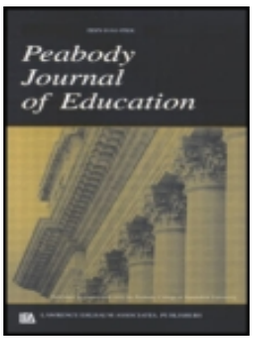

Peabody Journal of Education

ISSN: 0161-956X (Print) 1532-7930 (Online) Journal homepage: https://www.tandfonline.com/loi/hpje20

# Tolerance and Liberty: Answering the Academic Left's Challenge to Homeschooling Freedom

Michael Farris

**To cite this article:** Michael Farris (2013) Tolerance and Liberty: Answering the Academic Left's Challenge to Homeschooling Freedom, Peabody Journal of Education, 88:3, 393-406, DOI: 10.1080/0161956X.2013.798520

**To link to this article:** https://doi.org/10.1080/0161956X.2013.798520

PEABODY JOURNAL OF EDUCATION, 88: 393–406, 2013

ISSN: 0161-956X print / 1532-7930 online
DOI: 10.1080/0161956X.2013.798520

Routledge
Taylor & Francis Group

# Tolerance and Liberty: Answering the Academic Left's Challenge to Homeschooling Freedom

Michael Farris
*Home School Legal Defense Association and Patrick Henry College*

Millions of children in the United States are educated in the home. Millions more receive their education from private institutions. For parents, a common reason for seeking alternatives to public education is the desire to ensure that they receive instruction in accord with their religious beliefs. In many cases, these beliefs include exclusive claims about the nature of God, salvation, or morality. Recently, several scholars have argued that, to achieve a diverse and tolerant society, homeschooling and private education should be abolished or severely limited. They have contended that "a liberal multicultural education," which will expose children to different ideas and perspectives, is necessary for the preservation of democratic values. Homeschooling, they claim, leads to close-mindedness and intolerance because children are taught to affirm certain beliefs which imply that not all other traditions are equally valid. The argument that homeschooling should be banned or severely restricted, however, relies on illiberal and intolerant premises that have already been discredited as inconsistent with our constitutional liberties. Although tolerance may be a valuable objective, it cannot be forcibly imposed by using the state's power to create philosophical homogeneity. True tolerance and diversity require a constitutional commitment to liberty for all, not a "constitutional norm" of silencing the "intolerant."

> Furthermore, since they did not think it worthwhile to retain the knowledge of God, he gave them over to a depraved mind, to do what ought not to be done. They have become filled with every kind of wickedness, evil, greed and depravity. They are full of envy, murder, strife, deceit and malice. They are gossips, slanderers, God-haters, insolent, arrogant and boastful; they invent ways of doing evil; they disobey their parents; they are senseless, faithless, heartless, ruthless. Although they know God's righteous decree that those who do such things deserve death, they not only continue to do these very things but also approve of those who practice them. (Romans 1:28–32, NIV)

This passage of Scripture was central to the reason that in 1982, my wife and I chose to homeschool our children. Public schools, we believed, had not retained the knowledge of God—but were required by law to exclude God from all aspects of education. We have never believed that other parents were bound by our reasoning because both theologically and politically we are advocates of the doctrines of free will and personal responsibility. But for ourselves, we took seriously the idea that there would be significant moral consequences in the lives of our own children if we

Correspondence should be sent to Michael Farris, 1 Patrick Henry Circle, Purcellville, VA 20132. E-mail: michaelfarris@hslda.org

excluded God from their acquisition of knowledge. Simply put, we wanted our children to receive a forthrightly Christian education.

We believe other core principles of Christianity. We taught our children that when Jesus said, "I am the way, the truth, and the life. No one comes to the Father except through Me" (John 14:6), that He was necessarily saying that there are no other paths to God. All other religions are in error and will not lead anyone to God. We taught our children that having sexual relations outside of a marriage between one man and one woman is immoral. These beliefs lead to conclusions that are not popular today. Many would consider their very articulation to be an expression of intolerance. Despite their potential to give offense to others in today's culture, our belief that the Bible is true compelled us to teach our children these truths without alteration or dilution. We have not just taught our children these ideas during Sunday worship exercises; we have blended this kind of moral and biblical instruction into every aspect of the life of our family, including the academic instruction that our children receive through home education.

No one should think that we have spent an enormous amount of time on the subject of the sexuality during our children's upbringing. It has been an exceedingly rare point of discussion usually triggered by topics such as political events or court challenges. However, teaching that Christianity is the only religion capable of leading one to God has been a regular occurrence in our home.

We are not the only family who believes and teaches these principles. As we begin our 32nd year in home education (our oldest child is 37 and the youngest is 16) and after being a national homeschooling leader for nearly all of that time, my observation is that roughly two thirds of American homeschooling families share the basic convictions that I have just related (Bielick, 2008; Murphy, 2012, pp. 22–23). Evangelicals and Catholics who are devout in their faith and who take the Word of God quite seriously comprise the strong majority of all home-educating families (Murphy, 2012).

