

## HOW TO REGULATE HOMESCHOOLING: WHY HISTORY SUPPORTS THE THEORY OF PARENTAL CHOICE

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*This Note explores the competing theories that have informed past and current homeschooling regulation. The author begins by chronicling the history of state education regulation and the advent of homeschooling. This history demonstrates that critics of homeschooling regulation base their theory on the incorrect assertion that education has historically been governed by parental choice. This history also shows that some past state regulations had the troubling objective of forcing minority groups to conform to the majority conception of education. Drawing upon this background, the author concludes that state regulation of homeschooling is appropriate but must be limited in nature. If state regulations serve to objectively and unobtrusively assess the adequacy of a homeschooled child's education without dictating the methodology, then states can fulfill their role of providing adequate education without infringing on parents' interests in their children's education.*

### I. INTRODUCTION

The United States has recently witnessed an enormous growth in homeschooling.<sup>1</sup> Although homeschooling was illegal in most states less than thirty years ago, over two million schoolchildren in the United States are now being educated at home.<sup>2</sup> The majority of these parents are conservative Christians who have chosen to educate their children at home because they disapprove of public schools' curricula and seek to shield their children from certain secular and liberal principles.<sup>3</sup> Although all states have laws relating to homeschooling, they are inconsis-

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1. See Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 124 (2008).

2. Robin L. West, *The Harms of Homeschooling*, PHIL. & PUB. POL'Y Q., Summer/Fall 2009, at 7.

3. See *id.* at 7; Yuracko, *supra* note 1, at 126–27. “Liberal” in this context does not mean politically liberal, rather it connotes the pedagogical philosophy that emphasizes rational and critical reasoning. See *infra* Part IV.B.

tent, and the overwhelming trend is towards deregulating the practice of homeschooling.<sup>4</sup>

The developing relationship between the law and homeschooling has been tumultuous.<sup>5</sup> Homeschooling parents contend that they have the right<sup>6</sup> to educate their children free from governmental interference, but homeschooling critics argue that the state has a legitimate interest in regulating the nature of every child's education.<sup>7</sup> This debate continues in the absence of any decisive opinion from the Supreme Court. Although the Court has recognized parents' fundamental right to direct the education of their children, it has also reaffirmed the state's interest in ensuring that children receive an adequate education.<sup>8</sup> In the absence of either uniform state laws or decisive constitutional case law, the issue remains unresolved: how should homeschooling be regulated?<sup>9</sup>

Many homeschooling parents contend that the government has never exerted control over education and maintain that educational authority is theirs alone.<sup>10</sup> History, however, demonstrates that this assertion is inaccurate. States have been regulating education since the seventeenth century.<sup>11</sup> Still, homeschooling parents' concern about the high cost of state regulation over education is not unfounded. In fact, history shows that the state often used its coercive power to force minority groups to conform to the majority's preferred conception of education.<sup>12</sup> Neverthe-

4. See West, *supra* note 2, at 7 (“[S]ome states need not even be notified of the parents’ intent to homeschool. . . . [I]n much of the country, if you want to keep your kids home from school, or just never send them in the first place, you can.”).

5. ROBERT KUNZMAN, *WRITE THESE LAWS ON YOUR CHILDREN: INSIDE THE WORLD OF CONSERVATIVE CHRISTIAN HOMESCHOOLING* 213 (2009) (“Homeschooling is clearly a significant educational trend, one that shows no signs of fading away. But the rise of homeschooling also holds implications that extend far beyond the phenomenon itself, raising fundamental questions about the purposes of education and the relationship between families, the state, and the society we share.”).

6. There is a significant difference between a legally enforceable right and an interest. I use them interchangeably in this Note, however, to convey what is at stake to parents, the state, and children in this debate.

7. See *infra* Part IV.B.

8. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (“[Parents have] the liberty . . . to direct the upbringing and education of children under their control.”); *Meyer v. Nebraska*, 262 U.S. 390, 400–02 (1923) (“The power of the State to . . . make reasonable regulations for all schools . . . is not questioned.”). Additionally, all fifty states have clauses in their state constitutions providing for education. Yuracko, *supra* note 1, at 135. These clauses state that the state “shall” provide education. *Id.* at 175. Consequently, this obligation is an affirmative one. See *id.*

9. “[H]omeschooling is an ideal test case for . . . arguing about the boundaries of parental and state authority over children’s education.” Rob Reich, *Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling*, in *MORAL AND POLITICAL EDUCATION* 275, 280–81 (Stephen Macedo & Yael Tamir eds., 2002). Although homeschooling is a rich source for normative debate, it is, for better or worse, primarily theoretical. There is simply very little empirical data about homeschoolers. See Eric J. Isenberg, *What Have We Learned About Homeschooling?*, 82 *PEABODY J. EDUC.* 387, 389 (2007) (“The main barrier to research on homeschooling has been lack of data.”).

10. CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL* 29 (1995).

11. See *infra* Part III.A.

12. See *infra* Part III.B. In accordance with Robert Kunzman, I consider conservative Christians to be a minority group. See KUNZMAN, *supra* note 5, at 216 (“[I]t shouldn’t stretch the imagination to recognize the ways in which conservative Christians see themselves struggling to navigate a culture marked by increasing ethical diversity and a seductive consumerist-materialistic value system that

less, the state must regulate education to some extent in order to ensure that all children receive an adequate education.<sup>13</sup> The state should both accommodate homeschoolers' diverse educational beliefs by allowing parents to determine the nature of their children's education and fulfill its need to guarantee that children receive a basic education by implementing regulations that objectively and unobtrusively assess the adequacy of homeschooling.

This Note explores the history and theory on which this recommendation rests. Part II provides a brief background about homeschooling by summarizing its recent growth, relevant case law, and current state regulations. Part III details the history of education in the United States and shows that states have been regulating education for three and a half centuries in order to ensure that children receive an adequate education. It also illustrates how the state has used education to subject minority religious and ethnic groups to the values of the majority. Part IV outlines the three competing interests at stake in the debate about education regulation.<sup>14</sup> It discusses and assesses the theoretical arguments of several legal scholars in favor of laws recognizing parental rights, the state's interests, or children's rights in the context of education regulation. Finally, Part V unites these theoretical arguments as well as their historical context and offers a resolution on how homeschooling should be regulated. Ultimately, this Note recommends that the state should regulate homeschooling to the extent that it ensures parents provide an adequate education to their children; parents, however, should retain the right to determine the nature of that education.

## II. BACKGROUND

### A. *Homeschooling's Recent Exponential Growth*

Homeschooling refers to the education of a child by a parent that occurs primarily in the home.<sup>15</sup> The practice of homeschooling is centuries old, but the modern homeschooling movement only recently re-emerged in the 1950s when counterculture reformers, objecting to the rigid nature of formal schooling, elected to educate their children individually at home.<sup>16</sup> In the 1980s, this movement was overtaken and domi-

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threatens to weaken their communities and commitments. For those who choose to homeschool, public schools often symbolize much of what is to be avoided or resisted in contemporary culture.”).

13. See *infra* Part II.B.

14. These legal scholars support the recognition of these theoretical interests in the context of education regulation generally. So although these arguments do not specifically pertain to homeschooling, they are directly applicable and necessary to consider before the issue of homeschooling regulation can be resolved because homeschooling is a form of education.

15. See Jack MacMullan, Comment, *The Constitutionality of State Home Schooling Statutes*, 39 VILL. L. REV. 1309, 1309 (1994).

16. See Yuracko, *supra* note 1, at 125–26.

nated by conservative Christian parents.<sup>17</sup> Believing that they had a duty to provide their children with a religious education, these parents withdrew their children from a public education system perceived as becoming too secularized.<sup>18</sup> At the time, however, homeschooling was illegal in half of the states.<sup>19</sup> Consequently, religious homeschoolers quickly solidified into an influential political bloc.<sup>20</sup> Their most powerful and active interest group, the Home School Legal Defense Association (HSLDA), began successfully challenging laws prohibiting homeschooling.<sup>21</sup> Today homeschooling is legal in all fifty states.<sup>22</sup> While only 125,000 children were homeschooled in the early 1980s,<sup>23</sup> over two million children are now educated at home.<sup>24</sup> This movement has been so profound that scholars estimate that homeschooling is growing at a rate of ten to twenty percent per year.<sup>25</sup>

There are several reasons that account for this exponential growth. Some parents are dissatisfied with the educational quality of the public schools. They feel that they can give their children a better education themselves.<sup>26</sup> Other parents fear for the safety of their children in public schools.<sup>27</sup> Some parents with special needs children choose to home-school because their local public schools lack the resources their children need.<sup>28</sup> But the most common reason for choosing homeschooling is religious.<sup>29</sup> Christopher Klicka, Senior Counsel to the HSLDA, explains:

These parents believe that God has given them the responsibility and the authority to educate their children. . . . The secondary rea-

17. See KUNZMAN, *supra* note 5, at 4; MITCHELL L. STEVENS, KINGDOM OF CHILDREN 13–14 (2001) (demonstrating that the majority of homeschooled children come from conservative Christian homes).

18. See Yuracko, *supra* note 1, at 126–27.

19. MacMullan, *supra* note 15, at 1336–37. Only since 1993 has homeschooling been legal in every state. Reich, *supra* note 9, at 277.

20. Yuracko, *supra* note 1, at 127–28; see also Rob Reich, *The Civic Perils of Homeschooling*, EDUC. LEADERSHIP, Apr. 2002, at 56.

21. See West, *supra* note 2, at 8 (“In the face of this adamantly asserted constitutional right, and strapped for cash in any event, the states ceded responsibility for what had previously been a core state function—the education of children . . . .”); Yuracko, *supra* note 1, at 127–28; see also Isenberg, *supra* note 9, at 388 (“In 1983, former Moral Majority leader Michael Farris founded a national organization, the Homeschool Legal Defense Association (HSLDA), to provide lobbying and legal assistance to evangelical Protestant homeschoolers.”). The HSLDA has since grown into a powerful homeschooling interest group. Over the past two and a half decades, the HSLDA has devoted its financial and legal resources to challenging most state homeschooling laws. See Yuracko, *supra* note 1, at 128.

22. Yuracko, *supra* note 1, at 124.

23. *Id.* at 124 n.3.

24. West, *supra* note 2, at 7.

25. Yuracko, *supra* note 1, at 125. As Rob Reich has observed, “Homeschooling is no longer a fringe phenomenon in American education.” Reich, *supra* note 9, at 278.

26. See Robert Kunzman, *Understanding Homeschooling: A Better Approach to Regulation*, 7 THEORY & RES. EDUC. 311, 315 (2009) (“Most homeschool parents believe they can provide a better educational experience for their child, and are willing to sacrifice their time, money and/or careers to make it happen.”); see also Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 80 (2002).

27. McMullen, *supra* note 26, at 81.

28. *Id.* at 82.

