

CHANGING OUR PERSPECTIVE:

HOW PRESUMPTIVE INVALIDITY OF HOME SCHOOL REGULATIONS WILL FURTHER THE STATE'S INTEREST IN AN EDUCATED CITIZENRY

[C]hildren schooled at home seem to be five or even ten years ahead of their formally trained peers in their ability to think.

I don't think we'll get rid of schools any time soon, certainly not in my lifetime, but if we're going to change what's rapidly becoming a disaster of ignorance, we need to realize that the school institution "schools" very well, though it does not "educate," that's inherent in the design of the thing.¹

John Taylor Gatto, Former New York City Teacher of the Year

The National Education Association believes that home schooling programs cannot provide the student with a comprehensive education experience.²

NEA Resolution B-68

I. INTRODUCTION

American educational policy has undergone a massive shift from a time when state and local governments had little involvement in providing formal education³ and imposed virtually no regulations on

¹ JOHN TAYLOR GATTO, DUMBBING US DOWN 26 (1992). Gatto made this statement in a January 19, 1991 speech as he accepted the New York City Teacher of the Year award. *Id.* at 23. Shortly thereafter Mr. Gatto ended 26 years as a New York City public school teacher, "quit[ting] because he didn't want to 'hurt' kids any more." Carol Innerst, *N. Y. Teacher of Year Walks Out on System*, WASH. TIMES, Oct. 22, 1991, at A1.

² NEA 2000-2001 RESOLUTIONS: B-68. HOME SCHOOLING, at <http://www.nea.org/resolutions/00/00b-68.html> (last visited Nov. 10, 2001) [hereinafter NEA RESOLUTION B-68]. This Resolution originated in 1988, Charles S. Clark, *Home Schooling: Is it a Healthy Alternative to Public Education?*, 4 CONG. Q. RESEARCHER 769, 783 (1994), and is republished annually, though sometimes under a different numerical heading. See NATIONAL EDUCATION ASSOCIATION, 1999-2000 HANDBOOK 292 (1999). See also CHRISTOPHER J. KLIČKA, THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION 23 (2d ed. 1998). Total NEA membership as of August 31, 1999 was 2,458,364, NATIONAL EDUCATION ASSOCIATION, *supra* at 177, making it the largest teacher's union in America, and the largest union of any type not affiliated with the AFL-CIO, which is actually a conglomeration of affiliated unions. THE WORLD ALMANAC AND BOOK OF FACTS 2000, at 153-54 (Robert Famighetti et al. eds., 1999). The NEA's membership exceeds that of the International Brotherhood of Teamsters by approximately one million. *Id.* at 154.

³ See JOHN W. WHITEHEAD & ALEXIS IRENE CROW, HOME EDUCATION: RIGHTS AND REASONS 37-58 (1993). In pre-revolutionary America, "local or church authorities built and

citizens' educational choices,⁴ to a time when the United States Supreme Court calls education "perhaps the most important function of state and local governments,"⁵ and every state has enacted, among other regulations, a compulsory education statute.⁶ One of the practical effects of this policy shift was the virtual elimination, over the years prior to 1983, of home education as a primary means of educating students.⁷

The last seventeen years,⁸ however, have seen substantial changes in education law, including historic deregulation of home schooling.⁹

financed what schools there were, with little outside supervision from civil government." *Id.* at 37. It was not until the common school movement of the early to middle 19th century gained followers that government schools were seen as desirable or even lawful. *Id.* at 42-44; see also *Stuart v. Sch. Dist. No. 1*, 30 Mich. 69 (1874) (ruling against taxpayers who sought to enjoin the State from collecting and expending taxes to fund a high school).

⁴ Even after public schools provided at taxpayer expense became available in the late 19th century the presumption of family responsibility and control remained. The strength of this parental prerogative in education can be gauged by the "right of excusal." At common law prior to the early 20th century, state courts generally upheld the right of parents to have their children excused from any course or program of study to which the parents objected. No questions were asked concerning the parents' motivation for such excusals; and although the effect on the efficiency and good order of the schools was considered, this was not interpreted to block parental wishes. School was regarded as an opportunity to which children were entitled, not as a requirement to be imposed, complete with specified content, upon dissenting parents.

WHITEHEAD & CROW, *supra* note 3, at 62 (quoting Stephen Arons, *Value Conflict between American Families and American Schools Final Report to National Institute of Education* 5-6 (1981) (available from ERIC Document Reproduction Services ED 210 786)). "During this period parents ' . . . remained in legally recognized control of the content of individual education.'" *Id.* "In addition to the assumption of parental control of education, an assumption of parental competency regarding the education of their children existed: 'It was assumed that parents were as competent as school personnel to determine what their children were to learn and how they ought to be taught.'" *Id.*

⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁶ CHRISTOPHER J. KLUCKA, *HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS* (2000). N.J. STAT. ANN. § 18A:38-25 (West 1999) is typical: "Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to [attend school]." *Id.*

⁷ As of 1983, only three states statutorily recognized the right to home school. MICHAEL FARRIS, *THE FUTURE OF HOME SCHOOLING: A NEW DIRECTION FOR CHRISTIAN HOME EDUCATION* 29 (1997). Many states explicitly forbade home education by anyone who did not possess a current state teacher's certification. *Id.* Farris estimates the number of home schooling families in the early 1980s to be "a few thousand." *Id.* at 3. However, as will be discussed in Section II, *infra*, estimates of home schoolers vary widely, for a number of reasons. One researcher estimates that in 1983, between 60,000 and 125,000 children were being educated at home. Patricia Lines, *Home Instruction: The Size and Growth of the Movement*, in *HOME SCHOOLING: POLITICAL, HISTORICAL, AND PEDAGOGICAL PERSPECTIVES* 10 (Jane Van Galen & Mary Anne Pittman eds., 1991).

⁸ 1983 was a significant milestone in the trend toward deregulation of home schooling as it was then that the Home School Legal Defense Association (hereinafter HSLDA) was formed. FARRIS, *supra* note 7, at 29. This organization provides legal defense

While the State still asserts its vital interest in education oversight,¹⁰ more and more states and municipalities are willing to trust parents with accomplishing the formal training of their children. This change, though, has not been without resistance.¹¹ Moreover, many view home education as an anomaly to be tolerated within strict regulatory limits,¹² rather than a welcome change to be embraced.

when necessary for any of its more than 66,000 home schooling member families, in exchange for annual membership dues. *Ten Reasons to Join HSLDA*, at <http://www.hsllda.org/courtreport/v16n.1/v16n102.asp> (last visited Aug. 14, 2001). This organization's successes in various courts and in lobbying legislatures have been remarkable. See generally CHRISTOPHER J. KLICKA, *THE RIGHT CHOICE: THE INCREDIBLE FAILURE OF PUBLIC EDUCATION AND THE RISING HOPE OF HOME SCHOOLING* 378-83 (rev. ed. 1993). Michael Farris, the organization's president, has represented home schooling families in such landmark cases as *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993) (holding that teacher certification requirements for religiously motivated home schoolers violates the Free Exercise Clause of the United States Constitution), and *Lawrence v. South Carolina Bd. of Educ.*, 412 S.E.2d 394 (S.C. 1991) (invalidating as unreasonable the State's requirement that home schooling parents, in addition to having a high school diploma, pass an Education Entrance Examination).

⁹ See KLICKA, *supra* note 6, at iv-v. Between 1956 and 1997, thirty-seven states adopted statutes specifically recognizing home schooling as a legal alternative to compulsory institutional education. *Id.* at iv. As of 2000, forty-one states impose no teacher qualification requirements on parents who educate their children at home, and seven more require only that the parent possess a high school diploma or General Equivalency Diploma (GED). *Id.* at v.

¹⁰ See, e.g., *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 699 (10th Cir. 1998) ("[P]arents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject."); see also *State v. DeLaBruere*, 577 A.2d 254 (Vt. 1990) (holding that reasonable state regulations do not infringe a parent's right to home school).

¹¹ See NEA RESOLUTION B-68, *supra* note 2. Also, the Democratic Party's National Platform, while not explicitly addressing home schools, would, if implemented, affect their *de facto* elimination. On August 15, 2000, the Democratic National Committee published the following language, promising "A Revolution in American Education": "By the end of the next presidential term, we should have a fully qualified, well trained teacher in every classroom in every school in every part of this country - and every teacher should pass a rigorous test to get there." DEMOCRATIC NATIONAL COMMITTEE, 2000 DEMOCRATIC NATIONAL PLATFORM (2000), at <http://www.democrats.org/hq/resources/platform/platform.html>. Synthesizing this with their stance that "[b]y the end of the next presidential term, every child should learn in a safe, modern classroom," *id.*, the inescapable conclusion is that substantial freedom for parents to home school is incompatible with the Democrats' vision for the future of American education. Such language is not unprecedented. In 1994, Rep. George Miller (D-Calif.) inserted an amendment to the then-pending Improving America's School Act, which would have required every full-time teacher in America to be state certified in every subject taught. John W. Kennedy, *House Learns Civics Lesson*, CHRISTIANITY TODAY, Apr. 4, 1994, at 76. Such a requirement would render impossible most home schooling of elementary students and virtually all home schooling of high school students. FARRIS, *supra* note 7, at 36.

