

Rights Talk, *Redux*

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In 2015, the nation was riveted by news that 670,000 high school students – mostly seniors, mostly in suburban and rural districts – had not participated in state-mandated assessments. The highest non-participation rates were in New York (240,000 students), New Jersey (130,000 students), and Colorado (100,000 students).¹ In New York, non-participation rates in Rocky Point (Suffolk County) and Chateaugay (Franklin County) were 80% and 90% respectively, while rates in New York City were consistent with other large urban districts at 1.4%.² Civil rights organizations condemned “anti-testing efforts that appear to be growing in states across the nation, like in Colorado and New York” for “sabotag[ing] important data and rob[bing] us of the right to know how our students are faring.”³ In one Colorado school, according to Professor Wilson’s research, “[o]nly nine of 530 eligible seniors stayed inside and completed the test,” with similar non-participation rates elsewhere in the district, mostly with parental consent. President Obama called on states to reduce “unnecessary testing.”⁴ Colorado responded by enacting parental “opt out” legislation.⁵

Wilson casts the Colorado “opt-out” movement as an example of youth activism offering “a new angle on longstanding legal and philosophical debates about educational authority.” I have doubts about this. To me, the “opt out” wave of 2015 bore the hallmarks of an anti-government populist or libertarian movement, not least because counties with the highest non-participation rates subsequently voted for Trump.⁶ The ongoing gun control walkouts may be a clearer case of student activism on a matter of greater public concern.⁷

Wilson’s central questions are as follows: “To what extent should young people (not just their parents) be able to refuse dimensions of public education? And how should these rights [including, if the title of the article is any guide, a “right of students to opt out of state assessments”] be balanced against public aims for education, including equal opportunity?” These are ethical and legal

questions, and Wilson seeks to address them “in conversation with her ongoing empirical study of opt-out activism in Colorado,” because, by her account, “youth-led efforts challenge the framework of parents’ rights employed by opt-out activists, state policymakers and district officials.”

Wilson cites a number of Supreme Court decisions, including *Pierce*, *Prince*, and *Yoder*, but I am unsure of their relevance.⁸ In *Pierce*, private schools successfully challenged proposed legislation that would have required all parents to send their children to public schools. “No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; [and] to require that all children of proper age attend some school,” noted Justice McReynolds. In *Prince*, Justice Rutledge held that “the State as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.” In *Yoder*, the Supreme Court carved out a narrow exemption from compulsory schooling laws for Amish parents. In a much later case, Justice Scalia noted that “the theory of unenumerated parental rights underlying [*Pierce* and *Yoder*] has small claim to *stare decisis* protection.”⁹

Wilson then undertakes a selective review of literature in which an interest in autonomy is ascribed to children (referencing Brighouse & Swift, Feinberg, Reich); in which the moral status of children is discussed (cf. O’Neill, Franklin-Hall); and in which the agency and interest theories of rights are distinguished (Brennan). These are different *theories*, not different *kinds* of rights. She then cites Curren – in a move he might find problematic – to support her claim that “young people may develop autonomy—and the capacity for choice and reflection—through acts of protest and dissent.”

Wilson discusses *Tinker* and *Morse*,¹⁰ but these First Amendment cases may be of limited application because “opting out” is probably not speech. Moreover, in ascribing limited free speech rights to the armband-wearing *Tinker* children, Justice Fortas conflated *pupils* in public schools with *students* protesting US involvement in Vietnam on university campuses. This conflation is understandable, in part because the age of majority in 1969 was *twenty-one*. A similar conflation occurred in *Morse*. Justice Roberts affirmed the “custodial and tute-

lary” nature of school authority, even though the “Bong Hits” banner-waving respondent was an *adult*.

There are at least two Supreme Court decisions on the constitutionality of extracurricular testing of some sort, and I discuss both in the article Wilson cites. In *Vernonia*, the random drug testing of interscholastic athletes was challenged on Fourth Amendment grounds.¹¹ Justice Scalia described school environments as “custodial and tutelary” and declared: “Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will.” Since *Vernonia*, the Supreme Court has consistently deployed the phrase “custodial and tutelary” when rights claims have been raised by or on behalf of students – including *Earls*,¹² where extracurricular drug testing was again found to be consistent with “the custodial responsibilities of school officials.”

Parents in Colorado now have a statutory right to opt their children out of state-mandated tests. Do students in Colorado have a right to opt *themselves* out? Yes. When they turn seventeen, they are no longer subject to compulsory schooling laws and may choose not to attend school.¹³ Until they turn eighteen, high school seniors need a parent or guardian to raise rights claims on their behalf in court. But why bother when a note from home will do?