29. See *id.* at 78.

son that parents offer is their concern over the . . . moral decline in the public schools. They are dissatisfied and disappointed with the removal of God and religion from public schools . . .<sup>30</sup>

Despite these significant reasons, many question the quality of a homeschooled education. Critics argue that children isolated in the home are not adequately socialized.<sup>31</sup> They further question the level of education a parent with no teaching degree can provide.<sup>32</sup> The example of Maren McKee, a homeschooler from Illinois, illustrates this concern. As she explains, “I wasn’t interested in math or composition, so I didn’t really do it. I liked to dance.”<sup>33</sup> In addition, scholars also characterize schools as a safety net.<sup>34</sup> Teachers are on alert to truancy and abuse and are required to report it.<sup>35</sup> If children are confined to the home, it will be harder to protect them.<sup>36</sup> Finally, some scholars believe homeschooling too often consists of an illiberal education.<sup>37</sup> The Phillipps family, homeschoolers from California, for example, make sure their children read a wide variety of literature but concede that their children have no one outside the family to engage in critical discussion with.<sup>38</sup>

Homeschooling parents, however, generally refute all these criticisms. They contend that they do offer opportunities for socialization and that many homeschooled children participate in extracurricular activities.<sup>39</sup> Judi Thomas of Georgia points out that even though her daughter is homeschooled, she “has tap and ballet on Tuesdays; Wednesdays, there’s choir; Thursdays, she has classes with other [homeschoolers]; Fridays, there’s usually a play date or a field trip.”<sup>40</sup> Additionally, parents argue that their own level of education bears no relation to the quality of education they can provide.<sup>41</sup> And in fact, homeschooled children perform higher on standardized tests than those who are formally schooled.<sup>42</sup> Furthermore, parents refute the claim

30. KLIKA, *supra* note 10, at 2–3 (footnote omitted); *see also* Kunzman, *supra* note 26, at 315 (“Central in [Christian homeschoolers’] mindset is the fundamental conviction that educating their children is a God-given right and responsibility, and one they can delegate only at great moral and spiritual peril.”). The religious aspect of homeschooling is crucial to remember when determining the appropriate scope of regulation. *Id.* at 317 (“[I]f homeschooling is seen as simply part of parenting, then it becomes easier to understand why many homeschool parents view regulations as unjustifiable intrusions into their sacred domain.”).

31. McMullen, *supra* note 26, at 83.

32. *See id.* at 85.

33. John Cloud & Jodie Morse, *Home Sweet School*, TIME, Aug. 27, 2001, at 46.

34. McMullen, *supra* note 26, at 86–87.

35. *Id.* at 86.

36. *Id.*

37. *See id.* at 84.

38. Cloud & Morse, *supra* note 33.

39. *See* KLIKA, *supra* note 10, at 15–19; Cloud & Morse, *supra* note 33.

40. Cloud & Morse, *supra* note 33.

41. Carrie Shaw, a homeschooling mother in Indiana, explains, “There is no chance that I could walk up the hill to the elementary school right now and teach. I couldn’t teach somebody else’s twenty-five children to save my life. . . . But if I didn’t think I was the best teacher for my own children, I wouldn’t do it.” Kunzman, *supra* note 26, at 319.

42. *See* KLIKA, *supra* note 10, at 8–14; McMullen, *supra* note 26, at 85.

that homeschooling allows parents to abuse their children free from state surveillance. On the contrary, homeschooling parents believe they have an increased devotion to their children because they are willing to make sacrifices to educate them at home.<sup>43</sup> In order to homeschool their daughter, “Fred [Carnell of Maryland] . . . works the office graveyard shift, which means he and his wife Debbie, a claims adjuster, hardly see each other. The family rarely eats dinner together, and the parents are constantly exhausted.”<sup>44</sup> Nevertheless, they make the sacrifice in order to provide their daughter with what they believe to be a superior education. Finally, and most importantly, homeschooling parents maintain that they still have a right to provide children with an education that includes religious teachings.<sup>45</sup>

Although many critics believe there are important reasons that justify state regulation over homeschooling, parents, represented primarily by the HSLDA, have frequently challenged state attempts at regulation.<sup>46</sup> Consequently, state regulation over homeschooling has become increasingly lenient.<sup>47</sup> In thirty years, many states went from prohibiting homeschooling altogether to exercising little oversight at all.<sup>48</sup>

### *B. Homeschooling Under the U.S. Constitution*

States exercise incredible flexibility over homeschooling laws because there is no Supreme Court case that specifically defines the permissive scope of state homeschooling regulation. Nevertheless, there are three Supreme Court cases that impose certain constitutional limits on state regulation of education, generally, and they must be considered when determining the limits on homeschooling regulation. The first of these, *Meyer v. Nebraska*, arose in 1923 and involved a state law that prohibited the teaching of foreign languages.<sup>49</sup> The purpose of the law was to prevent “the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land.”<sup>50</sup> One teacher was subsequently convicted for teaching German.<sup>51</sup> On appeal before the Supreme Court, the Court admitted that it had not yet defined the nature of the liberty protected by the Fourteenth Amendment, but it found that this liberty protected certain fundamental rights that included the right “to acquire useful know-

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43. See Cloud & Morse, *supra* note 33 (“[I]t takes a galactic commitment of time and money and patience for a parent to spend all day, every day, relearning algebra (or getting it for the first time) and then teaching it.”).

44. *Id.*

45. See Klicka, *supra* note 10, at 49–62.

46. Yuracko, *supra* note 1, at 128.

47. *Id.* at 128–29.

48. See *id.* at 124, 130.

49. 262 U.S. 390, 397 (1923).

50. *Id.* at 397–98 (internal quotation marks omitted).

51. *Id.* at 396.

ledge” and the right to “bring up children.”<sup>52</sup> The Court recognized “[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools” as without question.<sup>53</sup> But the state could not regulate education in an arbitrary or unreasonable manner.<sup>54</sup>

The scope of state regulatory authority was further defined two years later in *Pierce v. Society of Sisters*.<sup>55</sup> Oregon had enacted a law that required all children to attend public schools.<sup>56</sup> Two private schools challenged the state law after their students were forced to withdraw in order to comply with the law.<sup>57</sup> In accordance with its ruling in *Meyer*, the Court held that the law unreasonably interfered “with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>58</sup> Moreover, the Court found that “[t]he 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.”<sup>59</sup>

The holdings in *Meyer* and *Pierce* carve out a sort of parental liberty over a child’s education that is constitutionally protected from state encroachment by the Fourteenth Amendment. *Pierce* recognized the “liberty of parents and guardians to direct the upbringing and education” of their children.<sup>60</sup> *Meyer* even characterized this right as fundamental.<sup>61</sup> These cases, however, still endorsed the state’s legitimate interest in overseeing the education of its citizens. The Court in *Meyer* observed that “nearly all the states, including Nebraska, [can] enforce [the state’s educational] obligation” with appropriate regulation.<sup>62</sup> The Court went on in *Pierce* to assume that the state could reasonably regulate “all schools, to inspect, supervise and examine them, their teachers and pupils; . . . [and] that certain studies plainly essential to good citizenship must be taught . . . .”<sup>63</sup>

Parents can also rely on the religious liberty protected by the First Amendment when challenging state education laws. Such a challenge made its way to the Supreme Court decades after *Meyer* and *Pierce* in

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52. *Id.* at 399.

53. *Id.* at 402.

54. *Id.* at 400.

55. 268 U.S. 510 (1925).

56. *Id.* at 530.

57. *Id.* at 531–33.

58. *Id.* at 534–35.

59. *Id.* at 535.

60. *Id.* at 534.

61. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (“That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain *fundamental* rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.” (emphasis added)).

62. *Id.* at 400.

63. *Pierce*, 268 U.S. at 534.

*Wisconsin v. Yoder*.<sup>64</sup> In *Yoder*, a group of Amish parents challenged a Wisconsin law requiring compulsory school attendance until the age of sixteen.<sup>65</sup> When the Amish parents were prosecuted for refusing to send their children to school past the eighth grade, they defended on constitutional grounds, claiming that compliance with the law would endanger their religious beliefs.<sup>66</sup> Once again, the Court observed that “[t]here [was] no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”<sup>67</sup> Still, this state interest “is not totally free from a balancing process when it impinges on . . . rights . . . protected by the . . . First Amendment, and the traditional interest of parents with respect to the religious upbringing” and education of their children.”<sup>68</sup> The Court concluded that Wisconsin’s compulsory attendance law violated the First and Fourteenth Amendment rights of the Amish parents.<sup>69</sup>

*Meyer*, *Pierce*, and *Yoder* are important cases to understand before delving into the homeschooling debate because they outline the constitutional interests at stake when determining how best to regulate homeschooling. They recognize that parents do have the right to direct the education of their children. This right extends to parents who make the educational choice to homeschool their children. Nevertheless, these three cases concede that this parental right is not absolute. The state can regulate to ensure that children receive an adequate education. But in the absence of decisive constitutional case law regarding the scope of proper homeschooling laws, the states have varied widely in how they regulate.

### C. Current State Regulations

All fifty states and the District of Columbia permit homeschooling; however, state regulations differ significantly.<sup>70</sup> Thirty-seven states and the District of Columbia have laws directly regulating homeschooling.<sup>71</sup>

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64. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

65. *Id.* at 207.

66. *Id.* at 208–09.

67. *Id.* at 213.

68. *Id.* at 214.

69. *Id.* at 234. *Yoder* engendered a thoughtful dissent from Justice Douglas, who articulated the common concern of homeschooling critics. Justice Douglas pointed out that “the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.” *Id.* at 241 (Douglas, J., dissenting). He worried that “[i]f children are] harnessed to the Amish way of life by those in authority over [them] and if [their] education is truncated, [their] entire life may be stunted and deformed” and argued that “[t]he child . . . should be given an opportunity to be heard before the State gives the exemption which we honor today.” *Id.* at 245–46.

70. See MacMullan, *supra* note 15, at 1337; McMullen, *supra* note 26, at 87.

71. See ALASKA STAT. § 14.30.010(b)(12) (2008); ARIZ. REV. STAT. ANN. § 15-802 (2009); ARK. CODE ANN. § 6-15-503 (2007); COLO. REV. STAT. ANN. § 22-33-104.5 (West 2005 & Supp. 2010); DEL. CODE ANN. tit. 14, § 2703A (West 2007); D.C. CODE § 38-202 (LexisNexis 2007 & Supp. 2010); FLA. STAT. ANN. § 1002.41 (West 2009); GA. CODE ANN. § 20-2-690(c) (2009); HAW. REV. STAT. ANN.



Three states do not directly regulate homeschooling but allow alternate forms of education if they are substantially equivalent to the public schools.<sup>72</sup> Ten states have laws regulating homeschooling as private schools.<sup>73</sup> Of these, the types of regulations range from no oversight at all to imposing a combination of conditions such as notice, curriculum requirements, record keeping, teacher qualifications, and test assessments.