Although the law regulating homeschooling has moved dramatically in the direction of freedom (Buss, 2012, p. 69), there are a growing number of academic critics who are calling for serious curtailment of the freedom to homeschool (Fineman, 2009; C. Ross, 2010; Yuracko, 2008). As we see in detail later, the theme of these criticisms is the claim that Christian homeschooling teaches children to be intolerant. Yet it will be clear that these advocates of tolerance display utter intolerance of Christian homeschoolers like me.

This article examines the claims of these "voices for tolerance." I suggest that a commitment to liberty, human rights, real tolerance, and the Constitution of the United States requires every thinking person—not just homeschoolers or Christians—to reject these hypocritical calls from a certain sector of the academic community who seek to curtail the freedom of Christian home educators.

## THE CLAIMS OF THE CRITICS

> Many liberal political theorists argue, however, that there are limits to tolerance. In order for the norm of tolerance to survive across generations, society need not and should not tolerate the inculcation of absolutist views that undermine toleration of difference. Respect for difference should not be confused with approval for approaches that would splinter us into countless warring groups. Hence an argument that tolerance for diverse views and values is a foundational principle does not conflict with the notion that the state can and should limit the ability of intolerant homeschoolers to inculcate

> hostility to difference in their children—at least during the portion of the day they claim to devote to satisfying the compulsory schooling requirement. (C. Ross, 2010, p. 1005)

This call for intolerance to achieve tolerance is rather extraordinary, and obviously self-conflicted. C. Ross (2010) is far from being the only member of academia who is calling for the limitation of homeschooling liberty. As I show, C. Ross is joined by other scholars who urge government to exercise far greater control over private and home education in order to regulate its philosophical content.

The loudest voices have begun to call for the outright banning of homeschooling and private education to achieve the philosophical homogeneity that they believe is demanded by a commitment to diversity. In other words, these scholars propose that, in order to achieve tolerance, our society must be intolerant of Christian homeschooling. They contend that, if we are to have diversity, we must have educational homogeneity by banning unorthodox approaches. These are self-contradictory objectives.

One of the most strident critics of Christian home education is Kimberly Yuracko, professor of law (and former Interim Dean) at Northwestern University School of Law. Her 2008 article "Education Off the Grid: Constitutional Constraints on Homeschooling" begins its analysis with a fictitious family:

> Ann and Bob Smith are a devoutly religious couple who choose to homeschool their seven-year-old twins Susan and Sam. In accordance with their religious beliefs, they teach their children only religious doctrine, refusing to provide their children with a basic education in reading, writing and arithmetic. (p. 124)

In 30 years of defending homeschooling families, I have never encountered or even heard of such a family. Very religious families, including my own, want their children to be highly literate. Just think of the literacy level it takes to read and comprehend the King James Version of the Bible (a very popular choice among homeschoolers). The idea that Christian homeschoolers want to deprive their children of the ability to read or write (or other basics) is simply unfounded, as the research base shows "religious" homeschooled students to be performing well above average in all academic areas (Murphy, 2012, Chapter 7; Ray, 2010).

It is reasonable to question any conclusions that Yuracko (2008) made, as she based her arguments upon a faux homeschooling family that she did not document with either factual anecdote or scholarly research. Yuracko's contention that Christian homeschooling is intolerant is laced with unsubstantiated comparisons with those who advocate polygamy, clitoridectomy, and child marriage. Consider the following by Yuracko (2008):

> Surprisingly, the social and legal implications of this phenomenon have received almost no scholarly attention. For decades political theorists have worried and argued about what steps a liberal society must take to protect children being raised in illiberal communities. They have focused their attention on the extent to which a liberal society must permit or condemn such practices as polygamy, clitoridectomy, and child marriage. Virtually absent from the debate has been any discussion of the extent to which a liberal society should condone or constrain homeschooling, particularly as practiced by religious fundamentalist families explicitly seeking to shield their children from liberal values of sex equality, gender role fluidity and critical rationality. The notable exception among political scientists is Rob Reich. Reich has cautioned that homeschooling in some cases may be incompatible with the state's obligation to ensure that children receive a liberal multicultural education that promotes at least minimal autonomy. He argues that, as a result, "the state must not forbid homeschooling but

> regulate it, and strictly enforce such regulations, so as to ensure that the interests of the state and the child are met." His argument about state obligation, though, is one of pure normative political theory (what a state should do) rather than one of positive legality (what a state must do). (pp. 130–131)

At some level Yuracko (2008) is correct in claiming that Christian homeschoolers generally reject her view of the world—including her view of "gender fluidity." Yuracko's article "seeks to begin to fill [an] important void" (p. 132) that goes beyond Reich's (as noted by Yuracko) arguments. She contended that there are "constitutional limits that the state action doctrine places on states' ability to delegate unfettered control over education to homeschooling parents" (p. 132). She argued for two principal controls: "First ... states must—not may or should—regulate homeschooling to ensure that parents provide their children with a basic constitutionally mandated minimum education" (p. 132). Second, she argued that "states must check rampant forms of sexism in homeschooling so as to prevent the severe under-education of girls by homeschooling parents who believe in female subordination" (p. 132).