¹² See NEA RESOLUTION B-68, *supra* note 2. The Resolution goes on to state the following:

This Comment will demonstrate that home schooling succeeds in educating children, most often better than do the public schools, and will explain why this is so. It will demonstrate how a legal presumption against the validity of any regulation limiting home schooling freedoms will actually further the stated ends of government in ensuring an educated public. Section II will provide an overview of America's historical treatment of home education, briefly discussing the current demographic and legal state of American home schools. Section III will analyze empirical data surrounding home schooled students' performance in a variety of academic and social settings, and will also address and rebut some of the more common arguments put forth in opposition to deregulated home schools. Section IV will analyze various courts' explanations of what justifies state regulation of education when that regulation conflicts with otherwise lawful parental choices. Section IV will also show how the governmental interests that courts rely on to justify regulations usually demonstrate the imprudence of those very regulations. This is so because most current regulations merely affect the structure and system of education; the true benefit of any education regulation should instead be measured only by its corresponding increase in student performance, and this within the confines of legitimate government interest in area - specific improvement.¹³ Section V will propose legislation which would effect a presumptive invalidity

When home schooling occurs, students enrolled must meet all state requirements. Home schooling should be limited to the children of the immediate family, with all expenses being borne by the parents/guardians. Instruction should be by persons who are licensed by the appropriate state education licensure agency, and a curriculum approved by the state department of education should be used.

Id.

¹³ The reader should not interpret this Comment as advocating improved student performance as the sole justification for State involvement. This Comment asserts, rather, that improved student performance is merely a threshold standard. That is, there exist areas of student performance which could ostensibly be improved by State intervention, yet which are clearly beyond the State's appropriate reach. For example, a student applying himself to the study of piano performance, to the exclusion of all flute performance, would almost surely perform better on the flute if the State required him to practice that instrument. However, in this scenario, the State, regardless of the student's likely improved flute performance, has no legitimacy in requiring any flute practice. This is true notwithstanding the arguable State interest in a citizenry acquainted with music and the arts. Thus, while the State asserts an interest in an educated citizenry, it does not follow that every area of childhood education remotely related to this goal is within the legitimate reach of governmental regulation.

For an excellent analysis of the appropriate limits on the ends of State regulation of home schooling, see Branton G. Lachman, Comment, *Home Education and Fundamental Rights: Can Johnny's Parents Teach Johnny?*, 18 W. ST. U. L. REV. 731, 769 (1991) (concluding that standardized testing, while a reasonable means of State regulation, must be "restricted to measure competency of citizenship only" if the State is to stay within its appropriate regulatory ends.).

against any existing or pending regulation that could impact home schools. Under this proposed legislation, any regulation's author or sponsor, in order to justify the proposed regulation, would be required to provide an impact statement, akin to that required by the 1969 National Environmental Policy Act,¹⁴ explaining the need for the regulation in terms of improved student performance. Furthermore, the proposed legislation requires that a state or municipality, when faced with a legal challenge to an enacted law, would be required to prove to the satisfaction of a reviewing court that the regulation was drafted in the least restrictive means possible.

II. HOME SCHOOLING IN AMERICA: PAST AND PRESENT

Home Schooling has been called a "drastic"¹⁵ and "radical"¹⁶ example of alternative education. It is in fact a return to this nation's historical traditions.¹⁷ While compulsory education laws have existed in America since 1642,¹⁸ it was not until 1852 that Massachusetts became the first state to enact a compulsory attendance statute.¹⁹ This statute heralded a fundamental shift in the perceived purposes of publicly provided education. The previous availability of public schools without any corresponding requirements for attendance indicated that they existed to assist parents in their duty of educating their children.²⁰ Compulsory

¹⁴ 42 U.S.C. § 4332(2)(C) (1994).

¹⁵ JOHN NAISBITT, MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES 145 (1982). Naisbitt considers the home schooling movement paradigmatic of the late twentieth century trend away from institutional help to self-help. *Id.* at 133.

¹⁶ *Id.* at 144.

¹⁷ See LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876 (1980).

The household remained . . . for the vast majority of Americans, the central agency of deliberate cultural transmission. In newly settled frontier regions, it frequently educated much as it had during the early stages of development in the middle and southern colonies, taking unto itself functions ordinarily performed by church and school.

Id. at 371. The following Americans are products of home education: Presidents George Washington, Thomas Jefferson, John Quincy Adams, Abraham Lincoln, Woodrow Wilson, and Franklin D. Roosevelt; Benjamin Franklin; Thomas Edison; Booker T. Washington; and Generals George Patton and Douglas MacArthur. Daniel E. Witte, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 226 n.179 (1996).

¹⁸ Kara T. Burgess, Comment, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69, 70 (1986). That year, the Massachusetts Bay Colony enacted a law which applied to all social strata and "required parents to teach their children reading, capital laws, religious understanding and a trade." *Id.*

¹⁹ *Id.*

²⁰ "Public education was regarded as a service to families, 'an opportunity to which children were entitled, not as a requirement to be imposed.'" Jennie F. Rakestraw &

education statutes, however, represented a newly asserted State interest in education,²¹ shown by modern litigation to be independent of, and sometimes at direct odds with parental desires.²² Section IV of this Comment will examine past legal challenges to specific regulations that have resulted from this shift, and will demonstrate that there often exists, at best, a tenuous relation between the claimed justifications for this State interest and the net effects of current regulations.

The modern home schooling movement is comprised primarily of Christians,²³ mostly Protestant, but with some Catholic representation as well.²⁴ However, a sizable minority of home schoolers come from other religious backgrounds including Judaism, Buddhism, and Mormonism, as well as atheism.²⁵ And while religious beliefs are the most common motivating factor in the decision to home school,²⁶ both religious and non-religious parents express pedagogical concerns, having concluded that home schooling will better serve their children's academic or social needs.²⁷

Estimates of the number of students currently studying primarily at home range from 700,000²⁸ to 2 million.²⁹ While this range may seem

Donald A. Rakestraw, *Home Schooling: A Question of Quality, An Issue of Rights*, 55 EDUC. F. 67, 69 (1990) (quoting Arons, *supra* note 4).

²¹ Herbert W. Titus, *Education, Caesar's or God's: A Constitutional Question of Jurisdiction*, 1982 J. CHRISTIAN JURISPRUDENCE 101, 114. In his article arguing against the Biblical legitimacy of public education, Dean Titus explains how the legal and non-legal Academies, as well as prominent jurists, now hold the State's interest in its survival and the preservation of democracy to be the basis and purpose for State schools. *Id.*

²² See, e.g., *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988).

²³ FARRIS, *supra* note 7, at 83. See also Lines, *supra* note 7, at 15; Clark, *supra* note 2, at 771.

²⁴ FARRIS, *supra* note 7, at 83. See also Lines, *supra* note 7, at 12.

²⁵ FARRIS, *supra* note 7, at 83.

²⁶ *Id.* at 84; see also *Murphy*, 852 F.2d at 1040 n.1. There, the appellants gave the court three scriptural references from which came their perceived mandate to home school their children. *Id.* at 1040. Among them were "Train a child on the way he should go, and when he is old he will not depart from it." *Proverbs* 22:6.

Hear, Oh Israel! The LORD is our God, the LORD is one! And you shall love the LORD your God with all your heart and with all your soul and with all your might. And these words which I am commanding you today, shall be on your heart; and you shall teach them diligently to your sons and shall talk of them when you sit in your house and when you walk by the way and when you lie down and when you rise up.

Deuteronomy 6:4-7.

²⁷ FARRIS, *supra* note 7, at 84. See also Jane A. Van Galen, *Ideologues and Pedagogues: Parents Who Teach Their Children at Home*, in HOME SCHOOLING: POLITICAL, HISTORICAL, AND PEDAGOGICAL PERSPECTIVES, *supra* note 7, at 71-72; Mary Elizabeth Cronin, *More Kids are Staying Home to go to School: Independence, not Religion, Behind Rise*, SEATTLE TIMES, Oct. 1, 1993, at B1.

²⁸ Nancy Mitchell, *Broad Home-Schooling Study Released*, COLORADO SPRINGS GAZETTE, Apr. 11, 1999, at 16.

wide, estimates of the total number of home schooled children in the early 1980s ranged from "a few thousand"³⁰ to one million or more.³¹ The United States Government includes questions about home schooling in their periodic national surveys,³² but expresses doubt over the responses,³³ based on factors both intrinsic and extrinsic to the surveys.³⁴ Educational analyses published by the Government, therefore, do not usually include statistics for home schooling families.³⁵

Demographic analysis of modern home schooling families is thus somewhat challenging and can be made more so by the wide variety of reasons given for the decision to remove children from an institutional classroom setting.³⁶ As the number of home schooled children grows, a greater number, if not a greater percentage, of home schooling families will adhere to views not necessarily congruent with those of the evangelical Christians commonly associated with the movement. To the extent that a given family's political, religious, or philosophical views affect demographic indicators, such as marital status, educational level,

²⁹ Jennifer Brett, "Webster Academy" is Home School Powerhouse, ATLANTA J. AND CONST., June 21, 2000, at 1B.

³⁰ FARRIS, *supra* note 7, at 3.

³¹ NAISBITT, *supra* note 15, at 144.

³² ROBIN R. HENKE ET AL., U.S. DEPARTMENT OF EDUCATION, SEPTEMBER 2000 TECHNICAL REPORT: ISSUES RELATED TO ESTIMATING THE HOME-SCHOOLED POPULATION IN THE UNITED STATES WITH NATIONAL HOUSEHOLD SURVEY DATA iv (2000), available at <http://nces.ed.gov/pubs2000/2000311.pdf> [hereinafter 2000 Technical Report].