A few states have no conditions on homeschooling. Alaska, Connecticut, Idaho, Illinois, Indiana, Michigan, New Jersey, Oklahoma, and Texas allow parents to homeschool their children without any additional conditions—not even notice.<sup>74</sup> The remaining jurisdictions do, at the very least, require parents to notify a local school official that they intend to homeschool their children.<sup>75</sup> Generally, notice regulations only require

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§ 302A-1132(a)(5) (LexisNexis 2010); IDAHO CODE ANN. § 33-202 (Supp. 2010); IOWA CODE ANN. § 299A.1 (West 1996); LA. REV. STAT. ANN. § 17:236.1 (2001); ME. REV. STAT. ANN. tit. 20A, § 5001-A(3)(A)(4) (2008 & Supp. 2009); MD. CODE ANN. EDUC. § 7-301(a) (LexisNexis 2008 & Supp. 2010); MICH. COMP. LAWS ANN. § 380.1561(3)(f) (West 2005); MINN. STAT. ANN. § 120A.22 (West 2008); MISS. CODE ANN. § 37-13-91(3)(c) (2007 & Supp. 2010); MO. ANN. STAT. § 167.031.2 (West 2010); MONT. CODE ANN. § 20-5-102(2)(e) (2009); NEV. REV. STAT. ANN. § 392.700 (LexisNexis 2008); N.H. REV. STAT. ANN. § 193-A (LexisNexis 2006 & Supp. 2010); N.M. STAT. ANN. § 22-1-2.1 (2006); N.Y. EDUC. LAW § 3204 (McKinney 2009); N.C. GEN. STAT. § 115C-563 (2009); N.D. CENT. CODE § 15.1-20-04 (2003); OHIO REV. CODE ANN. § 3321.04(A)(2) (LexisNexis 2009); OR. REV. STAT. § 339.030(1)(e) (2009); 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 2006); R.I. GEN. LAWS § 16-19-2 (2001); S.C. CODE ANN. § 59-65-40 (2004); TENN. CODE ANN. § 49-6-3050 (2009); UTAH CODE ANN. § 53A-11-102(2) (LexisNexis 2009); VT. STAT. ANN. tit. 16, § 166(b) (2004 & Supp. 2010); VA. CODE ANN. § 22.1-254.1 (2006 & Supp. 2010); WASH. REV. CODE ANN. § 28A.225.010 (West 2006); W. VA. CODE ANN. § 18-8-1(c) (LexisNexis 2008 & Supp. 2010); WIS. STAT. ANN. § 118.15(4) (West 2004 & Supp. 2009); WYO. STAT. ANN. §§ 21-4-101, 102 (2009); *see also State Laws*, HSLDA, <http://www.hsllda.org/laws/default.asp> (click on state for state-specific information). I relied on the HSLDA website when identifying and categorizing these state regulations.

72. *See* CONN. GEN. STAT. ANN. § 10-184 (West 2002 & Supp. 2010); N.J. STAT. ANN. § 18A:38-25 (West 1999); OKLA. STAT. ANN. tit. 70, § 10-105(A) (West 2005 & Supp. 2009).

73. *See* ALA. CODE § 16-28-1 (LexisNexis 2001); CAL. EDUC. CODE § 48222 (West 2006 & Supp. 2010); 105 ILL. COMP. STAT. ANN. 5/26-1 (West 2008); IND. CODE ANN. § 20-33-2-4(2) (LexisNexis 2007); KAN. STAT. ANN. § 72-1111 (2002 & Supp. 2008); KY. REV. STAT. ANN. § 159.030 (LexisNexis 2009); MASS. ANN. LAWS ch. 76, § 1 (LexisNexis 2003); NEB. REV. STAT. § 79-1601(2) (2008); S.D. CODIFIED LAWS § 13-27-3 (2004); TEX. EDUC. CODE ANN. § 25.086(a)(1) (West 2006); *see also State Laws*, *supra* note 71 (click on state for state-specific information). I relied on the HSLDA website when identifying and categorizing these state regulations.

74. *See* ALASKA STAT. § 14.30.010(b)(12); CONN. GEN. STAT. ANN. § 10-184; IDAHO CODE ANN. § 33-202; 105 ILL. COMP. STAT. 5/26-1; IND. CODE ANN. § 20-33-2-4(2); MICH. COMP. LAWS ANN. § 380.1561(3)(f); N.J. STAT. ANN. § 18A:38-25; OKLA. STAT. ANN. tit. 70, § 10-105(A); TEX. EDUC. CODE ANN. § 25.086(a)(1); *see also State Laws*, *supra* note 71 (click on state for state-specific information). I relied on the HSLDA website when identifying and categorizing these state regulations.

75. *See* ALA. CODE § 16-28-7; ARIZ. REV. STAT. ANN. § 15-802(B)(2); ARK. CODE ANN. § 6-15-503(a); CAL. EDUC. CODE § 48222; COLO. REV. STAT. ANN. § 22-33-104.5(3)(e); DEL. CODE ANN. tit. 14, § 2704(b); FLA. STAT. ANN. § 1002.41(1)(a); GA. CODE ANN. § 20-2-690(c)(1); HAW. REV. STAT. ANN. § 302A-1132(a)(5); IOWA CODE ANN. § 299A.3; KAN. STAT. ANN. § 72-53; KY. REV. STAT. ANN. § 159.030; LA. REV. STAT. ANN. § 17:236.1(A); ME. REV. STAT. ANN. tit. 20-A, § 5001-A(3)(A)(4)(b); MD. CODE REGS. 13A.10.01.01; MASS. ANN. LAWS ch. 76, § 1; MINN. STAT. ANN. § 120A.24 Subd. 1; MISS. CODE ANN. § 37-13-91(3); MONT. CODE ANN. § 20-5-109; NEB. REV. STAT. § 79-1601(2); NEV. REV. STAT. ANN. § 392.700(1); N.H. REV. STAT. ANN. § 193-A:5(1); N.M. STAT. ANN. § 22-1-2.1(A); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10; N.C. GEN. STAT. § 115C-560; N.D. CENT. CODE § 15.1-23-02; OHIO ADMIN. CODE 3301-34-03(A) (2010); OR. REV. STAT. § 339.035; 24 PA. CONS. STAT. ANN. § 13-1327.1(b)(1); R.I. GEN. LAWS § 16-19-2; S.C. CODE ANN. § 59-65-40; S.D.

parents to file notice that they intend to homeschool their children. Eighteen states, however, regulate further by requiring parents to also submit curriculum plans in certain subjects along with such notification.<sup>76</sup> These submissions do not have to be detailed. Pennsylvania, for example, simply asks for an outline of proposed educational objectives by subject area.<sup>77</sup> Some states assert more ongoing surveillance. Twenty states impose record-keeping requirements on homeschoolers.<sup>78</sup> Most states, like Colorado, require only that records of attendance, test results, immunization, and required subjects be maintained.<sup>79</sup> Others, however, like New York, require parents to keep records of hours of instruction, material covered, and a narrative evaluation of the student's progress.<sup>80</sup>

In addition to notice, some states regulate further by imposing a teacher qualification requirement. Typically, these types of regulations require that the homeschooling parent have a high school diploma or an equivalent.<sup>81</sup> Other states are more stringent. Minnesota's homeschooling statute, for example, requires that homeschool instructors hold a teacher's license.<sup>82</sup> If the instructor is not a licensed teacher, then they must be directly supervised by a licensed teacher, have passed a teacher competency exam, or hold a college degree.<sup>83</sup> Of the fifty states, fourteen

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CODIFIED LAWS § 13-27-3; TENN. CODE ANN. § 49-6-3050(b)(1); UTAH CODE ANN. § 53A-11-102(2)(a); VT. STAT. ANN. tit. 16, § 166b(a); VA. CODE ANN. § 22.1-254.1(B); WASH. REV. CODE ANN. § 28A.200.010(1)(a); W. VA. CODE ANN. § 18-8-1(c)(2)(a); WIS. STAT. ANN. § 118.165(2); WYO. STAT. ANN. § 21-4-102; OHIO ADMIN. CODE 3301-34-03(A) (2010); *see also State Laws, supra* note 71 (click on state for state-specific information). I relied on the HSLDA website when identifying and categorizing these state regulations.

76. *See* ALA. CODE § 16-28-5; ARK. CODE ANN. § 6-15-503(a); CAL. EDUC. CODE § 33190; IOWA CODE ANN. § 299A.3; LA. REV. STAT. ANN. § 17:236.1(C)(1); MASS. ANN. LAWS ch. 76, § 1; MINN. STAT. ANN. § 120A.24 Subd. 1; MONT. CODE ANN. § 20-5-109; NEV. REV. STAT. ANN. § 392.700(5); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10; 24 PA. CONS. STAT. ANN. § 13-1327.1(b)(1); S.D. CODIFIED LAWS § 13-27-3; TENN. CODE ANN. § 49-6-3050(b)(1); VT. STAT. ANN. tit. 16, § 166b(a)(5); VA. CODE ANN. § 22.1-254.1(B); WIS. STAT. ANN. § 118.165(1)(d); WYO. STAT. ANN. §§ 21-4-102(b); OHIO ADMIN. CODE § 3301-34-03(A); *see also State Laws, supra* note 71 (click on state for state-specific information). I relied on the HSLDA website when identifying and categorizing these state regulations.

77. *See* 24 PA. CONS. STAT. ANN. § 13-1327.1(b)(1).

78. *See* ALA. CODE §§ 16-28-5, 16-28-7; CAL. EDUC. CODE § 48222; COLO. REV. STAT. ANN. § 22-33-104.5(3)(g); FLA. STAT. ANN. § 1002.41(1)(b); GA. CODE ANN. § 20-2-690(c)(8); HAW. REV. STAT. ANN. § 302A-1144; IOWA CODE ANN. § 299A.4; KY. REV. STAT. ANN. 159.040; MINN. STAT. ANN. § 120A.24 Subd. 2; MISS. CODE ANN. § 37-13-91(3); MONT. CODE ANN. § 20-5-109; N.H. REV. STAT. ANN. § 193-A:6(I); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10; N.C. GEN. STAT. ANN. § 115C-556; N.D. CENT. CODE ANN. § 15.1-23-05; 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1); R.I. GEN. LAWS § 16-19-2; S.C. CODE ANN. § 59-65-40(A)(3); S.D. CODIFIED LAWS § 13-27-3; TENN. CODE ANN. § 49-6-3050(b)(2); *see also State Laws, supra* note 71 (click on state for state-specific information). I relied on the HSLDA website when identifying and categorizing these state regulations.

79. *See* COLO. REV. STAT. ANN. § 22-33-104.5(3)(g).

80. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10.

81. *See, e.g.,* GA. CODE ANN. § 20-2-690(c)(3).

82. *See* MINN. STAT. ANN. § 120A.22 Subd. 10 (West 2008 & Supp. 2010).

83. *See id.*

require that a homeschooling instructor satisfy some kind of teacher qualification.<sup>84</sup>

States also regulate by subjecting homeschooled students to some form of assessment to ensure that they are receiving an adequate education. Some states require typical standardized testing. Georgia's homeschooling law, for instance, mandates that homeschooled children must take a national standardized achievement test every three years.<sup>85</sup> Others provide a range of options. Florida allows homeschooled children to demonstrate their education by being evaluated by a certified teacher, taking a national standardized achievement test, taking a student assessment test used by the local school district, being examined by a psychologist, or by any other agreed upon measure.<sup>86</sup> Altogether, twenty-four states require that homeschooled students submit to some form of assessment.<sup>87</sup>

Ultimately, states are far from uniform in how they regulate homeschooling. What seems to be the common trend, however, is implementing little to no oversight at all. Nine states do not even require notice of the choice to homeschool, and many states require notice and nothing more. The scope of permissible state regulation will be explored in the rest of this Note, but it is clear that most states are abandoning their obligation to ensure that all children receive an adequate education.<sup>88</sup>

84. See ALA. CODE § 16-28-5 (LexisNexis 2001); GA. CODE ANN. § 20-2-690(c)(3); MINN. STAT. ANN. § 120A.22 Subd. 10; N.M. STAT. ANN. § 22-1-2.1 (2006); N.C. GEN. STAT. ANN. § 115C-564 (2009); N.D. CENT. CODE ANN. § 15.1-23-03 (2003 & Supp. 2009); 24 PA. CONS. STAT. ANN. § 13-1327.1(a); S.C. CODE ANN. § 59-65-40(A)(1) (2004); TENN. CODE ANN. §§ 49-6-350(a)(2)(B), 49-6-3050(b)(4) (2009); VA. CODE ANN. § 22.1-254.1(A) (2006 & Supp. 2010); WASH. REV. CODE ANN. § 28A-225.010(4)(a)–(c) (West 2006); W. VA. CODE ANN. § 18-8-1(c)(2)(B) (LexisNexis 2008 & Supp. 2010); OHIO ADMIN. CODE § 3301-34-03(A)(9); see also *State Laws*, *supra* note 71 (click on state for state-specific information). I relied on the HSLDA website when identifying and categorizing these state regulations.