Yoder may be relevant to the “opt out” movement in a roundabout way. The Amish parents would not have been charged with truancy if they had waited until October 1 to withdraw their children from school. They wouldn’t wait, the district lost \$20,000 in per-pupil funding, and the rest is history.¹⁴

The question of whether someone has a “right” to opt out of state-mandated tests is more likely to become a matter of public concern when there are actual *costs* for schools. As Wilson notes, “it’s possible for students (of all ages) to ‘opt-out’ of testing through sheer apathy; as teachers have long observed in collecting blank answer sheets.” “Opting out” in this way does not entail lost revenue (for non-attendance) or liability (should a minor student leave the school and be injured).¹⁵ “Opting out” through non-attendance costs far more

in New York (which uses an average daily attendance formula) than Colorado (which uses an October 1 enrolment formula).

If asking whether “young people” have a right to opt out of state-mandated assessments is both “the wrong question to ask” and “the wrong way to frame [their] complex activism,” I wonder why Wilson spends so much time on these things. There are theories of moral and legal rights as *claims* that might be helpful here.¹⁶ In the end, Wilson is “more interested in the philosophical dimensions of parents’ and students’ rights, as well as how a rights-based *discourse* (often without reference to any particular legal rights) is employed.” If that is where Wilson is going, I’ll look forward to reading more.¹⁷

1 Bob Schaeffer & Lisa Guisbond, “More than 670,000 Refused Tests in 2015,” *FairTest.org* (2015, Dec. 12); online at <https://www.fairtest.org/more-500000-refused-tests-2015/>

2 Randy E. Bennett, *Opt Out: An Examination of Issues* (Princeton, NJ: ETS, 2016), citing E.A. Harris & F. Fessenden, “Rallying Cry in Anti-Test Movement: Opt Out,” *NY Times* (2015, May 21), A1.

3 Shin. Inouye, “Civil Rights Groups: We Oppose Anti-Testing Efforts,” *CivilRights.org* (2015, May 3); online at <https://civilrights.org/civil-rights-groups-we-oppose-anti-testing-efforts/>

4 Anya Kamanetz, “Obama Wants Students to Stop Taking Unnecessary Tests,” *NPR.org* (2015, Oct. 24); online at <https://www.npr.org/sections/ed/2015/10/24/451456267/obama-wants-students-to-stop-taking-unnecessary-tests>

5 C.R.S., Title 22, Education § 22-7-1013, ss. (8) (A-C)

6 See Randall Curren, “Coercion and the Ethics of Grading and Testing,” *Educational Theory* 45, no. 4 (1995): 425-41; citing M. Smith, *The Libertarians and Education* (London: Allen and Unwin, 1983). For Trump support by county, see “New York Results,” <https://www.nytimes.com/elections/2016/results/new-york>.

7 Vivian Yee & Alan Blindermark, “Thousands Walk Out of Class,” *NY Times* (2018, March 15), A1.

8 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

9 *Troxel v. Granville*, 530 U.S. 57 (2000) [*dissenting*].

10 *Tinker v. Des Moines*, 393 U.S. 503 (1969); *Morse v. Frederick*, 551 U.S. 393 (2007).

11 *Vernonia v. Acton*, 515 U.S. 646 (1995).

12 *Board of Education v. Earls*, 536 U.S. 822 (2002).

13 C.R.S., Title 22, Education Article 33, §104, ss. 1(a).

14 Shawn Frances Peters, *The Yoder Case: Religious Freedom, Education, and Parental Rights* (Lawrence, KS: University of Kansas Press, 2003), 1.

15 See Christina Caron, "Texas Boy Killed by Truck as His School Held a Walkout on Guns," *NY Times* (2018, April 22); online at

<https://www.nytimes.com/2018/04/22/us/texas-walkout-student-killed.html>

16 See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1914): 16-59; Joel Feinberg, "The Nature and Value of Rights," *Journal of Value Inquiry* 4 (1970): 251; J. G. Dwyer, *The Relationship Rights of Children* (Cambridge: Cambridge University Press, 2006), 291-307.

17 For an exceptional philosophical assessment of the harms associated with parental opt-out policies in Ontario, see Lauren Bialystok, "My Child, My Choice? Mandatory Curriculum, Sex, and the Conscience of Parents," *Educational Theory* 68, no. 1 (2018): 11-29.