³³ Data from the October 1994 Current Population Survey Educational Supplement and the 1996 National Household Education Survey, Parent and Family Involvement/Civic Involvement, both conducted by the National Center for Education Statistics, indicated that the home schooled population in America nearly doubled from 1994 to 1996. The National Center for Education Statistics finds this growth "unlikely." *Id.* at iii.

³⁴ The 2000 Technical Report analyzed two intrinsic factors which could have resulted in the disparate results between 1994 and 1996: data collection procedures and instrument error. *Id.* at vi-vii. It did not determine whether these factors alone could have accounted for the difference. *Id.* The report also analyzed the "political/legal and cognitive contexts" within which the surveys were conducted. *Id.* at viii. Here, the Report reached no conclusion as to whether home schoolers interviewed in government surveys were more reticent than others to participate, though it acknowledged the possibility. *Id.* Other commentators have indicated such reticence is likely, based on home schoolers' independent nature, and, for those who believe government regulation is a natural and likely antecedent of government oversight, on the notion that "opposition to unregulated home schooling is . . . evidence of broader efforts to undermine the family and Christianity." Van Galen, *supra* note 27, at 71.

³⁵ See U.S. CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL BOOK 161-210 (119th ed. 1999); NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, THE CONDITION OF EDUCATION 2000 (2000). When analyzing race, gender, wealth, or other factors, these publications tend to classify elementary and secondary schools as "public" or "private," occasionally distinguishing amongst Catholic and other private schools.

³⁶ See *supra* notes 26-27 and accompanying text.

or wealth, among others, studies undertaken to statistically analyze these indicators could potentially be hampered by the unlikeliness of radically different ideological groups being captured in a single study.³⁷ Still, in spite of the lack of demographic and ideological homogeneity amongst all home schoolers, several demographic trends emerge.³⁸

Today, children educated at home are more likely to have married parents than are children in the general population.³⁹ Their parents tend to have more formal education than other parents of school-age children.⁴⁰ Home schooling parents also have higher median incomes than other parents,⁴¹ though mothers in home schooling families are statistically more likely to either not work outside the home, or to work only part time.⁴² Home schooling families are larger than the national

³⁷ As an example of this, see Lawrence M. Rudner, *Scholastic Achievement and Demographic Characteristics of Home School Students in 1998*, 7 EDUC. POL'Y ANALYSIS ARCHIVES (1999), available at <http://epaa.asu.edu/epaa/v7n8/> [hereinafter Rudner study]. The results of this study are summarized in Lawrence M. Rudner, *Home Schooling Works, Pass it On!: The Scholastic Achievement and Demographic Characteristics of Home School Students in 1998* (1999) (available from ERIC Document Reproduction Service, ED 429 109) [hereinafter Rudner summary]. Rudner is the Director of the Educational Resources Information Center (ERIC), a service sponsored by the U.S. Department of Education. *Id.* at 13. Rudner's study analyzed survey results of 20,760 students from 11,930 families, which amounts to seven times as many families as any previous study of its kind. *Id.* at 2. However, the sample was taken from only those students who have their standardized testing monitored by Bob Jones University, the largest home school testing service in the nation. *Id.* at 12. While this fact does not bear on the validity of the analysis of the sample, it is at least intuitively reasonable that religious, political, or cultural beliefs would affect the makeup of the sample itself; families at ideological odds with Bob Jones University would seem less likely to have their children's testing overseen by this school than those whose views align, to a greater or lesser degree, with the University's various tenets. In fact, the Rudner study reports that 93.8% of its respondents identify themselves with a Christian denomination. See Rudner study, *supra*.

³⁸ Notwithstanding the religious similarities amongst those sampled in the study, the findings of the Rudner study are otherwise generally consistent with other available studies. See, e.g., Mark Tipton, *An Analysis of Home-Schooled Children's Comprehensive Test of Basic Skills Results and Demographic Characteristics of Their Families* (1990) (unpublished Master's thesis available from ERIC Document Reproduction Service, ED 336 208); Jennie F. Rakestraw, *Home Schooling in Alabama*, HOME SCHOOL RESEARCHER, Mar. 1988, at 3 (available from ERIC Document Reproduction Service, ED 329 329).

³⁹ Rudner study, *supra* note 37. Of the home schooling parents Rudner surveyed, 97.2% were married, compared with 72% for parents of school-aged children nationwide. *Id.*

⁴⁰ *Id.* According to Rudner, 88% of home schooling parents have some formal education beyond high school, compared with 50% of American adults. *Id.*

⁴¹ *Id.* At the time of Rudner's study, median income for home schooling families was \$52,000, compared with \$36,000 (in 1995) nationally. *Id.*

⁴² *Id.* This might stem from religious beliefs, or it might be a simple function of the time commitment required to educate children at home.

average.⁴³ Home schooled students tend to watch less television than the average American child.⁴⁴

The legal trend over the past two decades has been toward deregulating home schooling.⁴⁵ Many states have repealed or rewritten laws that explicitly or implicitly limited parents' ability to educate their children at home.⁴⁶ Home schooling is now legal and practiced in every state.⁴⁷ Home schooling advocates have won significant victories, predominantly through successful lobbying of legislatures,⁴⁸ but also in various state and Federal courts.⁴⁹ There have, however, also been bitter court defeats.⁵⁰ Some states also still enforce regulations which home schoolers believe limit their ability to effectively and creatively educate their children.⁵¹ Section III discusses home schoolers' academic and social performance under the current regulatory system.

III. IF THE NUMBERS ARE SO GOOD, WHY ALL THE FUSS?

A. What Are the Data Telling Us?

David and Micki Colfax are justifiably proud parents. In 1987, Grant, their oldest son, graduated with high honors from Harvard University and received a Fullbright fellowship.⁵² Upon completing the fellowship, Grant returned to Harvard to study medicine.⁵³ His younger

⁴³ *Id.* 62.1% of the families surveyed by Rudner have three or more children. 79.6% of Americans with school-age children have only one or two children. *Id.*

⁴⁴ *Id.*

⁴⁵ See FARRIS, *supra* note 7, at 29-38.

⁴⁶ KLIČKA, *supra* note 6, at iv. Since 1982, thirty-five states have added home schooling statutes to their education laws. Each of these statutes worked exceptions to the compulsory education laws which preceded them. *Id.*

⁴⁷ Rudner study, *supra* note 37.

⁴⁸ See, e.g., Kennedy, *supra* note 11. The Home Schooling lobby demonstrated its abilities when, in response to an amendment to a 1994 House bill known as the Improving America's School Act, a bill which could have severely restricted home schooling rights, between 500,000 and one million people called the Capitol to register their opposition. *Id.*

⁴⁹ See, e.g., Jeffery v. O'Donnell, 702 F. Supp. 516 (M.D. Pa. 1988) (enjoining state from pursuing criminal prosecution against home schooling parents, as statute requiring instruction by a "properly qualified private tutor" was unconstitutionally vague); People v. DeJonge, 501 N.W.2d 127 (Mich. 1993) (declaring teacher certification requirements for religiously motivated home educators violative of the Michigan constitution).

⁵⁰ See, e.g., Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988) (upholding Arkansas' requirement that home schooled students take standardized tests).

⁵¹ "I would not voluntarily choose to live under the home schooling laws of either Pennsylvania or New York." FARRIS, *supra* note 7, at 126-27.

⁵² DAVID COLFAX & MICKI COLFAX, HOMESCHOOLING FOR EXCELLENCE xiii (1988).

⁵³ *Home-Grown Scholars Thrive When Transplanted to Harvard Yard*, COURIER-JOURNAL (Louisville Ky.), June 5, 1992, at 2A.

brothers, Drew and Reed, also graduated from Harvard with high honors.⁵⁴ Drew was a Rockefeller fellow.⁵⁵

These accomplishments would, of course, be remarkable for any family. What makes the Colfaxes' story doubly impressive, however, is that their children were educated almost completely at home.⁵⁶ Their 1988 book, *Homeschooling for Excellence*, was a wake-up call to the American education institution, and particularly to those who believed home schooling was a fringe movement which would result in marginal success. Their book tells how, in 1973, the Colfaxes moved to a 47-acre homestead in the mountains of northern California⁵⁷ and resolved to "test the limits of [their] self-sufficiency."⁵⁸ From that time on, with one six month interruption, the Colfax children obtained all of their elementary and secondary education at home, free from the "[p]ointless and time-consuming"⁵⁹ strictures of institutional schools.⁶⁰

The Colfaxes are remarkable, but they are not alone in their successes in home education. Home schooled children finished first, second, and third in the 2000 Scripps Howard National Spelling Bee.⁶¹ Four of the ten finalists in the 2000 Geography Bee were home schooled.⁶² Jason Scoggins, one of four children educated at the Scogginses' "Webster Academy" home school, scored a 1570 out of 1600 on his SAT college entrance test, and won a prestigious National Merit Scholarship.⁶³ Molly Richman, schooled at home by her parents at their farmhouse in Armstrong County, Pennsylvania, scored a 1560 on her SAT, and received a Chancellor's Scholarship to the University of Pittsburgh, which will provide her with free tuition, room, and board.⁶⁴ One home schooled student has registered a perfect score on the SAT, and another has come within 10 points of the same.⁶⁵ Stanford University received 35 applications from home schoolers for the 2000-2001 academic year, accepting nine students.⁶⁶ This acceptance rate, 26

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ COLFAX & COLFAX, *supra* note 52, at 14.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 27.