85. See GA. CODE ANN. § 20-2-690(c)(7).

86. See FLA. STAT. ANN. § 1002.41(1)(c) (West 2009).

87. See ARK. CODE ANN. § 6-15-504(a) (2007); COLO. REV. STAT. ANN. § 22-33-104.5(3)(f) (West 2005 & Supp. 2010); FLA. STAT. ANN. § 1002.41(1)(c); GA. CODE ANN. § 20-2-690(c)(7); HAW. CODE R. § 8-12-18 (LexisNexis 2010); IOWA CODE § 299A.4 (West 2005); LA. REV. STAT. ANN. § 17:236.1(D) (2001); ME. REV. STAT. ANN. tit. 20-A, § 5001-A(3)(A)(4)(b) (2008); MASS. ANN. LAWS ch. 76, § 1 (LexisNexis 2003); MINN. STAT. ANN. § 120A.22 Subd. 11; N.H. REV. STAT. ANN. § 193-A:6(II) (LexisNexis 2006 & Supp. 2010); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10; N.C. GEN. STAT. ANN. § 115C-564; N.D. CENT. CODE ANN. § 15.1-23-09; OR. REV. STAT. § 339.035(3) (2009); 24 PA. CONS. STAT. ANN. 13-1327.1(e)(1); S.C. CODE ANN. § 59-65-40; S.D. CODIFIED LAWS § 13-27-3 (2004); TENN. CODE ANN. §§ 49-6-3050(a)(2)(b), 49-6-3050(b)(5)(A); VT. STAT. ANN. tit. 16, § 166b(d) (2004 & Supp. 2010); VA. CODE ANN. § 22.1-254.1(C); WASH. REV. CODE ANN. § 28A.200.010(1)(c); W. VA. CODE ANN. § 18-8-1(c)(2)(D); OHIO ADMIN. CODE § 3301-34-04; see also *State Laws*, *supra* note 71 (click on state for state-specific information). I relied on the HSLDA website when identifying and categorizing these state regulations.

88. Yuracko observes that the “obligation that states have to provide children with a basic minimum level of education holds regardless of whether it is the state or homeschooling parents doing the actual education.” Yuracko, *supra* note 1, at 175–76. Yet, “state laws regulating homeschooling have become increasingly lenient.” *Id.* at 128–29.

### III. HISTORY OF STATE REGULATION OVER EDUCATION

Before the theoretical arguments in support of the law recognizing parents', states', or children's interests can be examined and resolved, it is important to understand the historical context from which they unfold. Even those active in the homeschooling debate have relied on history to bolster their beliefs. Many homeschooling advocates contend that education has always been within the exclusive authority of parents and that any form of governmental regulation is unjustified.<sup>89</sup> Homeschooling critics, on the other hand, seek to use the power of the state to ensure that all American children receive an education that conforms to the preferences of the majority.<sup>90</sup> This Part examines the historical implications of these arguments. It reveals that parents have long relinquished some control over their children's education to the state. But homeschooling parents' concerns are not unfounded. State regulation over education has not always been limited to the generally accepted purpose of ensuring that children receive an adequate education. In fact, the recent century and a half reveals that too often the state has used its coercive power to force religious and ethnic minorities to conform to the educational preferences of the majority.

#### A. *The Trend Toward Greater State Oversight*

In denouncing any attempt by the state to regulate homeschooling, Christopher Klicka, Senior Counsel to the HSLDA, writes, "During the first 250 years of the United States . . . [e]ducation was not a government responsibility and it was left completely under the private control of parents and the churches."<sup>91</sup> This historical assertion is inaccurate. Education in the United States has never been completely under the private control of parents and churches. In fact, historical research demonstrates that the state has long been involved in the education of American children. As scholar Matthew Steilen observes, "[P]arents have only recently asserted a constitutionally significant 'right' against the state power to regulate the education of their children, and they have long ceded some control over education to the state . . . ."<sup>92</sup> This Section establishes why, historically, the state is within its authority to regulate homeschooling, at least to ensure that all children receive an adequate education.

State regulation of education dates as far back as the colonial period. Colonial families in the "new world" assumed burdens not imagined in England. Confronted with a brutal natural landscape and a

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89. KLIKA, *supra* note 10, at 29.

90. See discussion *infra* Part IV.B.

91. KLIKA, *supra* note 10, at 29 (emphasis omitted).

92. Matthew Steilen, *Parental Rights and the State Regulation of Religious Schools*, 2009 BYU EDUC. & L.J. 269, 338.

new and unknown population, the colonial settlers believed their very survival was at stake.<sup>93</sup> Without support from the church and family back in England, settlers struggled to fulfill their traditional educative roles.<sup>94</sup> Because colonists viewed education as a critical means of maintaining their way of life in a foreign frontier, education became a matter of public concern.<sup>95</sup> Worried that families were not providing children with an adequate education, colonial governments began to impose legal requirements on the family and the community.<sup>96</sup> In 1642, Massachusetts empowered certain men of each town to inquire into each household to ensure that children were literate so that they could read the Bible and understand the laws.<sup>97</sup> Connecticut, New York, and Pennsylvania passed similar laws in the next several decades.<sup>98</sup> In 1647, Massachusetts passed the School Act, requiring towns of fifty or more to establish primary schools and towns of one hundred or more to establish grammar schools.<sup>99</sup> As historian Bernard Bailyn explains, “The Puritans quite deliberately transferred the . . . functions of the family to formal instructional institutions, and in so doing not only endowed schools with a new importance but expanded their purpose . . . .”<sup>100</sup> The colonies began to regulate to make sure that children received a basic education.<sup>101</sup>

A century later, the Founding Fathers similarly worried about the adequacy of education in the new republic.<sup>102</sup> In his Farewell Address, George Washington emphasized the need for public “institutions for the general diffusion of knowledge.”<sup>103</sup> A system of schools, tied to the republic, would be the most universal and effective means of providing a proper education.<sup>104</sup> Education, however, was neither mentioned in the Constitution, nor was it specified as within Congress’s regulatory authority.<sup>105</sup> Any development of an educational system would have to proceed as it had at the state and local level. Thus, Thomas Jefferson tried to es-

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93. *See id.* at 286.

94. *See* BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* 25–26 (1960).

95. *See* LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607–1783*, at 193 (1970).

96. Steilen, *supra* note 92, at 287 (“The threat of ‘barbarism’ in colonial America led to two major changes in traditional educational practices. First, formal education became more important than it previously had been. . . . Second, the state (in this case, the colonial government) began to regulate educational practices inside the home.” (emphasis omitted)).

97. CREMIN, *supra* note 95, at 124.

98. *Id.* at 125; JAMES W. FRASER, *BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA* 11–12 (1999).

99. Steilen, *supra* note 92, at 287.

100. BAILYN, *supra* note 94, at 27.

101. *See id.* (“In the context of the age the stress placed by the Puritans on formal schooling is astonishing.”).

102. *See* DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954*, at 23 (1987).

103. Steilen, *supra* note 92, at 291.

104. *See* LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876*, at 148 (1980).

105. *See* TYACK ET AL., *supra* note 102, at 21.

establish a state public school system in Virginia.<sup>106</sup> His plan provided for three years of free, tax-supported education.<sup>107</sup> These schools would teach basic but essential skills such as reading, writing, arithmetic, and history.<sup>108</sup> The Virginia Legislature did not see the need for such a system and rejected Jefferson's proposal.<sup>109</sup> George Clinton, Governor of New York, likewise feared that the war had created a "chasm in education" that required establishment of more schools.<sup>110</sup> But Virginia and New York simply did not consider the establishment of a state-supported school system justified. With the frontier further west than in the colonial period, formal schooling was no longer considered necessary.

This brief historical analysis shows that state governments have been regulating education as far back as the seventeenth century. Although several of the Founders were unsuccessful in expanding these efforts, their concerns emphasize the growing trend toward the belief that the states needed to ensure that children were receiving an adequate education.

### *B. The Misuse of Education*

State aversion to expanding regulation over education suddenly changed in the mid-nineteenth century when an unprecedented number of European immigrants began arriving in the United States. The arrival of thousands of non-English and non-Protestant immigrants persuaded states to do what Jefferson had unsuccessfully proposed decades before—establish a state-funded public school system. As states began exercising greater control over education, they did so not simply for the purpose of providing an adequate education to all. On the contrary, the public school system was founded to homogenize these minority groups and force them to conform to the majority's educational preferences. This Section examines this misuse of education that unfolded in the nineteenth and twentieth centuries.

Between the 1820s and 1850s, over two million Catholics immigrated to the United States.<sup>111</sup> In addition to being poor and illiterate, these immigrants were culturally, linguistically, and religiously different from the majority of Americans at the time.<sup>112</sup> In this context, many Americans encouraged the establishment of a common, public, state-funded school system.<sup>113</sup> These schools, however, were not established to simply teach immigrants basic knowledge and skills. As Matthew Steilen

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106. Steilen, *supra* note 92, at 295.

107. *Id.*

108. *Id.*

109. *Id.* at 296.

110. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 8 (Eric Foner ed., 1983).

111. Steilen, *supra* note 92, at 307.

112. *See id.* at 307–08; *see also* KAESTLE, *supra* note 110, at 79.

113. *Id.* at 309–10.

notes, “The anti-Catholic attitude of the time was primarily nativist, and sought . . . to ensure that Protestant doctrine was taught in schools [and] that the dominant religious and ethnic groups in America remained dominant.”<sup>114</sup> According to Horace Mann, Secretary of the then newly formed Massachusetts Board of Education, common schools would assimilate foreign immigrants into the fabric of American life.<sup>115</sup> As New York’s state assembly committee believed, “We must decompose and cleanse the impurities which rush into our midst.”<sup>116</sup> One New England magazine responded, “There is but one rectifying agent—one infallible filter—the School.”<sup>117</sup>

A common school system would teach immigrant children English, but more importantly, it would assimilate them into American society.<sup>118</sup> This assimilation necessarily required instruction in morality as well. Because America was home to countless different Protestant denominations, Mann recognized that the common schools could not endorse one over the others.<sup>119</sup> But without religion, the schools could not teach morality. Mann’s solution was to require Bible readings.<sup>120</sup> By requiring all American schoolchildren to read the Bible, the schools could still provide a moral, yet nonsectarian, foundation.<sup>121</sup>

Technically, these common schools were nonsectarian.<sup>122</sup> But in practice, this “nonsectarianism” was virulently anti-Catholic.<sup>123</sup> Protestantism pervaded the common schools. The Webster’s Speller taught with Protestant epigrams.<sup>124</sup> The McGuffey Reader contained countless Protestant excerpts.<sup>125</sup> What inflamed Catholics the most, however, were the required Bible readings. Protestants read the King James Bible. Catholics read the Douay-Reims version with accompanying commentary.<sup>126</sup> At first Catholic parents fought the presence of the Bible in the schools as well as the prejudicial bias against Catholics in textbooks and lessons, but because Catholics were discriminated against in obtaining

114. *Id.* at 321.