Amid this critique of Christian homeschooling, an interesting legal question creeps in. Yuracko (2008) contended that the Constitution requires states to regulate homeschooling to achieve "a minimum education" (p. 179). This constitutional norm imposes a duty on the state "to ensure that children receive a liberal multicultural education that promotes at least minimal autonomy" (p. 131). This analysis cites neither a constitutional text nor any case law as claimed justification.

It is self-evident that there is no explicit constitutional text that contains any of these requirements. It is also difficult to imagine how such claims can arise from any reasonable interpretation of the relevant constitutional texts. In fact, in *San Antonio v. Rodriquez* (1973), the Supreme Court rejected the idea that the 14th Amendment contains a fundamental right to *receive* public education. The idea that this Amendment (or any other federal constitutional text) contains a mandate on the states to ensure that every child in public, private, and home education *must* be taught a certain brand of philosophical content in their education is entirely without constitutional merit.

Even though the United States Supreme Court rejected the concept that school-funding inequality could be remedied through the 14th Amendment, numerous state courts, such as the Texas Supreme Court in *Edgewood Independent School District v. Kirby*, have reached the opposite conclusion using the dictates of their own state constitutions. This is not a rejection of the Supreme Court's constitutional interpretation by the state courts. As explained by Duquesne University Law Professor Ken Gormley (2006),

> This is an important feature of our federal system, in which state and federal constitutionalism coexist compatibly. The key is as follows: The state provision must not undercut the federal provision. There are no federal Supremacy Clause problems, however, where a state chooses to give its citizens *more* rights under the state constitution, than those enjoyed under the federal charter. The federal Constitution sets the floor, beneath which states may not fall. But a state may always go beyond that floor, and grant more expansive rights under the state constitution. That is precisely what Texas did in the school funding case. (p. 213)

Gormley (2006) argued that state constitutions should be amended to explicitly enumerate education as a fundamental right to ensure that equitable funding for public schools is the rule rather than the exception. But, in the midst of this liberal defense of adequate public school funding, Gormley paused to note that homeschooling "is a wonderful luxury for those who can afford it" (p. 213). There is not the slightest hint of the idea that a fundamental right to an

education goes beyond the duty of the state to provide adequate and equal funding for all public schools within a state. Gormley's review of state constitutional texts on education provides not a whiff of the kind of philosophical mandate that Yuracko (2008) suggested.

In the very same issue of the *Forum on Public Policy: A Journal of the Oxford Round Table* that contains the Gormley article, Vanessa S. Browne-Barbour defends the rights of parents to opt out of public schools including the right to choose homeschooling. She writes, "Although states have the authority to enact compulsory attendance laws, absent a compelling state interest, those laws may not substantially interfere with the parents' fundamental rights, particularly the right to free exercise of their religion" (Browne-Barbour, 2006, p. 377).

Even in the states where there is a state constitutional duty to offer an adequately and equally funded public education, no state constitution contains any provision that bears even a remote resemblance to a "constitutional" imperative that the states must ensure that children receive "a liberal multicultural education that promotes at least minimal autonomy" (Yuracko, 2008, p. 131). No such imperative exists even for the public schools—much less a universal rule that requires prescribed philosophical content to be imposed on all forms of private education.

Any claim that all children must receive a "liberal multicultural education" runs counter to our nation's rejection of the crime of heresy—on any topic. As the United States Supreme Court said in *West Virginia v. Barnette* (1943),

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. (p. 642)

*Barnette*'s key holding was that Jehovah's Witnesses could not be coerced to follow the majoritarian views of their day regarding flag salutes. There is no reason to doubt the applicability of *Barnette*'s reasoning to any claims that liberal multiculturalism is a requirement that must be imposed on all children. Our constitutional view of liberty means that majorities may never impose their philosophical preferences on unwilling minorities.

## OTHER "TOLERANT" OPPONENTS OF LIBERTY

C. Ross (2010, p. 1005) also advocated limiting tolerance in order to preserve tolerance. She made it clear that no tolerance should be shown for intolerant homeschoolers, subscribing to a heretofore-undiscovered "constitutional norm of tolerance" (p. 991). She wrote, "Democracy relies on citizens who share core values, including tolerance for diversity. When parents reject these values, the state's best opportunity to introduce them lies in formal education" (p. 1013). C. Ross continued by writing, "Favoring licensed schools over homeschooling promotes the state's normative goals in exposing children to constitutional values" (p. 1014). By reporting constitutional norms requiring both the practice of tolerance and the teaching of tolerance Ross follows a trend which Justice Scalia observed taking root in the Supreme Court: "The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize" (*Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 1996, p. 711).