⁵⁹ *Id.* at 28.

⁶⁰ *Id.*

⁶¹ James E. Challenger, *Home Schooling Growing Factor in Job Force*, CHI. SUN-TIMES, Aug. 6, 2000, at Financial 5.

⁶² David Scott, *Home School Superiority Proven by Contests, Tests Scores, Advocates Say*, CHI. TRIB., June 8, 2000, at News 2.

⁶³ Brett, *supra* note 29, at 1B.

⁶⁴ *Homeschoolers Set Sights on College*, CHI. SUN-TIMES, May 2, 2000, at Education Guide 17.

⁶⁵ KLIKA, *supra* note 2, at 167.

⁶⁶ *Homeschoolers Set Sights on College*, *supra* note 64, at Education Guide 17.

percent, is nearly twice that of the university's non-home schooled applicants.⁶⁷

The foregoing anecdotes are impressive, to be sure, but anecdotes only prove what can occur, not what is statistically likely. Regarding home schooling, the available empirical data strongly indicates that such anecdotes are to be reasonably expected, as the overall success rates, as measured by a variety of academic indicators, are quite high.

In 1994, Dr. Brian Ray, president of the National Home Education Research Institute, analyzed standardized test results of over 16,000 home schooled students.⁶⁸ He found that, for students from kindergarten through high school, the mean score for reading skills was at the 79th percentile, relative to all students nationwide.⁶⁹ For language and math, the grand mean was at the 73rd percentile.⁷⁰ Ray's study found that almost 55 percent of home schooled students scored in the top 25 percent of all students taking these tests.⁷¹

Ray conducted another study over the 1994-95 and 1995-96 academic years, this time collecting data on 5,402 home schoolers from 1,657 families.⁷² This study confirmed his previous findings that home schoolers were substantially outperforming their non-home schooled counterparts.⁷³ His study also found that whether home schooling parents had ever held a teaching certification made little difference in student performance.⁷⁴ Education level achieved by the home schooling parent was similarly of slight statistical consequence.⁷⁵ Significantly,

⁶⁷ *Id.*

⁶⁸ KLIČKA, *supra* note 2, at 167.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² FARRIS, *supra* note 7, at ix. Ray's methodology included direct mailings to home schooled families, some randomly selected and others who were longitudinal participants from a previous study, as well as blindly forwarding surveys "to families through the leadership of independent home school support groups and networks operating in every state." *Id.* at ix-x.

⁷³ *Id.* at xi. Study participants scored at the 87th percentile in total reading skills, 85th percentile in total listening, 80th percentile in total language, 82nd percentile in total math, 84th percentile in total science, 85th percentile in social studies, and at the 81st percentile in study skills. *Id.*

⁷⁴ *Id.* at xiii. The basic battery average national percentile rank of home schooled students was 88 for those of whom either parent had ever been certified, and 85 for those of whom neither parent had ever been certified. *Id.*

⁷⁵ *Id.* at xiv. Home schooled students whose fathers had less than a high school education scored at the 79th percentile on their basic battery; those whose fathers had graduated college scored at the 87th percentile. When segmented by mothers' educational level, home schooled students whose mothers had less than a high school education scored at the 83rd percentile; those whose mothers had graduated college scored at the 88th percentile. *Id.* Ray's research does indicate that, depending on the academic indicator, public school students' performance can be substantially related to parents' educational

Ray found that students educated at home in states whose home school laws are highly restrictive performed identically to those studying in the least restrictive states.⁷⁶

Ray's results are typical of other studies. In 1998, Lawrence Rudner published "the results of the largest survey and testing program for students in home schools to date,"⁷⁷ which compared, among other things, the home schoolers' performance on standardized tests to both their public and private school counterparts. At each grade level, the scores of private school students exceeded that of public school students for each of five areas tested: reading, language, mathematics, social studies, and science.⁷⁸ Composite scores at each grade level were likewise higher for students at private schools.⁷⁹ Rudner found that home schooled students outperformed their private school counterparts at each grade level and in every area tested.⁸⁰

The performance of home schoolers in the 1990s parallels that of the 1980s. In their book, *Home Education: Rights and Reasons*,⁸¹ John Whitehead and Alexis Irene Crow analyze the results of dozens of studies, conducted by both private organizations and state governments,⁸² and confirm that home schooled students from a variety of backgrounds consistently outscore traditionally schooled students on standardized tests.⁸³

level. He indicates that average math scores for public students whose parents had less than a high school education will be at the 28th percentile, while those whose parents graduated college will be at the 63rd percentile. *Id.* at xv.

⁷⁶ *Id.* at xx. Ray lists as states with "high regulation" Maine, Vermont, Rhode Island, New York, Pennsylvania, West Virginia, Minnesota, North Dakota, Utah, and Washington. *Id.* at xxi. He lists as states with "low regulation" Idaho, Texas, Oklahoma, Montana, Illinois, Indiana, Michigan, and New Jersey. *Id.*

⁷⁷ Rudner study, *supra* note 37.

⁷⁸ *Id.* Twelfth grade students in private schools scored at the 53rd percentile for mathematics. *Id.* Every other category (median scaled score in each tested subject for students in a particular grade) showed higher scores. *Id.* The national median, is, by definition, at the 50th percentile. Thus, mathematically, if private and home schooled students are removed from the set of all tested students, public school students' scores will, in none of the categories, exceed the 50th percentile.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ WHITEHEAD & CROW, *supra* note 3.

⁸² *Id.* at 137-76.

⁸³ *Id.* For example, in 1986, an Oregon Department of Education report found that "23.8 percent of home schooled students scored in the 91st to 99th percentile range, 52.3 percent scored in the 51st to 90th percentile range, 17.5 percent scored in the 21st to 50th percentile range, and 6.4 percent scored in the 1st to 20th percentile range." *Id.* at 149. In Tennessee, "home-schooled [students] outscored their public-schooled peers on 7 of the 8 comparisons" of reading and math scores. *Id.* at 153 (quoting BRIAN D. RAY & JON WARTES, *The Academic Achievement and Affective Development of Home-Schooled Children*, in

Home schoolers are also excelling on what are arguably the most important standardized tests a high school student will take, college entrance examinations. This is significant, because these tests are perhaps the truest "level playing field"; regarding students' performance on these tests, there can be no concerns about research methodology, representative sampling, or the like. Home schooled students taking the ACT in 2000 averaged 22.8 out of a possible 36.⁸⁴ The national average was 21.⁸⁵ The average for home schooled students exceeds that of the top-scoring state, New Hampshire (22.5).⁸⁶ SAT results in 2000 were similar. Among all students taking the SAT, the average on the math section was 514, and the average on the verbal section was 505.⁸⁷ A perfect score on each section is 800, for a total of 1,600. Home schooled students' average math score was 532, and their average verbal score was 568.⁸⁸

Logically, it should not be surprising that home schools achieve the results they do. First, parents who choose to do what professional educators do, but without any financial compensation (indeed, many make significant financial sacrifices in terms of education costs and the opportunity cost of foregone paid employment) demonstrate unusual commitment to their children's education. Second, home schools, by their very nature, do not suffer many of the maladies that professional educators blame for poor results in institutional school settings. The National Education Association is correct in its assertion that "excellence in the classroom can best be attained by small class size."⁸⁹ Their error is in their narrow definition of "classroom." Indeed, there are hundreds of thousands of "classrooms" in this nation where class size is at or well below the "optim[al] . . . size of fifteen students" which the NEA endorses,⁹⁰ however, virtually none of these are located in public school buildings. A related problem, lack of teacher to student one-on-one time, is similarly solved in home schools.⁹¹ Moreover, because of home

HOME SCHOOLING: POLITICAL, HISTORICAL, AND PEDAGOGICAL PERSPECTIVES, *supra* note 7, at 43, 49).

⁸⁴ Editorial, *Hard-Core Academic Achievers*, PLAIN DEALER, Aug. 30, 2000, at 8B.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Andrea Billups, 'Cautious Optimism' on Nation's SAT Scores, WASH. TIMES, Aug. 30, 2000, at A1.

⁸⁸ *Id.*

⁸⁹ NEA 2000-2001 Resolutions: B-6. Class Size, at <http://www.nea.org/resolutions/00/00b-6.html> (last visited Nov. 10, 2001).

⁹⁰ *Id.*

⁹¹ Though John Dewey's philosophy of the purpose of education would likely be antithetical to that of many modern home schooling parents, *see infra* Section III.B.1., he understood that "[o]nly as a teacher becomes acquainted with each one of her pupils can she hope to understand childhood, and it is only as she understands it that she can hope to

schooling's inherent flexibility, parents are able to contour curriculum and speed to the individual's needs of each child. Thus, home schooled children demonstrating exceptional aptitude in or proclivity for a given discipline are uniquely able to focus on that discipline. Likewise, a home schooled child needing greater than average help in a given area has much less risk of being left behind than a student being taught by a teacher who cannot afford to "hold up" the progress of such a student's thirty or more classmates. All this is true completely independent of the commitment, dedication, ability, and training of the institutional teacher. The advantages to home schooling are systemic and fundamental, and they are borne out by the consistent achievements of those fortunate enough to study at home.