115. *Id.* at 309; see also Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1199 (1997) (“The common school . . . simply cannot be understood except as an effort to Protestantize the immigrant children.”).

116. See KAESTLE, *supra* note 110, at 163 (internal quotations omitted).

117. See *id.* (emphasis omitted). One professor at a Protestant seminary similarly believed, “[i]t is altogether essential to our national strength and peace, if not even to our national existence, that the foreigners who settle on our soil, should cease to be Europeans and become Americans.” FRASER, *supra* note 98, at 35 (internal quotations omitted).

118. FRASER, *supra* note 98, at 34–36.

119. Steilen, *supra* note 92, at 307.

120. *Id.* at 312.

121. See *id.* at 311–12.

122. See BRUCE J. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER: HOW *ENGEL V. VITALE* CHANGED AMERICA 14 (2007).

123. Steilen, *supra* note 92, at 311 (“[A]nti-Catholicism played a large role in the ideology of the common school reformers, who regarded American Protestantism as being naturally superior.”).

124. DIERENFIELD, *supra* note 122, at 13–14.

125. *Id.* at 14.

126. *Id.* at 17.

teaching or school board positions, these parents fought unsuccessfully.<sup>127</sup> And in fact, Catholic opposition only served to legitimize Protestant beliefs that Catholic minds were indeed enslaved by a foreign Church and that those children had to be taught to read the Bible without clerical intermediation.<sup>128</sup> Consequently, the King James Bible remained in the public schools,<sup>129</sup> and many Catholic parents withdrew their children from the common schools and formed their own parochial school system. By 1900, more than 850,000 children attended Catholic parochial schools.<sup>130</sup>

The continued growth of parochial schools into the twentieth century concerned many Protestants.<sup>131</sup> After World War I, states attempted to reinvigorate the power of public schools by prohibiting both attendance at private schools as well as the teaching of foreign languages in public schools.<sup>132</sup> As historian William Ross notes, "The war had provided a vivid reminder that unassimilated ethnics might present a menace during a time of national crisis."<sup>133</sup> This xenophobic hysteria was especially aimed at Catholics and German-Americans.<sup>134</sup> After World War I, the German language became the primary target of post-war hysteria.<sup>135</sup> In 1919, nineteen states passed laws prohibiting the teaching of the German language.<sup>136</sup> Nebraska was one such state and even went further by forbidding the teaching of any foreign language in all schools through the eighth grade.<sup>137</sup> The law's supporters hoped that by removing foreign languages from the schools, children in ethnic communities would finally become Americanized.<sup>138</sup> One teacher who was prosecuted for teaching

127. WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927*, at 13-14 (1994).

128. Steilen, *supra* note 92, at 321 ("A religious xenophobia in part made up this view; nativists liked to spread worries of a Catholic fifth column, undermining the republic by taking orders from the pope. Whereas the King James Bible was everywhere associated with political liberty, the Douay Bible was an instrument for subjugating free people to the 'Romish' church.").

129. FRASER, *supra* note 98, at 51 ("[T]his system was quite clearly a Protestant system, designed to instill Protestant values, especially in those who might not otherwise share them.").

130. ROSS, *supra* note 127, at 14. Catholics were not the only minority group to oppose the Protestant nature of the common schools. German Lutherans, anxious to preserve their own denomination and language, also began to form their own schools. Jewish immigrants similarly attempted to establish a network of Jewish day schools. These schools became a means by which minority groups could freely transmit their own traditions and beliefs. *See id.* at 16-20.

131. *Id.* at 23.

132. *See* *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (deeming the state's prohibition of parochial education as unconstitutional); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (deeming the state's prohibition of foreign language education as unconstitutional); *see also* TYACK ET AL., *supra* note 102, at 169 ("Nativists associated immigrants with violence, radicalism, poverty, ignorance, and disloyalty. Leaders began to worry whether so disparate a population could constitute one people . . ."); William G. Ross, *Pierce After Seventy-Five Years: Reasons to Celebrate*, 78 U. DET. MERCY L. REV. 443, 445 (2001).

133. ROSS, *supra* note 127, at 59.

134. Edward McGlynn Gaffney, Jr., *Pierce and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491, 502, 506-07 (2001).

135. ROSS, *supra* note 127, at 39.

136. Gaffney, *supra* note 134, at 502.

137. *Meyer*, 262 U.S. at 397.

138. Gaffney, *supra* note 134, at 503.



German challenged the constitutionality of the law.<sup>139</sup> In determining the law's purpose, the Nebraska Supreme Court revealed its nativist assumptions, "The Legislature had seen the baneful effects of permitting foreigners . . . to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety."<sup>140</sup> On appeal, the Supreme Court overturned the law because the means adopted excessively interfered with constitutional rights.<sup>141</sup> But even the Court acknowledged that "[t]he desire of the Legislature to foster a homogenous people with American ideals . . . is easy to appreciate."<sup>142</sup>

The Court decided *Pierce v. Society of Sisters* at the same time states were attempting to require compulsory public education.<sup>143</sup> It was believed that compulsory public education could finally ameliorate divisions caused by race, class, and religion.<sup>144</sup> One of the most outspoken proponents of compulsory public education laws was the Klu Klux Klan, whose primary goal was to shut down Roman Catholic parochial schools.<sup>145</sup> Anti-Catholic nativism won its biggest victory in Oregon in 1922 when voters approved a law compelling all students to attend public schools.<sup>146</sup> Unsurprisingly, the law's strongest opponents were Catholics.<sup>147</sup> A religious order that operated several parochial schools quickly challenged the law.<sup>148</sup> On appeal to the U.S. Supreme Court, the state continued to support the law by arguing that "'bolshevists, syndicalists, and communists' would organize schools if the state were not permitted to require compulsory public education . . ."<sup>149</sup> The Court disagreed and found that the Constitution "exclude[d] any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."<sup>150</sup> The Court's decision in *Pierce* quickly received widespread acceptance. In fact, one journal even declared that *Pierce* was "a

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139. *Meyer*, 262 U.S. at 396.

140. *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922).

141. *Meyer*, 262 U.S. at 402–03; see also discussion *supra* Part II.B.

142. *Meyer*, 262 U.S. at 402.

143. Ross, *supra* note 132, at 448–49.

144. *Id.* at 449–50.

145. ROSS, *supra* note 127, at 69 ("[T]he Klan recognized that schools were crucial agents of socialization and feared that the hyphenated Americans whom Klansmen so distrusted never would adopt American standards if permitted to retain their parochial schools.").

146. Ross, *supra* note 132, at 451. Oregon was the only state to pass a law requiring compulsory education. ROSS, *supra* note 127, at 148.

147. ROSS, *supra* note 127, at 157. Jewish residents also opposed the law, "correctly perceiv[ing] that the school amendment represented forces of bigotry that threatened all minority groups." *Id.* at 158.

148. *Id.* at 160–61.

149. *Id.* at 165. The state even asserted that, "Within a few years . . . our country will be dotted with elementary schools which instead of being red on the outside will be red on the inside." *Id.*

150. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); see also Carter, *supra* note 115, at 1203 ("This language suggests a normative claim that the state should not try to ensure that all citizens have a common view of the world . . .").

victory over the forces which would make every American the abject creature of an omnipotent state.”<sup>151</sup>

World War II was the ultimate catalyst in changing and removing the nativist nature of state education laws. As historian Philip Gleason observes, “[T]he monstrous contrast of nazism galvanized Americans to a new appreciation of their own ideological values.”<sup>152</sup> Rather than forge a national identity around white Protestantism, a new American identity emerged that was grounded on individual values.<sup>153</sup> In contrast to the coerced conformity and bigotry of Nazi Germany, American courts began to vindicate individual liberties against compulsory educational requirements like flag salutes and eventually mandatory prayer and Bible readings. Accordingly, the Supreme Court forbade schools from forcing students to recite the Pledge of Allegiance.<sup>154</sup> Twenty years later, the Court declared that Bible readings and school prayer in the public schools were unconstitutional.<sup>155</sup>

Americans may no longer support laws requiring Catholic school-children to read the King James Bible or prohibit foreign languages or private education, but some scholars still seek to use the law to force minority groups to conform to majority conceptions of education. Although this scholarly debate has explored the theoretical advantages and disadvantages of recognizing parent, state, or children’s rights, it has not reflected on historical attempts of the state to regulate education. As this Part has shown, the state has regulated education for centuries in order to ensure that all children are adequately educated, but it has also gone much further by using education as a coercive tool to force minority groups to conform to the majority’s conception of education.

#### IV. COMPETING INTERESTS IN THE FIELD OF EDUCATION REGULATION: PARENT, STATE, AND CHILD

The preceding historical analysis is essential to understanding how best to regulate homeschooling. History shows that the state has been regulating education for centuries to ensure that children are adequately educated, but it also shows that the state has gone much further and has used education as a coercive tool to force minority groups to conform to the educational preferences of the majority. Although this historical lesson is important, it does not provide a normative resolution to the question of how the state *should* regulate education, particularly homeschool-

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151. ROSS, *supra* note 127, at 173.

152. Philip Gleason, *Americans All: World War II and the Shaping of American Identity*, 43 REV. POL. 483, 502 (1981).

153. *See id.* at 503, 512.

154. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

155. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963); Engel v. Vitale, 370 U.S. 421, 436 (1962).

ing. This Part explains and assesses the three theoretical arguments that seek legal recognition of either parental, state, or children's authority over education. Part V then unites these historical and theoretical analyses to recommend how homeschooling should be regulated.

### A. Parent

It seems obvious that parents have a right to make choices about their children's education. Homeschooling, however, represents not only parents' educational choice, but also their ability to educate their children themselves. As will be discussed, some scholars believe that parental authority should yield to the state and its need for productive and responsible citizens. Still others believe that parents should have no such rights and that children should have the right to determine their own education. In the face of these challenges, scholars have put forth renewed defenses in support of parental rights over education. This Section discusses and assesses the argument of Stephen Gilles in favor of parental rights.

#### 1. In Support of Parental Rights

Stephen Gilles is the leading legal scholar to comprehensively defend parents' right to determine their children's education.<sup>156</sup> In his article, *On Educating Children: A Parentalist Manifesto*, Gilles provides a broad conception of parental authority.<sup>157</sup> Gilles bases his defense of parental rights on two grounds: that parents are more likely to act in their children's best interest and that parental control over their children's values must be superior to the state's interest.<sup>158</sup> Gilles's first point is that we should allocate the right to direct children's education to those who have the strongest incentive to act in accordance with children's best interests.<sup>159</sup> He argues that parents have these incentives because they are "naturally inclined to love and care for their children."<sup>160</sup> Additionally, they are legally obliged to support their children and "as custodians who share a common life with their children, [they] have strong emotional incentives to act in their children's best interests."<sup>161</sup> Of course, the fact that parents have strong incentives to act in their children's best interest

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156. Others have done so to a lesser extent. See generally KLIČKA, *supra* note 10, at 29–48; Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 120–34, 145–46 (2000).

157. See generally Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

158. See *id.* at 940.

159. *Id.* at 945.

160. See *id.* at 953. Not all parents faithfully act in furtherance of this incentive, but "that sad fact cannot be decisive in a culture in which most parents do care deeply and well for their children . . . ." *Id.* at 953–54.