C. Ross (2010) urged mandatory instruction in such philosophical presuppositions when she stated, "Public schools at their best offer alternative views of the world that are essential to our constitutional system" (p. 1010). She did not seem particularly interested in achieving anything that resembles philosophical balance within the public schools themselves, adding:

> When parents withdraw their children entirely from the public sphere, children are sheltered from any countervailing messages. Civic messages serve shared social goals and also allow children to choose their own identities as they mature, a step that many parents find threatening no matter what world view they subscribe to, but which traditionalist religious parents are apt to find even more frightening because they sincerely believe that erring children will burn in hell. (C. Ross, 2010, pp. 1006–1007)

C. Ross turned to a most unlikely Supreme Court decision to buttress her claimed constitutional norms—*Meyer v. Nebraska* (1923). She noted,

> When the children of parents who hold absolutist beliefs of this sort attend public school, we hope that they will learn about the civic norms at the heart of the First Amendment. This is unfortunately one of the main reasons their parents remove them from public school. If children hear the message of tolerance in school, they may disagree with the teacher; they may have arguments about it in the cafeteria. Parents of public school students have ample time to counteract and undermine lessons the children have learned in school that conflict with family values. The children are free to accept or reject the views of their parents on the subject. This is part of the balance between family and state that distinguishes our republic from totalitarian regimes such as Plato's Republic and ancient Sparta, as the Court put it in *Meyer*. (C. Ross, 2010, p. 1006)

Of interest, the *Meyer* case arose when Nebraska sought to "foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters" (*Meyer v. Nebraska*, 1923, p. 402). Nebraska did not totally remove children from their parents to be raised by the state. It merely banned any instruction in a foreign language in the private schools prior to high school. Meyer had been charged with a crime for teaching Bible stories in German to elementary-aged students in a Lutheran school. The Supreme Court held that this invasion of parental liberty to make decisions concerning the education of their children was unconstitutional.

The limitations on parental liberty advocated by some of today's critics are far more extreme than those held unconstitutional in *Meyer.* The contention is that government should impose a mandatory philosophical content that would negate the core message of many forms of Christian education. In *Meyer*, the legislature made no attempt to stop the teaching of Bible stories or Lutheran doctrine. It was a simple ban on the language of instruction—but many would argue that the goal of the Nebraska law was philosophical homogeneity for all children in the state.

In this context, the message from *Meyer* was not about unconstitutional means, but unconstitutional ends. "We are constrained to conclude that the statute as applied is arbitrary and *without reasonable relation to any end* [emphasis added] within the competency of the State" (*Meyer v. Nebraska*, 1923, p. 403). Philosophical homogeneity is an unconstitutional goal for any government in this nation.

Critics' proposed solutions involve elaborate philosophical controls on homeschooling through mandated curriculum—although there are more than enough hints that they may be ready to simply ban all forms of private education.

> Imposing curricular requirements about respect for diverse viewpoints will be seen as undermining the most authoritarian conservative homeschoolers—those who believe in an absolute truth which forms

> the basis of the education they provide their children. Unfortunately, the unavoidable counterpart of a belief in absolute truth is that other belief systems are mistaken at best, and at worst, evil. (C. Ross, 2010, p. 1008)

Ironically, C. Ross (2010) contended that tolerance and diversity are such essential "absolute truths" that they must be compulsorily taught to all children. This quote implies that she strongly opposes the practice of parents who impose their absolute values on their own children but apparently sees neither harm nor inconsistency in imposing the her own absolute values on everyone's children.

Tolerance is, of course, not the only value possessed by the individuals in a liberal-democratic society. The difference in values is conceivably unlimited. The fact that rational and independent human beings are capable of professing so many different beliefs certainly justifies a state position of tolerance. It is possible and desirable for a neutral state to tolerate all sorts of religious and philosophical positions. Thus, we conclude, the state should be tolerant.

Some critics, however, see the state as an agent of indoctrination to achieve "a constitutional norm of tolerance." Should a constitutional requirement be imposed upon *the people* to be tolerant? Such a view is intrinsically nonsensical because the constitution is an expression of the people's requirement of the state, not an expression of the state's requirement of the people. In this context, although the state should be tolerant, it cannot require the people to believe in its view of tolerance. To *require* tolerance of the citizens, the state would necessarily have to refuse to tolerate certain beliefs (i.e., all claims to exclusive truth). Citizens *can* require that the state be tolerant. The state, however, can never simultaneously *be* tolerant *and* require tolerance by the citizen. Liberal philosophy not only forbids philosophical indoctrination, it is destroyed by it. Any liberal apostle of tolerance, therefore, will be best served spreading their gospel in the manner of the Twelve—peaceful persuasion—rather than through the apparatus of state power. Tolerance can (and should!) be exemplified, but it can never be enforced in this manner.