B. Opposing Arguments

Given the foregoing data and analysis, it might seem surprising that organizations as large and influential as the Democratic Party and the NEA take a negative stand toward home schooling.⁹² The following arguments are some of the most commonly expressed by those opposed to, or merely skeptical of, home schooling. Each argument is followed by an analysis and rebuttal.

1. Home Schooled Children Will Not Be Adequately "Socialized"

This is probably the most often asserted, and the most passionately debated argument relating to home schooling.⁹³ The term "socialization," as used in this context, has two connotations. The first encompasses practical skills – the ability to interact with peers of the same age group⁹⁴ or other children of different ages.⁹⁵ The second, more subtle and less discussed, has its roots in eighteenth century philosophy, and was promulgated by the early twentieth century school reformers. One of the most famous of these reformers, John Dewey,⁹⁶ saw schools as a means

evolve any scheme of education which shall approach [the desired] standard." JOHN DEWEY, *SCHOOLS OF TO-MORROW* 137 (1915).

⁹² See *supra* notes 2, 11 and accompanying text. Even the NEA bases its primary opposition to home schooling not on any alleged academic shortcomings, but rather its less than "comprehensive" nature. *Supra* text accompanying note 2.

⁹³ WHITEHEAD & CROW, *supra* note 3, at 159.

⁹⁴ *Id.*

⁹⁵ DEWEY, *supra* note 91, at 195-96. Dewey's works predated the modern home schooling movement, but he was an early advocate of combining age groups in an educational setting to teach students how to interact with one another. *Id.*

⁹⁶ John Dewey's impact on American public education cannot be overstated. He "has been the most important figure in the history of American education. He redefined what constitutes intelligence and how we think and give a holistic purpose to education. Much of what is best in American education comes from Dewey." MAURICE R. BERUBE,

to reshape prevailing political philosophies and structures.⁹⁷ Decrying the "autocratic" purposes for which schools were, in his view, developed, Dewey advocated "building a new education which shall really give an equal chance to every one, because it will base itself on the world in which the children live."⁹⁸ To Dewey, "socializing education"⁹⁹ meant inculcating into pupils a world view necessarily different than the one he perceived to be prevalent. Citing Rousseau and "all the educational reformers" who followed him, Dewey advocated "look[ing] to education as the best means of regenerating society."¹⁰⁰ Thus, for Dewey, "socialization" encompassed not merely the experience-based training in people skills necessary to function well in a social world, but also the training *by society* in the views deemed appropriate for members of "a democratic society, dependent upon applications of science for all its prosperity and welfare."¹⁰¹

The first, practical, socialization argument - that home schooled students will lack the ability to function well amongst dissimilar peers if

EMINENT EDUCATORS: STUDIES IN INTELLECTUAL INFLUENCE 40 (2000). Dewey was a prolific author, publishing forty books and over 700 articles. *Id.* at 39. The topics of his writings ranged from education to ethics to darwinism to political philosophy. ARTHUR G. WIRTH, JOHN DEWEY AS EDUCATOR: HIS DESIGN FOR WORK IN EDUCATION (1894-1904) at 307-11 (1966). Though an atheist, BERUBE, *supra*, at 42, Dewey wrote extensively on religion, including his humanistic treatise, *A Common Faith*, which opens with a chapter denouncing individual religions and, ends by expressing gratitude for the "grace of the doings and sufferings of the continuous human community in which we are a link," and offers a formula for "conserving, transmitting, rectifying and expanding the heritage of values we have received." JOHN DEWEY, A COMMON FAITH 87 (1934). *A Common Faith* closes with this thought: This passing down of ever-modified values included "all the elements for a religious faith that shall not be confined to sect, class, or race. Such a faith has always been implicitly the common faith of mankind. It remains to make it explicit and militant." *Id.*

⁹⁷ DEWEY, *supra* note 91, at 169-70.

⁹⁸ *Id.*

⁹⁹ *Id.* at 174.

¹⁰⁰ *Id.* at 173-74.

¹⁰¹ *Id.* at 169. See also Clark, *supra* note 2, at 779.

"Officially," says [Brian] Ray [president of the National Home Education Research Institute], "school superintendents who oppose home schooling are concerned about academics and wonder how a mother with a high school education can teach algebra. But unofficially, they're concerned about maintaining what has been called the "hidden curriculum," about students becoming good democratic citizens, their socialization, their values and belief systems."

Id. John Dewey advocated this idea that the inculcation of moral values was appropriately accomplished primarily at schools, as opposed to in homes or churches, in his 1909 treatise *Moral Principles in Education*. JOHN DEWEY, MORAL PRINCIPLES IN EDUCATION (1909). Though the First Amendment likely renders unconstitutional Dewey's desire to use "militant" tactics to make secular humanism America's "explicit" religion, DEWEY, *supra* note 96, concerns that public educators will nonetheless see this as a legitimate mandate drives many parents to educate their children at home. See KLICKA, *supra* note 2, at 49.

removed from an institutional school setting - is easily rebutted with a practical solution. Home schooling parents, by definition particularly interested in their children's upbringing, tend on the whole to encourage social interaction with other children through outside activities.¹⁰² The wide variety of activities engaged in is doubly beneficial for socialization: rather than being exposed only to peers of the same age group, home schooled students who participate in extracurricular activities such as church, scouting, or home school support groups will also be exposed to children of all age groups; this is contrary to the rule of age segregation practiced in most public schools.¹⁰³

There is another element of the practical socialization argument which, if one accepts the definition of failure to socialize given by some home schooling opponents, is probably accurate. Some critics will be dissatisfied with the social activities in which home schoolers participate, not because of the amount of socialization occurring, but because of the type not occurring. While "most home-schooling families make a deliberate effort to expose their children to a variety of people and lifestyles,"¹⁰⁴ the various religious views reflected by a majority of home schooling students,¹⁰⁵ to one degree or another, would likely be incongruous with, for instance, the NEA's belief that "education should foster acceptance and appreciation for recognizing the qualities that pertain to people . . . of diverse populations,"¹⁰⁶ when those qualities explicitly include "sexual orientation."¹⁰⁷ Thus, though this argument against the ability of home schoolers' to be socialized comes with a

¹⁰² WHITEHEAD & CROW, *supra* note 3, at 133. Brian Ray's study of over 5,000 home schooled students, *supra* note 72 and accompanying text, found that 98 percent of participants engaged in two or more of the following activities: Scouts, ballet or dance classes, 4-H, volunteer work, ministry, bible clubs, classes outside the home, music classes, groups sports, Sunday school, field trips, or playing with children outside of the family. FARRIS, *supra* note 7, at xxv. Additionally, many home schoolers participate in home school support groups, whose offerings range from field trips and tutoring to history and science fairs boasting thousands of exhibits. *Id.* at 49-68. These activities seem to be working, as demonstrated by the results of numerous studies relating to "Social-Emotional of Affective Development and Socialization" analyzed by two home schooling experts. See WHITEHEAD & CROW, *supra* note 3, at 159-68.

¹⁰³ Dewey himself recognized the benefit of having older children teach younger children. See *supra* note 95. The fact that home schooling families tend to be larger than the average American family, see *supra* text accompanying note 43, means that a substantial percentage of home schooling children will, due to the presence of older siblings, potentially reap the benefits Dewey envisioned by mixing age groups in an educational setting.

¹⁰⁴ MARY HOOD, THE HOME SCHOOLING RESOURCE GUIDE AND DIRECTORY OF ORGANIZATIONS 3 (1998).

¹⁰⁵ See *supra* text accompanying notes 22-24.

¹⁰⁶ NEA 2000-2001 RESOLUTIONS: B-7. DIVERSITY, at <http://www.nea.org/resolutions/00/00b-7.html> (last visited Nov. 10, 2001).

¹⁰⁷ *Id.*

practical solution offered by its proponents (i.e., expose children to an appropriately diverse set of people, institutions, and ideals), the argument tends to the ideological, rather than to the truly practical, and is more appropriately discussed with Dewey's ideological arguments below.

First, though, an alternative but complementary response to practical socialization arguments merits discussion. Many home schooling parents are acutely aware of the socialization which their children miss in institutional school settings, and are pleased. They contend that the socialization aspect of schools today is often inappropriate and detrimental to the learning process:

Much of what goes on in public schools is an inappropriate mix of socialization and academics. Children whisper, slip notes to each other, gaze longingly at their latest flame, or do any number of socially oriented activities while the teacher is trying his or her best to impart some material. And it goes without saying that much of the socialization that is common these days is plainly wrong in any setting. Drugs, alcohol, and premarital sex are all part of the socialization scene that home schoolers miss out on during their academic day.¹⁰⁸

But what of Dewey's thesis, that socialization extends beyond the mere acquiring and honing of people skills, but also requires that schools, as "embryo communities,"¹⁰⁹ be the institution through which society "train[s] up its children"¹¹⁰ in the appropriate world view? It is here that pro- and anti-home schooling thinkers reach an impasse. Many home schooling parents believe that they, not the State nor Society, have the sole right and duty to "train up"¹¹¹ their children.¹¹² Those opposing home schooling on this ideological type of socialization grounds assert a tautological argument: By defining socialization to include the inculcation of political and social values potentially antagonistic to those

¹⁰⁸ FARRIS, *supra* note 7, at 123-24. Some of the more worrisome examples of this "negative socialization" make their way to the courts. In 1999, the Mississippi Supreme Court reviewed a case arising from a public middle school student's having been beaten and forced to perform homosexual acts upon another student. *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136 (Miss. 1999). The assailant had twice earlier on the day of the assault threatened his victim, once in the presence of a teacher; the other threat was immediately reported to another teacher. *Id.* at 1137. Neither teacher took any action. *Id.* In *Dozier v. Indiana*, 709 N.E.2d 27 (Ind. 1999), the defendant, a gang member, appealed his conviction for carrying a .9 millimeter pistol to school with him, asserting a necessity defense. His gang, from which he was trying to dissociate himself, was "notorious for engaging in a variety of illegal activities including drug trafficking, gun dealing, intimidation, and extortion. *Id.* at 28. Pursuant to a threat on his life, *id.* at 29, Dozier took the gun to school, concerned that gang members would attempt to murder him there. *Id.*

¹⁰⁹ DEWEY, *supra* note 91, at 174.