161. *Id.* at 954.

is not decisive, but parents' incentives are better than those of any other third party, especially any political majority.<sup>162</sup>

Gilles also argues that parental ideals further enhance parental incentives for making decisions in their children's best interest.<sup>163</sup> He believes parents have a right to treat their children "as central elements of [their] highest aspirations."<sup>164</sup> Parents wish their children to participate in the good life as they conceive that good life to be. They seek to impart to their children their fundamental values and beliefs.<sup>165</sup> Although parents may differ on what these values are and how they should be taught, all parents share a desire to educate their children in the manner they feel is best.<sup>166</sup> Parents should not be required to make educational choices that are contrary to their own beliefs.<sup>167</sup> Because all parents share this desire to raise their children in accordance with their own conception of the good, parents should have the right to oversee their own children's education.

Ultimately, Gilles's primary concern is majoritarian interference with parental choices. Gilles argues that the state should not enact laws that seek to realize the majority's conception of the good life and a good education.<sup>168</sup> He asks, "Why should the mere fact that some parents are in the majority entitle them to teach their children as they think best, while using the state's coercive powers to prevent minority parents from doing the same?"<sup>169</sup> Furthermore, "There is little reason to expect the majority's values to be better or more reasonable than the minority's, [and] the affront to liberal pluralism seems plain."<sup>170</sup> Still, Gilles willingly concedes the legitimate interest of the state in ensuring that children are adequately taught.<sup>171</sup> Even Gilles acknowledges that there is a general consensus among all parents that all children should receive an adequate education in essential subjects like reading, writing, and mathematics.<sup>172</sup> Thus, the state can use its power to make sure that children are learning

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162. See *id.* at 953–60.

163. *Id.* at 940.

164. *Id.* at 962. Stephen Carter elaborates on this belief by observing that "religion survives through tradition, and tradition is multigenerational." Carter, *supra* note 115, at 1205. In fact, "A religion that fails to extend itself over time is . . . not a religion at all." *Id.*

165. See Gilles, *supra* note 157, at 965.

166. *Id.* at 966.

167. See *id.* at 967–68.

168. *Id.* at 967. Gilles hypothesizes that "majority parents would . . . remain free to educate their children in accord with their basic values . . . [and] their efforts would be reinforced by the state's endorsement of those values" but "[m]inority parents . . . would be compelled to teach contrary to—or, at least, to refrain from teaching in accord with—their beliefs." *Id.*

169. *Id.* at 968.

170. *Id.*

171. *Id.* at 986 ("[T]here is a world of difference between a law that requires parents to teach their children the 3Rs . . . —while leaving parents the freedom to decide how to define and achieve these goals—and one that requires all educations to promote these ends both as the majority conceives of them and in the manner the majority thinks best. The former law is legitimate because it does not outrun the general liberal consensus that these are necessary educational ends.").

172. See *id.*

these basic skills, but it should not go further and prescribe the manner in which a parent chooses to teach these subjects.<sup>173</sup>

## 2. *Against Maintaining Parental Rights*

It seems intuitive that parents should have the right to direct the upbringing and education of their children. But giving parents exclusive authority over their children's education ignores both that children are their own autonomous individuals and that they have future obligations to their country as adult citizens. James Dwyer and Barbara Bennett Woodhouse especially criticize parental rights theory because it assumes that parents' rights include not only their own liberty but extend to that of their children.<sup>174</sup> Gilles's own description of parental rights is defined exclusively from the viewpoint of the parent. He acknowledges, "We do claim a right to treat our children as central elements of our highest aspirations . . . ."<sup>175</sup> In response, Dwyer maintains that "[respecting] children as equal persons requires finding equally offensive a legal regime that treats them in such an instrumental fashion, as objects for others to manipulate for their own satisfaction."<sup>176</sup>

In addition to giving parents the right to make children instruments of their own quest for the good, critics worry that the recognition of parental rights interferes with the child's capacity to become a functioning and productive citizen. As Amy Gutmann points out, emphasizing parental control over the child ignores a state's equally compelling interest in its future citizens.<sup>177</sup> By refusing state interference except in the most extreme of circumstances, parents are permitted to deny to their children the ability to make choices about how to live their lives.<sup>178</sup> This is in direct conflict with the liberal state's respect for self-determination. When the law places "so few safeguards on ensuring children's right to self-determination, and so much power in parents' hands," it violates children's individual autonomy and equal right to liberty and self-determination.<sup>179</sup> It also may threaten society itself. As Maxine Eichner notes, "The point is that citizens must give up some portion of their autonomy to secure the very freedom to raise their children . . . since without citizens' acquiring civic virtues, liberal democracy will founder."<sup>180</sup>

These criticisms have merit. Recognizing a parental right to direct the upbringing of children does elevate the right of the parent over those of both the state and child. Unless parents are educating their children in

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173. *Id.*

174. *See infra* Part IV.C.

175. Gilles, *supra* note 157, at 962.

176. JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 92 (1998).

177. AMY GUTMANN, DEMOCRATIC EDUCATION 32–33 (1987).

178. *See* Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1353 (2007).

179. *Id.*

180. *Id.* at 1352.

an abusive and clearly harmful fashion, their educational choice will always prevail. This imbalance does not necessarily square with our intuitions that all persons, even children, have a right to self-determination. Additionally, recognizing parental choice severely limits the extent to which the state can oversee children's education. Most Americans would probably agree that there is value in children receiving an education that exposes them to many subjects and challenges them to think rationally and question their own beliefs. If the state cannot regulate homeschooling in this manner, it cannot ensure that children receive this kind of education. But not all parents want this for their children. Some parents have conceptions about the good life and a good education that do not conform to these values. And as history has demonstrated, the state should not oversee education in a manner that forces minority groups to conform to the values of the majority. The state should not force all parents to make educational choices consonant with the majority's conception of what constitutes a good life and a good education.

### B. State

In response to those who advocate on behalf of maintaining parental rights, some scholars have expressed concern with the lack of strong state regulation over education. They believe that the state has an important interest in ensuring that all American children receive a liberal education that will enable them to become productive citizens. This Section discusses and assesses the arguments of Amy Gutmann, William Galston, and Stephen Macedo in favor of more extensive state regulation over education.<sup>181</sup>

#### 1. In Support of State Oversight

##### a. Amy Gutmann

Amy Gutmann has written the most comprehensive argument in favor of extensive state regulation over education. In her book, *Democratic Education*, she explains her basis for a democratic theory of education.<sup>182</sup> Gutmann acknowledges the conflict between parents and the state in the context of education. Parents want to impart an understanding of their values to their children just as the state wants to shape its future citizens.<sup>183</sup> Yet Gutmann reminds us that it is one thing to recognize the responsibility of parents towards their children and another to claim

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181. Suzanna Sherry is another legal scholar who argues that the state should intervene to ensure that children receive an education in republican citizenship. See generally Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995). Sherry believes education should both foster "an emotional attachment to the polity and one's fellow citizens" as well as engage children "in the sort of reasoned dialogue crucial in a diverse democracy." *Id.* at 162, 175.

182. GUTMANN, *supra* note 177, at 6–14.

183. See *id.* at 26–27.

that it “extends to a right of parents to insulate their children from exposure to ways of life or thinking that conflict with their own.”<sup>184</sup> Gutmann argues that the same principle requiring the state to recognize adults’ freedom also requires it to guarantee that children receive an education that will make such freedom meaningful when they enter into adulthood.<sup>185</sup> A state can do this “by teaching its future citizens respect for opposing points of view and ways of life” and making “choice meaningful by equipping children with the intellectual skills necessary to evaluate ways of life different from that of their parents.”<sup>186</sup> Thus, the state must regulate to guarantee that all children receive this form of liberal and democratic education.

Capacity for choice justifies Gutmann’s idea of democratic education. She believes it is illegitimate for anyone, “to deprive any child of the capacities necessary for choice among good lives.”<sup>187</sup> Accordingly, the state should “provide its members with an education adequate to participating in democratic politics, to choosing among . . . good lives, and to sharing in the several sub-communities . . . that impart identity to the lives of its citizens.”<sup>188</sup> Democratic education should also be guided by certain limitations.<sup>189</sup> Gutmann identifies one of these as “nonrepression.”<sup>190</sup> A democratic education cannot repress rational deliberation or consideration of different viewpoints.<sup>191</sup> Another of Gutmann’s limitations, “nondiscrimination,” emphasizes that democratic education cannot discriminate.<sup>192</sup> It requires that all children be educated and prohibits excluding any child from this form of education.<sup>193</sup> Accordingly, parents are prevented from using their present deliberative freedom to undermine the future deliberative freedom of their children.<sup>194</sup>

Ultimately, the democratic state recognizes children not merely as subjects of their parents but as future citizens.<sup>195</sup> The critical educational objective under Gutmann’s vision is children’s right to develop their own capacities so that they can make their own, rational, and deliberative choice about what constitutes the good life.<sup>196</sup> Families have a role in

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184. *Id.* at 29.

185. *See id.* at 30.

186. *See id.*

187. *See id.* at 40. Gutmann explains that this is illegitimate because “even if I know that my way of life is best, I cannot translate this claim into the claim that I have a right to impose my way of life on anyone else, even on my own child . . .” *Id.* Furthermore, “a good life and a good society for self-reflective people require (respectively) individual and collective freedom of choice.” *Id.*

188. *Id.* at 42.

189. *Id.* at 44–45.

190. *Id.* at 44.

191. *Id.* (“The principle of nonrepression prevents the state, and any group within it, from using education to restrict rational deliberation of competing conceptions of the good life . . .”).

192. *Id.* at 45.

193. *Id.* (“No educable child may be excluded from an education adequate to participating in the political processes that structure choice among good lives.”).

194. *Id.*

195. *See id.* at 46.

196. *See id.*

shaping their children's beliefs and future choices, but they do not have the right to determine the totality of their children's education.<sup>197</sup> On the contrary, the state, and not the family, must guarantee that "professional educators . . . develop in children the deliberative capacity to evaluate competing conceptions of [the] good . . . ."<sup>198</sup> Gutmann's conception of a democratic education is not accepting of all methods of education. It only tolerates those that develop a child's rational and deliberative capacity.

b. William Galston

William Galston similarly seeks to strengthen the ability of the state to guarantee a liberal education for children. He challenges those who maintain that the state must be neutral toward all conceptions of the good life.<sup>199</sup> On the contrary, Galston believes that the liberal state "embraces a view of the human good that favors certain ways of life and tilts against others."<sup>200</sup> In the context of education, Galston suggests that the purpose of civic education is to teach children how to live their lives within and in support of our liberal society.<sup>201</sup> Children should be taught certain values like "the disposition to respect the rights of others, the capacity to evaluate . . . and the ability to moderate public desires in the face of public limits."<sup>202</sup> Again, this education is not universal or neutral. It is for the purpose of maintaining the liberal state.

This purpose is not widely accepted, however. Galston notes that the most significant challenge to liberal civic education is "the desire of parents to pass on their way of life to their children."<sup>203</sup> If parents believe they are living out their conception of the good life, it is only natural that they would wish to impart that to their children. And "who can contemplate without horror totalitarian societies in which families are compelled to yield all moral authority to the state?"<sup>204</sup> As Galston points out, however, parental authority is limited by the fact that children are future adults and future citizens.<sup>205</sup> Just as parents are prevented from impeding children's health development, they should not be able to impede their children's acquisition of knowledge and "habits that support the polity and enable individuals to function competently in public affairs."<sup>206</sup> Ultimately, Galston draws the line at these civic necessities. The state cannot go beyond this line, but it can "identify a core of civic

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197. *Id.*

198. *Id.*

199. See WILLIAM A. GALSTON, LIBERAL PURPOSES 7 (1991).

200. *Id.* at 3.