Any effort to convince children to reject the Christian worldview of their parents is neither tolerant nor actually promotes philosophical diversity. Diversity efforts often focus on external factors such as race and gender. But there are inherent difficulties in presupposing that all members of a particular race or gender think alike. True diversity is at the philosophical level. The only "constitutional norm" of tolerance that is consistent with true diversity is the existing guarantee of free exercise of religion (buttressed by robust views of freedoms of speech, press, and association). Diversity is not the result of the use of governmental power in education, it is the result of people freely thinking and associating in a constitutional framework of liberty. Our government should neither take sides in philosophical battles nor seek to use mandatory schooling to homogenize all children in the popular philosophy of the day.

Martha Albert Fineman, professor of law at Emory, stakes out an ultimate solution for the problem posed by Christian home education. She wants to ban all private education. "Perhaps the more appropriate suggestion for our current educational dilemma is that public education should be mandatory and universal" (Fineman, 2009, p. 237). She wrote,

> The long-term consequences for the child of being home schooled or sent to a private school cannot be overstated. The total absence of regulation over what and how children are taught leaves the child vulnerable to gaining a sub-par or nonexistent education from which they may never recover. Moreover, the risk that parents or private schools unfairly impose hierarchical or oppressive beliefs

> on their children is magnified by the absence of state oversight or the application of any particular educational standards. (Fineman, 2009, p. 235)

A deep resentment to beliefs that Fineman labeled "hierarchal or oppressive" echoes throughout the writings of Yuracko and C. Ross as well. They are not the first Americans to propose the elimination of private education aimed at rescuing children from "dangerous" philosophies. One prior example is worthy of a closer look.

## OREGON'S 1922 BAN OF PRIVATE EDUCATION

The Grand Lodge of Oregon of the Ancient Free and Accepted Masons, together with the Imperial Council of the Ancient Arabic Order of the Nobles Mystic Shrine, led the efforts to place a ballot measure on the Oregon ballot that would ban all private schools. The Masons had potent allies in this endeavor: "The Ku Klux Klan, the Federation of Patriotic Societies and the Scottish Rite Masons were the only groups that aggressively worked for its enactment" (W. G. Ross, 1994, p. 151). This measure made public education a requirement for all children—creating a de facto ban on private education.

As is customary in states with ballot initiatives, the proponents of the measure were given an opportunity to explain their justification for the legislation in a publication given to the voters of the state. The proponents' official statement for this ballot measure included the following core argument:

- Do you believe in our public schools?
- Do you believe they should have our full, complete and loyal support?
- What is the purpose of our public schools, and why should we tax ourselves for their support?
- Because they are the creators of true citizens by common education, which teaches those ideals and standards upon which our government rests.
- Our nation supports the public school for the sole purpose of self-preservation.
- The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.
- We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.
- Mix the foreign born with the native born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American. (U.S. Supreme Court Records and Briefs, 1832–1978, *Pierce v. Society of Sisters*, 1925, Appendix, pp. 24–25)

Oregon's liberals opposed this bill and the anti-Catholic bias that fueled it. John Dewey himself publicly opposed the efforts of the Masons and the Ku Klux Klan to require attendance of all children at public schools. Dewey argued that the Oregon measure "seems to strike at the root of American toleration and trust and good faith between various elements of the population and in each other" (McGreevey, 1997, p. 120). The President of Columbia University, Nicholas Murray

Butler, denounced the measure, saying, "This bill should be entitled 'a bill to make impossible the American system of education in Oregon.' It is fundamentally un-American" (Holsinger, 1968, p. 333).

Holsinger (1968) contended that these Oregon efforts were part and parcel of the wave of "false patriotism, religious fundamentalism, or national bigotry" (p. 327), which had also led to the efforts to forbid the teaching of German in the public schools of Nebraska, as well as the desire to ban the teaching of evolution in Tennessee. Walter Pierce, the 1922 Democratic candidate for Governor of Oregon, buoyed by support from the Klan and other proponents of the ban on private education, claimed an upset victory over the incumbent Republican candidate who was an outspoken opponent of the Klan (Holsinger, 1968). Like Pierce, the ballot initiative banning private education passed by a sizeable margin in November of that year.

The national outrage against Oregon's action was widespread, especially among intellectuals and the newspaper editors. Holsinger contended that the *Baltimore Sun*'s editorial on the measure "expressed the feelings of many of America's great liberal papers when its editors wrote":

> The school law just ratified by the voters of Oregon is a virtual attempt to Ku Klux education in that state. . . . The Oregon law is a challenge to a religious civil war. It undertakes to deprive parents of the liberty of educating their children in the schools of their own selection, against which nothing can be said except that they generally combine certain features of religious with mental training. It is a reproach to this country that a single state in the American Union should have yielded to this degrading and shameful spirit of bigotry. (Holsinger, 1968, p. 336)

Today, as in Oregon in the 1920s, we must ask if such a policy is consistent with our nation's commitment to individual liberty. Should we create public schools from which there is no escape so that these schools can create "true citizens by common education, which teaches those ideals and standards upon which our government rests" (U.S. Supreme Court Records and Briefs, 1832–1978, *Pierce v. Society of Sisters*, 1925, Appendix, pp. 24–25)? Any campaign to ban all private education for the explicit purpose of inculcation of philosophical homogeneity necessarily proceeds from views that are intolerant of some unpopular religion.