¹¹⁰ *Id.* at 173.

¹¹¹ *Proverbs* 22:6.

¹¹² TITUS, *supra* note 21.

of the parents, and thereby unlikely to be taught in the home, government schools become, by default, the appropriate fora for appropriate socialization. This debate is ideological, not practical. Because of this, empirical or legal analysis, no matter how compelling, will not convince everyone. The debate continues to play out in legislatures,¹¹³ the courts,¹¹⁴ and in the legal Academy.¹¹⁵

2. Parents Are Not Qualified to Teach Their Children¹¹⁶

This argument, seemingly centered on improved educational results, also has a pragmatic element, that is, public acceptance of the argument would benefit those who promulgate it. This will be addressed in greater detail below. As to parental qualifications, any concerns about the capability of those without state certification to adequately educate their students are quickly allayed by empirical analysis. As seen above, home schooling parents, even those without state licenses or bachelors degrees, are educating their children as well or better than their public school counterparts.¹¹⁷ As is true of any generalization drawn from empirical analysis, there will be anecdotal exceptions - there are no doubt home schooling parents without credentials who fail to educate

¹¹³ See KLIKA, *supra* note 2, at 189-90.

¹¹⁴ See *id.* at 179-87.

¹¹⁵ Compare James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994) (contending that any parental decision motivated by religious beliefs is an unconstitutional violation of the children's rights), with Stephen G. Gilles, *Review Essay: Hey Christians, Leave Your Kids Alone! Religious Schools v. Children's Rights*, 16 CONST. COMMENT. 149 (1999) (responding that states should defer to parental authority unless a particular decision proves patently unreasonable).

¹¹⁶ A front page article in a major newspaper opened with the following language: "Wanted: One parent, usually female, to teach elementary and secondary education in all subjects to her own children in her home. *No teaching ability* or degree required." Wendy Benjaminsen, *Home Is Where The Mind Is*, HOUS. CHRON., Apr. 17, 1994, at A1 (emphasis added). This language exemplifies the opinion that, not only is instruction by credentialed teachers preferable to instruction by those without, but also that there is nothing intrinsic to the parent-child relationship which enables the parent to be a good teacher to his or her child. See also Jodi S. Cohen & Charles Hurt, *Home Schools do Best on Test*, DETROIT NEWS, Aug. 25, 1997, at A1 (quoting Carole Kennedy, president of the National Association of Elementary School Principals: "Sometimes the most well-meaning parents don't have the skills to teach."). Compare this to the insight of David and Micki Colfax, home schooling pioneers whose three oldest sons graduated *magna cum laude* from Harvard, *supra* Section III.A: "All parents, after all, are teachers, and it is only the *formal* education of our children that most of us entrust to the 'experts.'" COLFAX & COLFAX, *supra* note 52, at 8.

¹¹⁷ See *supra* note 74 and accompanying text; see also HOOD, *supra* note 104, at 4: "No research has ever determined that certified teachers are 'better' than those who are lacking such credentials."

their children.¹¹⁸ (For that matter, there may well be credentialed home schooling parents who similarly fail.) However, every year, a tragic number of students graduate from public schools, having studied under credentialed and degreed teachers, while having failed to receive a rudimentary education.¹¹⁹ With unfortunate anecdotes on both sides, analysis and results must be brought to bear in weighing parents' qualifications to teach their children. Were anecdotal evidence of public school failure offered to support a proposal that children failing to progress in public schools be required to study at home, the proponent of the evidence would likely be dismissed without serious consideration. Analogously, those who assert that parents are patently unqualified to teach their children, despite substantial evidence to the contrary, and further propose the *remedy* of mandatory institutional school attendance, proffer an argument not able to withstand analytical scrutiny, and indeed not fair.

As was mentioned above, there is another reason underlying the opposition to uncredentialed teaching. If those not properly *trained* in appropriate methods of teaching are allowed to teach, and if they demonstrate success in so doing, public confidence in alternative means of education will increase, and funding for public schools will diminish.¹²⁰

¹¹⁸ Such concerns prompted Missouri legislator Fred Curd, that state's House Education Committee Chairman, to sponsor legislation requiring that all parents who would educate their children at home have a high school diploma or equivalency degree. Lonnie Harp, *Home-school Growth Prompts Call for Standards*, COURIER-JOURNAL (Louisville Ky.), Jan. 6, 1998, at 1A.

¹¹⁹ Roger G. Schwartz, *Why Johnny's Parents Can't Read . . . Or Vote, or Work, or Participate: The National Literacy Crisis and a Proposal to Integrate Illiterate Adults into Mainstream American Society*, 4 U. CHI. L. SCH. ROUNDTABLE 183, 203 n.70 (1997).

Some of the most common misconceptions concerning illiterate adults include . . . the idea that the number of illiterate adults in America is very small; the belief that the only adults who are illiterate are those who did not graduate from high school; [and] the belief that America's system of free public education has made illiteracy a concern of the past.

Id. See also WHITEHEAD & CROW, *supra* note 3, at 23: "[F]our million persons annually . . . slip through the schools without an ability to read"; Hagit Elul, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 497-98 (1999). Elul recounts how in 1983, the National Commission on Excellence in Education issued its 1983 report, entitled "A Nation at Risk," which reported that "thirteen percent of all seventeen-year-olds were functionally illiterate." *Id.* at 497. His article discusses how Federal policymakers were unable to change this trend, showing how the attempted changes were superficial, and did not implement any needed changes in the "delivery of education services." *Id.* at 497 n.10. As of the time of Elul's writing, "[i]lliteracy among high school graduates [was still] growing." *Id.* at 498.

¹²⁰ This increased confidence is shown by the marked increase in home schooling over the past two decades, corresponding with the decreasing number of states requiring teacher certification. See *supra* note 9. Moreover, while many private schools do not require state certification for their teachers, the American public does not conclude that this

Maintaining a monopoly¹²¹ will, to be sure, benefit those who administer it, but such basis for denying the privilege of teaching to those not certified by the monopoly's administrators should be easily overcome by any other basis predicated first on facilitating effective education of students.¹²² The demonstrated success of students educated by their parents, including parents who have no state certification to teach, provides that basis.

3. Parents are not Qualified to Teach Advanced Subjects

Even those who find parents' rights to be, alone, a sufficient justification for extensive freedom to direct their children's education recognize the challenges a parent can face when attempting to teach an advanced math or science course,¹²³ or a foreign language that the parent

results in lower quality teaching than that offered by the public schools. KLICKA, *supra* note 2, at 133. As to diminished funding, in the many states and districts which fund public education on a per-student basis, a student's being taught outside of the public school system effects a direct cost to the public school she would otherwise attend. *See Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 697 (10th Cir. 1998). Hence, the "cost" of uncredentialed teachers to the public schools can be measured in actual dollars, even before the uncredentialed teachers' performance is measured or any "cost" to education generally is determined.

¹²¹ *See* Dale Ballou & Michael Podgursky, *Gaining Control of Professional Licensing and Advancement*, in *CONFLICTING MISSIONS? TEACHERS UNIONS AND EDUCATIONAL REFORM* 69, 107 (Tom Loveless ed., 2000); *see also* COLFAX & COLFAX, *supra* note 52, at 34. "[T]he educational establishment and its political allies are in a position to massively resist any serious effort to break up the public school monopoly." *Id.* For additional analysis of the full ramifications of single-source supply of teaching, *see* MYRON LIEBERMAN, *PRIVATIZATION AND EDUCATIONAL CHOICE*, 43 (1989). *See generally* MYRON LIEBERMAN, *THE TEACHER UNIONS* (1997).

¹²² The NEA's 2000-2001 Resolutions claim to "recognize[] the importance of parental involvement in a child's development." NEA 2000-2001 RESOLUTIONS: B-1. EARLY CHILDHOOD EDUCATION, at <http://www.nea.org/resolutions/00/00b-1.html> (last visited Nov. 10, 2001). However, the Association believes that the parent's role is to assist educators in helping that child develop: "The Association further supports the provision of training programs that prepare parents/guardians to take an active role in the child's education." *Id.* Only on this view of (at least initial) parental incompetence to educate can the NEA assert that its demand for 100% teacher certification benefits students first, themselves incidentally. If parents are, in fact, competent to teach their children, without State or NEA training and certification, the NEA's call for certification of all teachers, including those teaching at home, cannot credibly be said to be focused primarily on student welfare.

