statutes appears to be the reference point in evaluating the merits of educational choice programs as a means of bringing about meaningful public school reform.