The major difference between that time and now is the relative position of the leadership of the academy. In the 1920s, academia correctly understood that banning private education to achieve philosophical sameness "seems to strike at the root of American toleration." They understood that coercion of this sort was "fundamentally un-American." But today, it is voices from academia that urge employing compulsory attendance laws to achieve philosophical dominance over discrete minorities. Although the number making such claims may be few, the silence of the rest of the academy speaks volumes. Philosophical homogeneity ironically wrapped in the garb of tolerance and diversity is the new and very demanding orthodoxy.

Perhaps the most stirring defense of liberty ever written by the Supreme Court provided the final answer to the bigots of Oregon in *Pierce v. Society of Sisters* (1925). It should also constitute the answer to those who would ban or strongly regulate private schools or homeschooling.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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. (*Pierce v. Society of Sisters,* 1925, p. 535)

The Supreme Court rejected both the means (banning private education) and the end (using uniform education to homogenize children) of the Oregon law. The Court said that using a "general power of the State to standardize its children" is utterly inconsistent with "the fundamental theory of liberty upon which all governments in this Union repose."

Oregon was not the only government that sought to control children's values through education. Europe provides yet another episode in history that demonstrates the illiberal nature of today's anti-homeschooling advocates.

## GERMAN NATIONAL SOCIALISTS, HOMESCHOOLING, AND THE HUMAN RIGHTS RESPONSE

Some brief history is crucial to understanding the origins of the modern international human rights movement and its connection to homeschooling freedom. It is beyond dispute that the Universal Declaration of Human Rights (UDHR), adopted in 1948 by the unanimous vote of the UN General Assembly arose "out of the desire to respond forcefully to the evils perpetrated by Nazi Germany" (Cronin-Furman, 2009, p. 176). The UDHR's view regarding parents and children is no exception to this rule. Article 26(3) of the UDHR proclaims: "Parents have a prior right to choose the kind of education that shall be given to their children." Numerous human rights instruments have been drafted in reaction to "the intrusion of the fascist state into the family" with its goal of seeking "to alienate children from their parents for the purpose of political indoctrination" (Eijkholt, 2010, p. 134).

Germany banned all forms of private education precisely to achieve philosophical unity:

> There was considerable concern among Nazi educational leaders that Protestant and Catholic children had been separated into denominational schools. In the Nazi state "such a division—separation in to different schools according to religious belief—cannot continue. . . . Children should be together in order to understand appreciate the further unit of the community, our *Volk.*" (Pine, 2010, pp. 28–29)

This heritage still impacts the German approach to home education.

> Strains of the nationalistic tendencies of Nazi Germany still infect parts of today's German Republic. Parents no longer have a right to educate their children at home, and procedures for setting up private schools are laborious. In fact, the draconian policies that are on the books in Germany today were originally implemented by Hitler in 1938. (Martin, 2010, p. 228–229)

What is more surprising is that the European Court of Human Rights has also embraced the concept that this pre–World War II German law is "within the margin of appreciation" for a democratic state (*Konrad v. Germany,* 2006).

The rejection of the Nazi view of parents and children was translated from the aspirational articles of the UDHR into the binding provisions of the two core human rights treaties of our era—the International Covenant on Civil and Political Rights (ICCPR; United Nations, 1966a) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR; United Nations, 1966b). Article 18(4) of the ICCPR provides, "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions" (p. 178).

Article 13(3) of the ICESCR repeats and expands on this same theme:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. (p. 8)

Three truths concerning the relationship between the state and parents as it pertains to children emerge from these three instruments that are collectively known as the International Bill of Rights. First, parental rights concerning their children are "prior" to any claim of the state. This rule of priority means that parents come first both in time and in rank. Second, parents have the right to ensure that their children's education conforms to their own moral convictions. Third, parents and others have the right to start schools that are separate from those offered by the state.

I point to these precepts of international human rights law not for the purpose of arguing their direct applicability to the domestic policy of the United States but to further illustrate the hypocritical and illiberal nature of the anti-homeschooling views of some critics.

## FUNDAMENTAL VS. ABSOLUTE RIGHTS

Yuracko (2008) devoted an appreciable portion of her anti-homeschooling article to a critique of a statement that I made in a book written in 1990. I made an argument that homeschooling is an "absolute right." This argument was made in Chapter 5 of my book *Home Schooling and the Law* (Farris, 1990). I was clearly arguing the theory in the alternative. In Chapter 4, I laid out in considerable detail my contention that homeschooling is a proper application of the *fundamental* right of parents to direct the upbringing and education of their children. At the end of Chapter 4, I warned that we needed to place our principal reliance on the traditional fundamental rights doctrine since "no theory which advocates home schooling as an absolute right is likely to prevail anytime soon" (Farris, 1990, p. 51). My argument in Chapter 5 was that when the government invades the "right to believe" it has invaded an absolute right.