This Section analyzes the impact of State certification requirements, the type most often confronting would-be home schoolers. Teachers' unions would, however, transfer licensing oversight from government to themselves. BALLOU & PODGURSKY, *supra* note 121, at 106. Some commentators contend that this self-regulation of the profession is a countereffective and undesirable goal: "[T]here is little reason to expect that professional self-regulation will improve teacher quality." *Id.* "In addition, there are signs that professional self-regulation will be used to restrict teacher supply in ways that impede efforts to recruit better teachers." *Id.* at 107.

¹²³ FARRIS, *supra* note 7, at 128.

does not know.¹²⁴ Whether or not these challenges were once sufficient to justify mandatory certification of parents educating their high school students at home, they are not now. The application of modern technology to schools, both institutional and home, has dramatically increased educational opportunities for children: on-line tutoring and CD-ROM curricula make available to students at their desks what once required substantial financial means and presented substantial logistical difficulties.¹²⁵ Moreover, the same support groups which parents find beneficial for socialization purposes are increasingly offering academic assistance, based on the special qualifications of individual group members.¹²⁶

4. Some Children Will Slip Through the Cracks

This argument expresses concern for the individual home schooled students who are the exception to the general rule: those who fail to meet minimum standards set for all students.¹²⁷ In this way it is like the

¹²⁴ *Id.* at 72.

¹²⁵ *Id.* at 69-82.

¹²⁶ *Id.* at 66.

¹²⁷ See Jessica C. Cox, *Chalk Talk: Parental Rights and Responsibilities of Control over Children's Education*, 26 J.L. & EDUC. 179 (1997). "Although there are many home schools where conscientious parents are able to give their children superior educations, there are many home schooled children whose educational needs are not being fulfilled by their parents." *Id.* at 180. Also, Cox asserts, "[r]egardless of how conscientious and dedicated some home schooling parents are, there are many who are not. State regulation of home schools is necessary, if only for the protection of a few unfortunate children." *Id.* at 181 (emphasis added). Cox cites no study or any other data which indicate that even one child is not having his educational needs met, or that even one parent is less than conscientiously going about educating his child at home.

Though it is likely reasonable to assume that some such people exist, Cox's assertion that "many" exist betrays the ideology which, more than analysis, often underlies much opposition to broad home schooling freedoms. In fact, her argument – "[s]tate regulation of home schools is necessary, if only for the protection of a few unfortunate children" – proves too much. See *id.* If the State can "mandat[e] state curriculum approval and home visits by state supervisory personnel" as "justified by the benefits they guarantee to children," why could the State not prescribe exactly the same curricula for home schoolers that their public school counterparts use? See *id.* Additionally, why could the State not prescribe weekly, or daily, or hourly home visits? One possible answer is that such regulations would likely violate the Free Exercise Clause, U.S. CONST. amend. I, and the right to freedom from unreasonable searches and seizures, U.S. CONST. amend. IV, respectively.

There is, however, another reason. A free society can tolerate only so much preemptive regulation of its few would-be malfeasors, without unacceptably limiting the liberty of the law abiding. Our Nation does not, nor should it, screen movie ticket purchasers in advance to find those who would, for example, shout "Fire!" in a crowded theater, thus inciting a riot. Rather, for the sake of the many who do not abuse their free speech, society waits until one wrongdoer does, and punishes him appropriately. Likewise, the appropriate regulatory stance for would-be neglectful home schooling parents is one which grants maximum freedom, punishing or regulating only after a wrong has been perpetrated. This protects the individuals about whom Cox is concerned (children of

teacher certification argument above. While available research demonstrates that most home schooled students excel in their studies (justifying the inference that most home schooling parents, even those lacking state certification, excel in their teaching), it is inevitable that some home schooled students will score lower, even substantially lower, than their average public school counterpart on objective tests. However, unlike the typically proposed solution to *failures* of uncredentialed parent-teachers, namely, requiring certification of *all* home schooling parents, the problem of poorly performing home schoolers can be remedied by much narrower State action. Several states that do require standardized testing for home schooled students mandate remedial measures for *individual* children who fail to meet statutorily prescribed minimum achievement levels.¹²⁸

Any regulation attempting to prevent individual home schooled students' failure to meet minimum performance standards is only as

neglectful parents), without trampling the freedom of the many, admitted by Cox to be "giv[ing] their children superior educations." See Cox, *supra* at 180.

¹²⁸ For example, COLO. REV. STAT. ANN. § 22-33-104.5(5)(b) (West 1998) provides that a student tested under Colorado's standardized testing requirements who fails to score above the thirteenth percentile shall be required to be enrolled "in a public or independent or parochial school until the next testing period; except that no action shall be taken until the child is given the opportunity to be retested." Minnesota's compulsory education statutes provide that all children not in public schools shall be tested annually using a "nationally norm-referenced standardized achievement examination." MINN. STAT. ANN. § 120A.22(11)(a) (West 2000).

If the results of [those tests] indicate that the child's performance on the total battery score is at or below the 30th percentile or one grade level below the performance level for children of the same age, the parent must obtain additional evaluation of the child's abilities and performance for the purpose of determining whether the child has learning problems.

§ 120A.22(11)(c). FLA. STAT. ANN. § 232.02(3) (West 1998) lists five options for parental and state evaluation of a home schooled student's academic progress. § 233.02(3)(b) provides that "[t]he pupil shall take any nationally normed student achievement test used by the district and administered by a certified teacher. Such test results shall be reported to the school superintendent." § 232.02(3) concludes with the following language:

The school superintendent shall review and accept the results of the annual educational evaluation of the pupil in a home education program. If the pupil does not demonstrate educational progress at a level commensurate with her or his ability, the superintendent shall notify the parent, in writing, that such progress has not been achieved. The parent shall have 1 year from the date of receipt of the written notification to provide remedial instruction to the pupil. At the end of the 1-year probationary period, the pupil shall be reevaluated as specified in this subparagraph. Continuation in a home education program shall be contingent upon the pupil demonstrating educational progress commensurate with her or his ability at the end of the probationary period.

Id.

meritorious as the state's interest in student performance is valid.¹²⁹ If, for instance, the state has a legitimate interest in ensuring that its citizens acquire the "knowledge and skills that are essential for effective citizenship,"¹³⁰ and if the ability of a 13-year-old to read at the level at least equivalent to most 11-year-olds¹³¹ is necessary for effective citizenship, a statute requiring remedial measures for the home schooler who could not meet this standard would be valid. The remaining sections of this Comment will demonstrate, however, that if the State would truly seek to ensure the best possible education for all of its citizens, even this type of assertion of State power (standardized testing) should be presumptively invalid. Regarding the first example given above, the fact that twenty-five states and Washington, D.C. require no standardized testing for all or most of their home schooled students¹³² indicates that good citizenship can likely be achieved without any testing. That is, half of American states have determined that even if a few home schooled children are *slipping though the cracks*, the success of home schooling generally is significant enough to warrant against state intervention.

5. Home Schooling Threatens the Public Schools¹³³

This actually reflects two arguments. First, some contend that the significant increase in home schooling will result in decreased funding of public schools, particularly if voucher programs ever allow home schooling families to receive the same financial benefit as could families who choose to send their children to private schools.¹³⁴ The economic

¹²⁹ See *supra* note 13 and accompanying text.

¹³⁰ MINN. STAT. ANN. § 120A.22(1) (West 2000).

¹³¹ See ARK. CODE ANN. § 6-15-504(a) (Michie 1999).

¹³² See KLICKA, *supra* note 6, at v. Twenty states have no mandatory testing. These are: Alaska, Arizona, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, Oklahoma, Texas, Utah, Wisconsin, and Wyoming. Nebraska law allows for mandatory testing, but its State School Board has chosen not to require it. *Id.* at 59. In Rhode Island, the law allows, but does not require, local school boards to mandate testing of home schoolers. *Id.* at 90. Three states have several different categories into which a home school can fall, and only require testing for certain categories: South Carolina, *id.* at 92, Tennessee, *id.* at 96, and Virginia, *id.* at 106.

¹³³ See Benjaminson, *supra* note 116, at A1. The article quotes a divorced father who won custody of his two children, previously home schooled by his ex-wife: "Home-schoolers neglect the public school system in order to fix their itty bitty little part of the world. If you have an idea, go get involved in the school system." *Id.* "The [Texas Education Association] agrees. 'Our position is, the ultimate form of parent involvement is for them to be involved in the schools.'" *Id.*

¹³⁴ Tuition vouchers were a debated issue during the 2000 presidential debate. The Democratic National Committee's Election 2000 web page states, "Al Gore is opposed to education voucher schemes that drain needed resources away from public schools, and has

effects of publicly-funded vouchers or tax credits for home schooling families,¹³⁵ as well as the economic effects of substantial disenrollment,¹³⁶ are much debated and are beyond the scope of this Comment. As a matter of legal and philosophical analysis, however, the notion that the public, or certain members of the public, are responsible for maintaining the existence of a public institution *for its own sake* is highly problematic.¹³⁷ A *public* institution that serves only itself is, by definition, an illegitimate entity.

