# The "Fundamental" Parental Right


by Antony Kolenc

In 2014, the United States Supreme Court refused to hear the final appeal of Uwe Romeike and his family, the homeschoolers who fled Germany in 2008 to avoid financial penalties, potential jail time, and the loss of their children to foster care—all due to their decision to educate their children at home. The German government does not believe parents possess a "fundamental right" that gives them the authority to educate their own children as they see fit.

Facing German oppression solely because of their homeschooling, the Romeike Family made the exodus to the shores of the United States (U.S.) seeking asylum. Instead, they found an American immigration system that did not want them. Denied asylum in the immigration courts, the Romeike's took their case to federal court, only to find a stone wall of opposition under President Obama's Department of Justice (DOJ).

Homeschool advocates decried Obama's refusal to help the family. But even more startling was the position the DOJ took in the case. Its legal briefs indicated that the Obama Administration did not believe a parent's decision to homeschool is so "fundamental" that it should be given special protection. Some homeschoolers saw this as more evidence that the Administration sought to erode the rights of U.S. parents. Then, in an unexpected reversal —after DOJ had won its battle in the courts—the Department of Homeland Security "deferred" the Romeike's deportation, allowing them to stay "indefinitely" in the U.S.

Thankfully, the right to homeschool in America is backed in the courts by a strong "fundamental" right with a distinguished and accepted legal pedigree.

*The Parental Right and "Natural Law"*

What is the source of your parental rights? You conceived your children and gave them life, chose to carry them to their birth, nurtured them as infants, sacrificed for their growing needs, and lavished them with unconditional love. So it would seem that, as a matter of Natural Law, parents have a cherished and sacred right to raise their children as they see fit.

Natural Law views certain rights as so sacred that no government has the ability to infringe them. In the *Declaration of Independence*, Thomas Jefferson referred to these as "the Laws of Nature and of Nature's God," and he announced, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." These are three natural rights we accept because of their connection to the American Revolution. Though not listed in the *Declaration*, the right of parents to raise and educate their children—the "Parental Right"—flows from the same wellspring.

Indeed, the Parental Right has been one of the most accepted natural rights throughout human history. It is woven into the fabric of Sacred Scripture, and has been so revered that it has gone virtually unchallenged for millennia. The rights of a father and mother have historically been enshrined in the laws that form the basis of Western society. For that reason, homeschool advocates argue that the Parental Right is contained within the Ninth Amendment, which recognizes that "the people" possess "other" natural rights that are not specifically enumerated in the U.S. Constitution.

*The Supreme Court Speaks*

Unlike in Germany, the highest court in the United States has spoken authoritatively on this topic in favor of the Parental Right. As early as 1923, in *Meyer v. Nebraska*, the Supreme Court said that Americans had a "fundamental" right to "marry, establish a home and bring up children[, and] … give [their] children education suitable to their station in life…."1 Two years later, the Supreme Court confirmed this view.2 Over the next 80 years, the Court from time to time mentioned this "fundamental" parental liberty interest.3

In the year 2000 a divided Supreme Court called the Parental Right "the oldest of the fundamental liberty interests recognized by this Court," and confirmed there is a "constitutional dimension to the right of parents to direct the upbringing of their children."4 Thus, U.S. homeschoolers have a strong basis to believe that parents have a fundamental right to educate their children.

*The Role of Government*

Homeschoolers in the United States should feel secure in their rights as parents. But they must also recognize that the Parental Right does not exist in a vacuum.

American courts have recognized the government's power to protect children as "*parens patriae*"—a Latin phrase meaning "parent of the country." The Supreme Court has affirmed the "power of the state" as *parens patriae* to place "reasonable regulations" on a child's education.5 It has also explained that the State "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare, [including] to some extent, matters of conscience and religious conviction."6

Due to this trade-off between the State and parents, courts often feel they must balance the interests of both sides when an issue arises. To fully grasp the Parental Right, then, we must understand how judges think about the issue.

*Strict Scrutiny*

We live in a constitutional democracy where the Majority votes for its leaders and holds them accountable at the ballot box when they act against the will of the people. Courts do not want to strike down laws passed by the Majority unless they have good reason to do so. For that reason, judges often look at a law and merely ask whether it is "rational." If the government has a rational reason for passing a law or taking an action, then the court is likely to uphold it.

But courts are less cooperative when the State interferes with a fundamental right. For instance, because the Supreme Court considers the right to Free Speech to be fundamental, it "strictly scrutinizes" laws that censor speech. The only way a law can survive this "Strict Scrutiny" is if the government has a "compelling" interest in regulating that right. Think of it this way: if the State's "rational" reason must be at least 50% strong, then its "compelling" reason must be at least 95% strong.

The good news for homeschoolers is that most courts view the Parental Right as "fundamental." Thus, the

power of Strict Scrutiny should serve as a strong future protection against any potential attempts by the government to destroy the right to homeschool in America.

*The Guaranteed Right to Homeschool*

Homeschooling is legal everywhere in the United States. Indeed, U.S. homeschoolers may enjoy the world's greatest freedom to educate their children. Should that right come under future attack, homeschooling advocates believe the right to rear and educate their children will be protected by the courts at the highest level—Strict Scrutiny. There is good reason for this belief.

The Supreme Court has repeatedly called the Parental Right "fundamental," even though it has never technically ruled that Strict Scrutiny must be used whenever that right is impacted. In one of the most recent cases involving this issue, every Justice on the Supreme Court acknowledged the importance of the Parental Right. And Justice Clarence Thomas argued that courts should use Strict Scrutiny *every time* the government interferes with that right.7

The Romeike Family, unfortunately, did not have a German court system that protected their fundamental rights as parents. But in America, in light of our precedent on this issue, lower courts assume that parental rights deserve special treatment. That is exactly what a California court did in 2008 when it used Strict Scrutiny to examine that State's homeschooling law.8 And should the right to homeschool come under fire in the future, U.S. courts will closely examine State homeschooling laws under a heightened level of scrutiny.

We, as American homeschoolers, can thank God that our "fundamental" legal right to homeschool is secure and thriving. And the Romeike Family is no doubt grateful for their "indefinite" reprieve from deportation. But we must continue to pray and work so that families around the world can educate their children in peace in their own native lands.

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1. *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923). The case involved a post-World War I appeal from a teacher being criminally prosecuted for teaching German to a student in a Lutheran school, in violation of a Nebraska "English-only" law. A unanimous Court ruled against Nebraska, finding no "reasonable relation" to any competent state interest.

2. *See Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Oregon had passed a statute requiring children to be educated in public school—a law that would have shut down all primary private schools in the state. A unanimous Court struck down the law, declaring, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

3. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In *Prince*, the Court upheld the conviction of a Jehovah's Witness whose minor daughter distributed religious pamphlets on the street in violation of child labor laws. In *Prince*, the Court said, "[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Thirty years later, the Court reiterated this idea in *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.'").

4. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). In that case, a Washington court had granted visitation rights to the grandparents of two young girls, despite objections by their custodial mother. The Court overturned the order, ruling that it "violated her due process right to make decisions concerning the care, custody, and control of her daughters."

5. *Pierce*, 268 U.S. at 536.

6. *Prince*, 321 U.S. at 166-69.

7. *See Troxel*, 530 U.S. at 57. Justice Clarence Thomas was the only justice arguing for strict scrutiny.

8. *See Jonathan L. v. Super. Ct. of Los Angeles County*, 81 Cal. Rptr. 3d 571, 592 (Cal. Ct. App. 2008).