Nearly two decades later, I stood before the California Court of Appeal in the oral argument of the case *In re Jonathan L* (2008) and said to the court, "Homeschooling is not an absolute right, but it is a fundamental right." Some might claim that I have grown in my views. Others might say that I have flip-flopped. The truth is that I still believe in an "absolute right" in some contexts and the "fundamental right" theory in others.

If the government attempts to regulate some aspect of homeschooling through mechanisms like teacher's certification rules, home visits, testing requirements, or the required number of hours of instruction, the correct legal theory is the fundamental rights test, which is not an absolute right but is balanced against governmental claims of a compelling state interest. But, on the claims raised by major critics, I would boldly contend that they seek to invade the rarified ground of an absolute right. When the government seeks to dictate to parents the moral and political philosophy that must be taught to their children, the government has stepped over a line that is subject to no balancing test. Government edicts concerning philosophical indoctrination violate the absolute freedom to believe. This is the essence of the argument I made in the 1990 book.

The Supreme Court proclaimed the principle of the absolute right to believe in the seminal case of *Cantwell v. Connecticut* (1940): "Thus the [First] Amendment embraces two concepts, the freedom to believe and the freedom to act. The first is absolute, but in the nature of things, the second cannot be" (pp. 303–304). I previously considered the Supreme Court's pronouncement in *West Virginia v. Barnette.* It is worth another look because it clearly shows that proposals to force Christian homeschooled children to be taught an opposing worldview contravenes an *absolute* constitutional principle.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. (*West Virginia v. Barnette*, 1943, p. 642)

Absolute rights are those that permit no exceptions. Fundamental rights permit those exceptions when the government establishes that the challenged rule is necessary to accomplish a compelling governmental interest and that there is no less restrictive alternative of achieving that same interest. However, the prohibition against government-established orthodoxy is not subject to such a balancing test. The Constitution prohibits all government attempts to prescribe orthodox views in "politics, nationalism, religion, or other matters of opinion" with no exceptions. The views of such critics as Yuracko, Fineman, and C. Ross certainly fall within this proscription.

International Human Rights law buttresses the claim of an absolute right of parents to prohibit any government indoctrination of their child. I have previously considered the dictates of Article 18(4) of the ICCPR (United Nations, 1966a), which guarantees that parents have the right "to ensure the religious and moral education of their children [is] in conformity with their own convictions" (p. 178). The absolute nature of this right is found in Article 4 of this treaty.

Article 4 allows for "derogation" of certain rights in the Convention "in time of public emergency which threatens the life of the nation" (ICCPR, p. 174). But such derogations must be limited "to the extent strictly required by the exigencies of the situation" (ICCPR, p. 174). It takes little imagination to hear some critics contend that the need for tolerance is so fundamental that the failure to ensure every child's inculcation therein indeed threatens the life of the nation. Such an argument necessarily fails because Article 4(2) explicitly proclaims that "no derogation" from Article 18 is ever permitted. This means that even when the life of the nation is threatened, no derogation or exception is permitted from the rule protecting the right of parents to control the religious and moral training of their child. That sounds like an absolute right.

The most severe critics do not propose mere academic regulations of days and hours of instruction, qualifications of teachers or any of the other regulatory issues that would be properly judged under the fundamental rights test. Their goals are to ensure that children's academic instruction reflects their favored philosophy. Both the American Constitution and traditional international human rights law echoes the position that I have taken. The freedom to believe something different from today's orthodoxy is an absolute right.

## CONCLUSION

Augustine executed the Donatists for disagreeing with the local Roman Catholic bishop. To Augustine, schism was unacceptable. All needed to agree (Christenson, 1999, p. 187). Calvin

executed Servetus for his views of believer's baptism and refusal to pronounce Jesus as God the Son though he said He was the Son of God. Diversity of viewpoints was unacceptable (Farris, 2007, see Chapter 8). In the 1920s, Oregon tried to make all of the school children "true Americans" by requiring all children to be indoctrinated by the state-approved philosophy of the public schools. Germany under Hitler enacted education laws to drive a wedge between parents and their children so that the children would embrace the philosophy preferred by the state. The essence of America is a commitment to liberty, not ill-defined tolerance. A commitment to liberty requires a willingness to defend the right of another to disagree with you. Taking away a neighbor's child so that you may instruct him in your philosophical fad du jour is not tolerant in any respect.

The renowned Harvard historian W.K. Jordan revealed the essential requirement for true tolerance and liberty. "It is true that every persecuted sect which holds that it teaches divine truth and follows the divine will maintains that the State cannot justly punish its members for beliefs which are held in conscience" (Jordan, 1965, pp. 258–259). But Jordan (1965) understood that advocates of genuine liberty and tolerance must contend "for the toleration of groups which differ both from them and from the established order" (p. 259). W.K. Jordan, like John Dewey and Columbia's Nicholas Murray Butler, actually believed in liberty. One has to wonder how liberty has become so unfashionable in today's academia.