201. See *id.* at 242–43.

202. *Id.* at 246.

203. *Id.* at 252.

204. *Id.* at 252.

205. *Id.* ("[Y]our child is at once a future adult and a future citizen. Your authority as a parent is limited by both these facts.").

206. *Id.*



commitments and competences” and ensure, through public education or regulation of alternative education, that these civic principles are disseminated.<sup>207</sup>

c. Stephen Macedo

Stephen Macedo likewise believes the state should regulate so as to ensure that all children receive a “liberal civic education.”<sup>208</sup> He acknowledges the falsehood of accepting as legitimate every differing notion of the good. In fact, “[t]he indiscriminate embrace of difference and diversity should be resisted.”<sup>209</sup> Macedo primarily focuses on the threat religious parents pose to a liberal education. He uses the case *Mozert v. Hawkins* to illustrate the conflict between religious parents and the state’s interest in providing a liberal education.<sup>210</sup>

*Mozert* arose after a group of Christian parents sued the local school board for implementing a reading program that interfered with their religious beliefs.<sup>211</sup> The challenged reading was not anti-religious; on the contrary, it exposed schoolchildren to all kinds of different religions.<sup>212</sup> Nevertheless, parents wanted their children to have the ability to opt out of the reading program.<sup>213</sup> The court disagreed. It found that exposure to differing religious views did not amount to indoctrination.<sup>214</sup> For the purposes of his argument, Macedo assumes the program would interfere with parents’ religious beliefs and thus asks if such interference is justified.<sup>215</sup>

The most obvious justification for the reading program is to provide differing viewpoints so that children can rationally deliberate among them all. Macedo describes this as “political liberalism.”<sup>216</sup> He argues that its basic motive is not fear of division or desire to exclude minority views, but instead the desire to respect reasonable people.<sup>217</sup> As he observes, “[M]any of our fellow citizens hold fundamental moral and reli-

207. *Id.* at 255–56 (“The state has a right to ensure that this core is generally and effectively disseminated, either directly, through public civic education, or indirectly, through regulation of private education. In cases of conflict, this civic core takes priority over individual or group commitments (even the demands of conscience), and the state may legitimately use coercive mechanisms to enforce this priority.”). It is important to note, however, that Galston would allow the state to go no further. Though he argues that the state does have the power to implement educational regulations that support our liberal society, it still cannot “prescribe . . . a single debatable conception of how human beings should lead their lives.” *Id.* Thus, Galston contemplates broader state authority than Gilles, but not as broad as Gutmann.

208. Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 473–76 (1995).

209. *Id.* 469.

210. *Id.* at 470; see also *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

211. *Mozert*, 827 F.2d at 1059–61.

212. See Macedo, *supra* note 208, at 470–71.

213. *Mozert*, 827 F.2d at 1059–61.

214. *Id.* at 1060, 1066.

215. Macedo, *supra* note 208, at 472.

216. *Id.* at 474.

217. *Id.*

gious beliefs that we believe false but which we can also allow are within the bounds of the reasonable . . . .”<sup>218</sup> Yet even those who disagree about their fundamental beliefs can still agree that certain public aims like peace, equality, and liberty are important.<sup>219</sup> These “basic political rights and institutions should be justified in terms of reasons and arguments that can be shared with reasonable people . . . ,” even if their beliefs, religious or otherwise, differ.<sup>220</sup> Religious beliefs are no different from secular beliefs, so long as they are reasonable conceptions of the good.

Accordingly, Macedo believes that there is good reason to refuse the parents’ request to opt their children out of the reading program.<sup>221</sup> He argues that parents must accept some limits on their own control over their children “for the sake of reasonable common efforts to insure that all future citizens learn the minimal prerequisites of citizenship.”<sup>222</sup> Children cannot be insulated from being aware of alternative life choices. Of course parents have the right to opt their children out of public education completely, but even then “that right should be understood to be conditioned by a public authority to regulate . . . to insure that civic basics are taught.”<sup>223</sup> Like Gutmann and Galston, Macedo believes that the importance of state interest in regulating education trumps whatever interests parents may have.

## 2. *Concerns with Increasing State Oversight*

Gutmann, Galston, and Macedo’s visions of education seem to make sense. Most parents would agree that any good education should include exposure to differing viewpoints and assistance in developing critical and rational reasoning. But this belief is not unanimous. As Gilles points out, “[T]o appeal to the capacity for critical deliberation is to make a controversial judgment about the extent to which we should rely on reason to govern our lives . . . .”<sup>224</sup> Many people do not allow reason and rational thinking to dictate every aspect of their lives. In fact, many believe that “a life without faith in, or commitment to, any values or principles would be neither reasonable nor good.”<sup>225</sup> Moreover, elevating the state’s authority over parents inverts the priorities of most people. In fact, “[f]or the millions of parents who place their families at the center of their lives, the project of educating their children is the cornerstone of their own individuality.”<sup>226</sup> Parents do not want to have

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218. *Id.*

219. *Id.*

220. *Id.* at 475.

221. *See id.* at 485–86.

222. *Id.*

223. *Id.* at 486.

224. Gilles, *supra* note 157, at 976.

225. *Id.* (emphasis omitted).

226. *Id.* at 996.

children just to relegate them to the authority of the state.<sup>227</sup> They have children to have a family and a “collective sharing of a life.”<sup>228</sup> Education is fundamental to that purpose.

There is also a fear that if the state possesses all educational authority, it will succumb too easily to majority pressure.<sup>229</sup> And indeed, the history described in Part III justifies this concern. Parents in the majority could benefit from their political position by denying parents in the minority the opportunity to educate their children with their differing views and simultaneously use the power of the state to uniformly endorse their majority views.<sup>230</sup> Protestants did it to Catholics and foreign immigrants before, and liberal scholars can just as easily do it to religious conservatives now. Quite simply, the state should not be permitted to use its coercive power to force those with minority beliefs to conform to the majority’s conception of the good life and a good education. Most have differing notions of what constitutes the good life, and parents, not the state, should be able to share that quest and accompanying education with their children.

### C. Child

Although those in favor of parental control and state interference disagree with each other, most understand this debate as being about whether educational authority should be allocated to either parents or the state. Relatively absent from the discussion are the interests of the children themselves. Recently, however, two legal scholars began and continue to advocate on behalf of the children caught between parents and the state. This Section analyzes the justifications of Barbara Bennett Woodhouse and James Dwyer for recognizing children’s independent interests in their own education.

#### 1. Recognizing Children’s Rights

##### a. Barbara Bennett Woodhouse

In her article, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, Woodhouse supports her conclusion that children’s rights need to be recognized by providing a revisionist history of *Meyer*

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227. See Carter, *supra* note 115, at 1209 (“The deeper problem is that the family becomes, in this liberal vision, not a fundamental institution . . . but a little citizen-making factory, existing by sufferance of the state . . .”).

228. ROB REICH, BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION 149 (2002).

229. See Martha Minow, *Before and After Pierce*, 78 U. DET. MERCY L. REV. 407, 423 (2001) (“I would not want to live in . . . a world standardizing children, squeezing pluralism to the margins of society, allowing the majority to impose its values on the minority in the most vital context of preparing and educating young people . . .”).

230. See Gilles, *supra* note 157, at 1033.

and *Pierce*.<sup>231</sup> Rather than applaud the two cases for expanding the canon of constitutional rights, she argues that they “constitutionalized a narrow, tradition-bound vision of the child as essentially private property.”<sup>232</sup> Unlike those who favor strong parental rights, Woodhouse argues that constitutional case law protects “a dangerous form of liberty, the right to control another human being.”<sup>233</sup>

Woodhouse’s argument focuses on the foundation for the Supreme Court’s decisions in *Meyer* and *Pierce*. She begins by tracing the ancient origins of patriarchal property ownership. As Woodhouse notes, Roman patriarchs not only owned their children but could even kill them.<sup>234</sup> This patriarchal property model has transcended through the centuries, even to America.<sup>235</sup> Since the colonial era, fathers have been entitled to their child’s labor and could even control the child with force.<sup>236</sup> In the early twentieth century, progressive reform began to chip away at patriarchal control of the family. Women acquired the right to vote and reformists sought to regulate the labor of both women and children as well as provide welfare services to them.<sup>237</sup> Reformists even began to contend that children would be the “last disenfranchised class.”<sup>238</sup> These reformists sought to transform the image of the child from one who could be exploited by parents for private ends to one who needed to be protected and nurtured by the community.<sup>239</sup>

Despite this trend towards recognizing children’s rights, the Supreme Court in *Meyer* and *Pierce* continued to endorse the parental property model and offered no consideration for the rights and interests of children.<sup>240</sup> Although these cases seemingly recognized liberty, Woodhouse emphasizes that “[t]here is a dark side of *Meyer* and *Pierce*, which promotes a view of the child as the parent’s private property, existing essentially outside the domain of social concern or legitimate state authority.”<sup>241</sup> Ultimately, Woodhouse argues that *Meyer* and *Pierce* bucked the trend towards recognizing children’s rights.<sup>242</sup> Instead it revitalized pa-

231. Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer* and *Pierce* and the Child as Property, 33 WM. & MARY L. REV. 995, 997 (1992).

232. *Id.*

233. *Id.* at 1000–01.

234. *Id.* at 1044.

235. *Id.* at 1043–46.

236. *Id.* at 1045–46.

237. *Id.* at 1051.

238. *Id.* at 1055.

239. *See id.* at 1060.

240. *See id.* at 1091 (“[P]arental control of the child, like private ownership of property, was not a feature of social organization that might be tampered with in the name of reform.”).

241. Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 394 (1996); *see also* Woodhouse, *supra* note 231, at 1114 (“Children are often used as instruments, as in *Meyer* and *Pierce*. The child is denied her own voice and identity and becomes a conduit for the parents’ religious expression, cultural identity, and class aspirations.”).

242. *See* Woodhouse, *supra* note 231, at 1113 (“*Meyer* and *Pierce* interrupted the trend of family law moving toward children’s rights and revitalized the notion of rights of possession.”).

rental control and ownership.<sup>243</sup> As a result, mere procreation continues to be valued at the cost of treating children as property of their parents.<sup>244</sup> To Woodhouse, a parental right to control a child's education denies the child "her own voice and identity and [she] becomes a conduit for the parents' religious expression, cultural identity, and class aspirations."<sup>245</sup>

b. James Dwyer

James Dwyer similarly seeks to challenge the prevalence of parental rights. Whereas Woodhouse sought to shed light on the "dark" side of *Meyer* and *Pierce* in order to implore the legal community to give consideration to the child, Dwyer advocates a legal regime that eliminates parental rights altogether.<sup>246</sup> Dwyer proposes that "children's rights, rather than parent's rights, [should] be the legal basis for protecting the interests of children."<sup>247</sup> In challenging the basis for parental rights, Dwyer argues that every justification in favor of recognizing parental rights is indefensible.<sup>248</sup>

Dwyer reaches this conclusion by questioning the assumption underlying the recognition of parental rights. He notes that many believe that children are not mature enough to make rational and informed decisions about significant questions and that adults are needed to provide guidance.<sup>249</sup> Yet Dwyer asks "[W]hy, if what we are most concerned with is protecting children's interests, we do not grant children themselves the rights necessary to protect those interests. Why, instead, do we rely on the conceptually awkward notion of parents' rights?"<sup>250</sup> He suggests that the law should instead recognize parents as their children's agents.<sup>251</sup> Parents would not have rights in childrearing, rather they would be agents entrusted with making decisions their children would make if ra-

243. *See id.*

244. *See id.* at 1113–14.