## AUTHOR BIO

Michael Farris, J. D., LL.M., is the Chancellor of Patrick Henry College and Chairman of the Home School Legal Defense Association. He founded both organizations. Farris teaches Constitutional Law and Public International Law at PHC. Farris is an experienced appellate advocate having argued before the United States Supreme Court, seven United States Courts of Appeals, and the appellate courts of 12 states. Farris received his Juris Doctorate (with honors) from Gonzaga University where he was Articles Editor of the law review and moot court champion. Farris earned an LL.M. in Public International Law (with honors) from the University of London. For his work in home education he was named by Education Week as one of the Top 100 Faces in Education of the 20th Century.

## REFERENCES

Bielick, S. (2008, December). *1.5 million homeschooled students in the United States in 2007*. Washington, DC: U.S. Department of Education, National Center for Education Statistics. Retrieved from http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2009030

Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996).

Browne-Barbour, V. S. (2006). Compulsory attendance and parental rights: There are limits. *Forum on Public Policy*, *2*, 360–377.

Buss, E. (2012, Winter). The gap in law between developmental expectations and educational obligations. *University of Chicago Law Review*, *79*, 59–81.

Cantwell v. Connecticut, 310 U.S. 296, 303–304 (1940).

Christenson, R. (1999). *Political trials: Gordian knots in the law*. New Brunswick, NJ: Transaction Publishers.

Cronin-Furman, K. R. (2009). 60 years of the universal declaration of human rights: Towards an individual responsibility to protect. *American University International Law Review*, *25*, 175–198.
Eijkholt, M. (2010). The right to found a family as a stillborn right to procreate? *Medical Law Review*, *18*, 127–151.
Farris, M. (1990). *Home schooling and the law*. Paeonian Springs, VA: Home School Legal Defense Association.
Farris, M. (2007). *From Tyndale to Madison: How the death of an English martyr led to the American Bill of Rights*. Nashville, TN: Broadman & Holman.
Fineman, M. A. (2009). Taking children's interests seriously. In M. A. Fineman & K. Worthington (Eds.), *What is right for children? The competing paradigms of religion and human rights* (pp. 229–238). Burlington, VT: Ashgate.
Gormley, K. (2006). Education as a fundamental right: Building a new paradigm. *Forum on Public Policy: A Journal of the Oxford Round Table*, *2*, 207–229.
Holsinger, M. P. (1968). The Oregon school bill controversy, 1922–1925. *The Pacific Historical Review*, *37*, 327–341.
In re Jonathan L. 165 Cal. App 4th 1074, 81 Cal. Rptr. 3d 571 (2d Dist. 2008).
Jordan, W. K. (1965). *The development of religious toleration in England*. Gloucester, MA: Peter Smith Publishers.
Konrad v. Germany, App. No. 35504/03, 8, Eur. Ct. H.R. Sep. 11, 2006.
Martin, A. T. (2010). Homeschooling in Germany and the United States. *Arizona Journal of International and Comparative Law*, *27*, 225–282.
McGreevey, J. T (1997). Thinking on one's own: Catholicism in the American intellectual imagination, 1928–1960. *The Journal of American History*, *84*, 97–131.
Meyer v. Nebraska, 262 U.S. 390 (1923).
Murphy, J. (2012). *Homeschooling in America: Capturing and assessing the movement*. Thousand Oaks, CA: Corwin.
Pierce v. Society of Sisters, 268 U.S. 510 (1925).
Pine, L. (2010). *Education in Nazi German*. New York, NY: Berg.
Ray, B. D. (2010, February 3). Academic achievement and demographic traits of homeschool students: A nation-wide study. *Academic Leadership Journal*, *8*(1). Retrieved from http://contentcat.fhsu.edu/cdm/compoundobject/collection/p15732coll4/id/456
Ross, C. (2010). Fundamentalist challenges to core democratic values: Exit and homeschooling. *William and Mary Bill of Rights Journal*, *18*, 991–1014.
Ross, W. G. (1994). *Forging new freedoms: Nativism, education and the Constitution*, *1917–1927*. Lincoln: University of Nebraska Press.
San Antonio v. Rodriquez, 411 U.S. *1* (1973).
U.S. Supreme Court Records and Briefs, 1832–1978, Pierce v. Society of Sisters, 268 U.S. 510 (1925), Appendix, pp. 24–25.
United Nations. (1966a). International Covenant on Civil and Political Rights. *Treaty Series*, vol. *999*, pp. 171–186.
United Nations (1966b). International Covenant on Economic, Social, and Cultural Rights. *Treaty Series*, vol. *933*, pp. 3–12.
West Virginia v. Barnette, 319 U.S. 624 (1943).
Yuracko, K. A. (2008). Education off the grid: Constitutional constraints on homeschooling. *California Law Review*, *96*, 123–184.