245. *Id.* at 1114. This fear was shared by Justice Douglas in his dissent in *Wisconsin v. Yoder*, 406 U.S. 205, 244–45 (1972) (Douglas, J., dissenting) ("While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.").

246. Woodhouse would agree, however, with Dwyer's observation that "parents' rights, like the plenary rights of husbands over their wives in an earlier age, ultimately rest on nothing more than the ability of a politically more powerful class of persons to enshrine in the law their domination of a politically less powerful class . . ." James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1373 (1994).

247. *Id.* at 1374.

248. *See id.* at 1426.

249. *Id.*

250. *Id.* at 1429.

251. *See id.* at 1430 ("Under this approach, the parents, acting as agents for the child, would have to argue that their judgment is the same as what the child would choose for herself if rationally able to do so, given the child's existing desires, values, inclinations, and needs, as well as her likely future interests.").

tionally able to do so.<sup>252</sup> This parental duty toward their children would not constitute a right over their children.

In the context of education, Dwyer suggests that any rational child would desire “an education that develops . . . independence of thought [and] keeps open for them a substantial range of alternative careers, lifestyles, and conceptions of the good . . . .”<sup>253</sup> He criticizes the theory of parental rights and its ability to make children mere means to achieving their parents’ vision of the good life.<sup>254</sup> On the contrary, “the state . . . should treat every person as an end in himself or herself, and not as an instrument for the expression or gratification of others, no matter how well intentioned those others are.”<sup>255</sup> Parents would object to losing control of their children, but Dwyer guesses that children would not resent the ability to pursue their own personal development, rather than have all choices closed off because parental rights protected their parents’ unreasonable choices.<sup>256</sup>

Ultimately, Dwyer proposes that “[c]ourts should acknowledge the illegitimacy of the parents’ rights doctrine and decline to recognize claims of parental rights in the future.”<sup>257</sup> Parents have a privilege, as agents of their children, to make decisions for their children, but they lack “legal claims of their own against state efforts to restrict their child-rearing practices or decision-making authority.”<sup>258</sup> Instead, children should have those legal claims. In legal disputes, the courts would consider only the best interests of the child and would no longer balance the parents’ rights against the state’s interest.<sup>259</sup>

## 2. *Problems with Recognizing Children’s Rights*

Together, Woodhouse and Dwyer challenge the traditional recognition of parental rights. Rather than protect children, they argue that it serves only to allow parents to make children instruments in realizing their own vision. This parental liberty is thus no liberty at all, but rather an endorsement of parental ownership over children. Arguing that the recognition of parental rights should be completely overturned is the most controversial of these three competing models. Woodhouse and Dwyer argue not only against centuries of tradition but also against a presumption repeatedly endorsed by the Supreme Court.<sup>260</sup> Additionally,

252. *See id.*

253. *Id.* at 1433.

254. *See* James G. Dwyer, *The Liberal State’s Response to Religious Visions of Education*, 44 J. CATH. LEGAL STUD. 195, 225 (2005).

255. *Id.*

256. *See* Dwyer, *supra* note 246, at 1433–34.

257. *Id.* at 1447.

258. DWYER, *supra* note 176, at 64.

259. *See* Dwyer, *supra* note 246, at 1376.

260. *See* *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“[O]ur constitutional system long ago rejected any notion that a child is ‘the mere creature of the State’ and, on the contrary, asserted that parents generally ‘have the right, coupled with the high duty, to recognize and prepare [their children] for ad-

an alternative regime where the state has more control is less likely to protect the child's best interest.<sup>261</sup> Gilles similarly points out that "[i]n light of the likelihood that intrusive state oversight of family life would . . . reduce children's welfare, our society's enforcement strategy relies primarily on parents' love for their children, on the child's voice within the family, and on persuasion by public . . . opinion . . . ."<sup>262</sup> If Dwyer and Woodhouse are truly concerned for the interests of the child then they should support parental rights because state intervention is likely to do more harm than the good provided by parents.

But the strongest critique of the children's rights model is its impracticality. When children are young, someone must have the legal right to act in their interest. Even Dwyer still makes parents their children's agents. Rather than presume that parents act in their child's best interests, he presumes that the state is the superior decision maker. In Dwyer's regime, the courts could override a parental decision if it deems it not in the child's best interests. And if the basis for Dwyer's argument is that it is wrong for parents to control the lives of their children, then it should be equally as offensive to submit the control of children's education to the state and its courts. Until children are old and mature enough to have the capacity to make their own decisions, someone must have the authority to make those choices. And it seems more palatable that parents should have that authority unless the decisions they make are truly unacceptable.

This Part assessed the theoretical arguments in support of education regulation that recognizes either parental, state, or children's rights. These are the legitimate interests at stake in deciding how homeschooling should be regulated. Oftentimes, these interests do not conflict. Parents usually take their children's interests into account and provide them with an education that enables them to be rational and productive citizens. But it is the circumstances when these interests clash that require some kind of legal resolution that will appropriately balance these interests.

## V. RECOMMENDATION

Viewed in historical perspective, then, our war . . . continues to display all the characteristics that made it so bitter a century ago. The group in power believes that the purpose of schools is to persuade the children of the other side that the other side is wrong. The purpose is clothed in the gentle language of preparing young

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ditional obligations." (alteration in original) (citations omitted)); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (upholding "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[I]t is the natural duty of the parent to give his children education suitable to their station in life . . . .").

261. See Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 160–62 (1999) (book review).

262. *Id.* at 161.

people to be adult citizens of the republic, but the clothing should not distract us from the argument underneath: good adults are, by definition, those who think the way the dominant group does, and this truth is the same whether the dominant group is nativist Protestants in the nineteenth century . . . or theorists of liberalism today.<sup>263</sup>

Too often the homeschooling debate just volleys back and forth between religious parents maintaining their absolute right to educate their children as they see fit and scholars who condemn them for seeking to insulate their children from secular and liberal ideals. This Note argues that history helps reveal the appropriate resolution. As Part III explains, states have sought to regulate education since the early seventeenth century. Even then, parents did not conceive of their right to rear and educate their children as absolute and inviolate. Nevertheless, as benign as a state interest in regulating the education of its young citizens may appear, history has also demonstrated that this power has been extended further to subject minority ethnic and religious groups to the educational preferences of the majority. The common schools were created a century and a half ago to make good citizens out of non-Protestant immigrants. Today, legal scholars demand much the same. They want to use the power of the state to make good liberal citizens out of homeschooled conservative Christian children. The times are different, but this illegitimate purpose of subjecting those in the minority to conform to whatever educational preferences are currently endorsed by the majority are not. What was condemned then should be just as offensive now. The state simply should not be able to dictate the nature of a child's education.

Of course, just because history shows that state regulation over education can come at such a high cost does not mean the state should abdicate the field of regulating education altogether. Although parents should retain the right to determine the best kind of education for their children, the state still has an important interest in ensuring that each child at the very least receives an adequate education. But how can this line be drawn? What distinguishes legitimate state regulation that seeks to ensure that homeschooling parents provide their children with an adequate education from illegitimate regulation that seeks to dictate the nature of a homeschooled education?

The generally accepted purpose of education provides the best answer.<sup>264</sup> There is a general consensus that the primary purpose of education is to provide children with basic knowledge, particularly in subjects like reading, writing, and mathematics.<sup>265</sup> Homeschooling parents accept

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263. Carter, *supra* note 115, at 1223–24.

264. See Gilles, *supra* note 157, at 986 (arguing that it is legitimate for states to pass laws in furtherance of a “general liberal consensus that [there] are necessary educational ends”). This notion of overlapping consensus belongs to John Rawls. See JOHN RAWLS, *POLITICAL LIBERALISM* 133–72 (1993).

265. Kunzman, *supra* note 26, at 324 (“Few would disagree that children have vital educational interests in basic literacy and numeracy, and it seems likely we could reach agreement on what skills are involved (some people would undoubtedly push for more than others, but even a lowest common



this. They homeschool for the very purpose of providing children this knowledge themselves. But while homeschoolers agree with the primary aim of education, they do have differing conceptions on how to achieve it. The state can accommodate these diverse educational beliefs by allowing homeschoolers to determine the nature of their children's education while also fulfilling its need to guarantee that children receive a basic education by implementing regulation that objectively and unobtrusively assesses the adequacy of homeschoolers' education.<sup>266</sup>

These objective and unobtrusive regulations would first require that parents notify their local school district of their intent to homeschool their children. This will provide knowledge to the school district and to the state that those children are receiving some form of education. The state should also require that certain mandatory areas be taught, like reading, writing, mathematics, and those annually tested by state standardized tests. These regulations should not, however, dictate the manner in which these subjects should be taught. Again, this will ensure that the generally accepted purpose of education, knowledge in basic subjects, is taught and also provide parents with the flexibility to determine how to teach these subjects. Finally, homeschooled children should be required to take the same statewide standardized tests as all other children. This will guarantee that homeschooled children are proficient in the basic areas of knowledge that are generally accepted as essential.<sup>267</sup> Furthermore, judicial bypasses should be available for children who seek to challenge the education chosen for them by their parents.<sup>268</sup> This will give value to children's own interests without granting to the state the enormous power of determining what kind of education children receive. These recommendations do not regulate homeschooling as extensively as critics would prefer, but they guarantee that children will receive an adequate education and that parents are able to provide the education they believe is best for their children.

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denominator of reading comprehension and computation skills would be worth verifying). . . . [S]uch straightforward skills would be relatively easy to assess objectively.”); *see also* Gilles, *supra* note 157, at 986.

266. Judith McMullen also suggests that “[h]omeschooling should be regulated to some degree, but such regulation should be fairly minimal and aimed less at intrusive oversight and more at identifying the small minority of homeschooling parents who are not in fact providing their children with an education.” McMullen, *supra* note 26, at 106.

267. Colorado's homeschooling law is an illustrative example. It requires that parents give annual notice of their intent to homeschool; that they teach reading, writing, speaking, math, history, civics, and science; and that their children take a national standardized achievement test. *See* COLO. REV. STAT. ANN. § 22-33-104.5(3)(d)–(f) (West 2005 & Supp. 2010).

268. Kimberly Yuracko has similarly proposed this kind of judicial bypass. Yuracko, *supra* note 1, at 179 (“States might establish judicial procedures, like in the abortion context, to allow children themselves to challenge the adequacy of their parents' homeschooling.”).

## VI. CONCLUSION

This Note has explored the complexities of the debate regarding the regulation of homeschooling. Already, over two million children are homeschooled in the United States. Because this number is certain to grow, determining the extent to which the states can and should regulate homeschooling will become ever more pressing. As more parents choose to homeschool their children, the desire to exercise more governmental control will undoubtedly become more tempting. A majority of Americans would probably agree that there is great benefit in ensuring that all children receive a comprehensive liberal education, but history has taught us that the cost of majoritarian control over education is too great. Although the state can and should ensure children receive an adequate education, even at home, once those requirements are met, parents should have the right to determine the nature of their children's education.