The second argument comes from its adherents' fundamental belief in what public education's purpose is. This argument contends that by removing students, particularly those who are academically or socially gifted, from institutional education, other students will suffer loss. John Dewey, the early twentieth-century school reformer, said:

What the best and wisest parent wants for his own child, that must the community want for all of its children. Any other ideal for our schools is narrow and unlovely; acted upon, it destroys our democracy. All that society has accomplished for itself is put, through the agency of the school, at the disposal of its future members. All its better thoughts of itself it hopes to realize through the new possibilities thus opened to its future self. Here individualism and socialism are at one.

fought Republican efforts to cut education funds." DEMOCRATIC NATIONAL COMMITTEE, GORE VS. BUSH: EDUCATION, at <http://www.democrats.org/election2000/contrast/education.html> (on file with the author).

¹³⁵ Nina Crimm comments:

While six percent of [Milwaukee, the nation's first city to enact a school choice program of its kind] students – approximately fifteen hundred children – receive publicly financed vouchers of \$4,700 a year to attend sectarian or nonsectarian private schools annually, the debate continues as to whether the vouchers have achieved what was intended and as to whether they have hurt the city's public schools.

Nina J. Crimm, *Core Societal Values Deserve Federal Aid: Schools, Tax Credits, and the Establishment Clause*, 34 GA. L. REV. 1, 41 n.143 (1999).

¹³⁶ See *supra* note 121. If current trends continue, the possibility is distinct that, whether or not vouchers add incentive for parents to educate their children at home, more and more will nonetheless choose to do so. The National Home Education Research Institute, estimates that the number of home schoolers is growing 7 to 18 percent per year. Amanda Paulson, *Homeschoolers are an Increasingly Diverse Crowd*, CHRISTIAN SCI. MONITOR, Oct. 10, 2000, at Features 18.

¹³⁷ In a surprisingly candid comment, one newspaper editor said, "The tax money that every citizen contributes to public education is meant to maintain *that system* - not private, largely unregulated options." Editorial, *A Fine Line; Good Communication is Called for Between Public Schools and Home Schools, but the Two Should Remain Separate Entities*, ORLANDO SENTINEL, Jan. 11, 1999, at A10 (emphasis added). Contrast this with the view that public funding of education exists for the purpose of educating the public through whatever means proves most efficient and effective. One prominent home schooling advocate believes that it is the foregoing editorialist's mindset that portends a coming "public education ice age." FARRIS, *supra* note 7, at 82. He contends that "the public education system has ceased to be about learning and is now operated for the benefit of the system and its countless employees." *Id.*

Only by being true to the full growth of all the individuals who make it up, can society by any chance be true to itself.¹³⁸

At first glance, Dewey's language seems benign at worst, quite noble at its best. Could anyone argue with the idea that the best parent should want the best not just for his child, but for all children in his community? However, the context in which Dewey wrote - encouraging society to embrace the public schools as society's regenerating and stabilizing force - reminds careful readers that these noble goals are not without their cost, namely, individual freedom. By stating that the community *must* want the best for all children, Dewey implies that parents may not, upon observing that public schools are holding their children back academically, or harming them emotionally or spiritually (or even, too often, physically), want better for their own children. If, as the data indicate, home schooled children are by and large academically excellent, as well as being socially well-adjusted, their presence in institutional school settings, and the corresponding positive influence on others, fosters the "full growth of all the individuals"¹³⁹ to whom they are exposed. Thus, following Dewey's value assertions to their logical end, it is the duty of home schooled students to "be true"¹⁴⁰ to those others, and to remain in the public schools, where they will benefit them. If that means sacrificing the potential individual excellence they could foster at home (by Dewey's logic, a "narrow and unlovely"¹⁴¹ ideal), this is a price Dewey stands willing to exact for the good of the community.

While Dewey may contend that this model harmonizes individualism and socialism, it appears the latter dominates. Home schooling parents may wrestle with the moral implications of removing their children from public schools, though many believe the greater moral concern is the detriment to their children resulting from remaining in the public schools.¹⁴² Still, the law does not enforce the kind of civic duty which Dewey posited,¹⁴³ nor should it. Even if Dewey's premise, that individuals owe society the moral duty of exposing it to

¹³⁸ John Dewey, *The School and Social Progress*, in *THE SCHOOL AND SOCIETY* 5, 5 (Jo Ann Boydston ed., 1980).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Indeed, many home schooling parents believe that educating high school aged children at home may be of some detriment to the children's academic or technical preparation, but willingly accept that potential cost, believing that the benefit of increased character in their children is a superior reward. FARRIS, *supra* note 7, at 73.

¹⁴³ PROSSER AND KEETON ON THE LAW OF TORTS 375 (W. Page Keeton ed., 5th ed. 1984). "[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life." *Id.* There does exist an affirmative duty on a parent to care for his child, but only for his own child. *Id.* at 377.

their beneficent qualities, represents a correct value judgment, any legal regulation grounded on this premise would run counter to long-standing American traditions of individual liberty. Voting, demonstrating against immoral laws, and membership in church or other civic organizations may indeed all be moral duties, but America has wisely chosen to keep all of these activities voluntary.¹⁴⁴ As regards sending children to public schools for the benefit of others, the laws in America should do the same.

IV. MODERN JUDICIAL PHILOSOPHY: BALANCING PARENTAL RIGHTS WITH THE STATE'S INTEREST IN PUBLIC EDUCATION

The fundamental issue litigated in virtually every challenge to specific regulations affecting home schools is whether the "State's interest in universal education,"¹⁴⁵ as sought to be furthered by the given restriction or requirement, "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."¹⁴⁶ While courts have frequently found that a state's chosen means of regulating home schools does not violate any constitutional rights,¹⁴⁷ an analysis of the courts' stated justifications for the State interest in education demonstrates that most regulations, even if constitutional, actually run counter to the very educational goals the state seeks to achieve.

In 1925, the United States Supreme Court found a fundamental liberty interest in the rights of parents to control their children's education,¹⁴⁸ stating 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."¹⁴⁹ In *Wisconsin v. Yoder*, this right served to exempt Amish parents from compliance with their state's compulsory education

¹⁴⁴ The requirement for young men to register for Selective Service is an exception to this rule. However, the extreme circumstances which have, and potentially could again, require America to prescribe civic duties upon her citizens are telling: Only when not requiring the civic action in question could potentially lead to America's ceasing to exist as a free nation at all has the State chosen to force civic duties upon its citizens. Even then, the conscientious objector right demonstrates America's paramount commitment to freedom.

¹⁴⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

¹⁴⁶ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

¹⁴⁷ See, e.g., *North Dakota v. Rivinius*, 328 N.W.2d 220 (N.D. 1982) (upholding teacher certification requirements for all teachers, including home schooling parents); *Ohio v. Schmidt*, 505 N.E.2d 627 (Ohio 1987) (upholding requirement that parents obtain prior permission from their local school boards before commencing home schooling).

¹⁴⁸ *Pierce*, 268 U.S. at 534-35.

¹⁴⁹ *Id.* at 535.

statutes, when the parents were motivated by religious concerns.¹⁵⁰ Like any fundamental liberty interest, however, the right "to direct the education and upbringing of [one's] children"¹⁵¹ can be statutorily restricted, subject to a state's showing a compelling interest justifying the regulating of education, and by demonstrating that the regulations chosen represent the least restrictive means of achieving the regulations' objective.¹⁵²

Courts in different jurisdictions have listed numerous reasons for finding the State's interest in regulating education, and home education in particular, as compelling. The State has "a high responsibility for education of its citizens," and therefore may "impose reasonable regulations for the control and duration of basic education."¹⁵³ Schools are where "good moral character and patriotic disposition," as well as "good citizenship" must be taught.¹⁵⁴ Education prevents illiteracy,¹⁵⁵ thereby "prepar[ing] individuals to be self-reliant and self-sufficient participants in society."¹⁵⁶ The State has the power to assure "that nothing be taught which is manifestly inimical to the public welfare."¹⁵⁷ Providing public schools ranks "at the very apex of the function of a State."¹⁵⁸ "[P]ublic school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.'"¹⁵⁹ Finally, public education "fulfills a most fundamental obligation of government to its constituency."¹⁶⁰

Thus, having found it "settled beyond dispute, as a legal matter, that the state has a compelling interest in ensuring that all its citizens are being adequately educated,"¹⁶¹ courts have upheld a large number of restrictions on home schools. Among these are a requirement for prior approval of a home education plan, including explanation of the parents'

¹⁵⁰ *Yoder*, 406 U.S. at 234. "[H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.* at 215.

¹⁵¹ *Pierce*, 268 U.S. at 534-35.

¹⁵² *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

¹⁵³ *Yoder*, 406 U.S. at 213.

¹⁵⁴ *Pierce*, 268 U.S. at 534.

¹⁵⁵ *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

¹⁵⁶ *Id.* (quoting *Yoder*, 406 U.S. at 221).

¹⁵⁷ *Pierce*, 268 U.S. at 534.

¹⁵⁸ *Yoder*, 406 U.S. at 214.

¹⁵⁹ *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

¹⁶⁰ *Id.* at 76 (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).

¹⁶¹ *Murphy v. Arkansas*, 852 F.2d 1039, 1042 (8th Cir. 1988) (quoting the trial court).

proposed curriculum and educational backgrounds;¹⁶² standardized testing requirements for home schooled students, without a corresponding requirement that students in public, private, or parochial schools be similarly tested;¹⁶³ and state certification requirements for parents seeking to home school their children;¹⁶⁴

The Constitution, then, as interpreted by a number of Federal and state courts, may be said to give wide latitude to state legislators to oversee and regulate home schools. But the constitutional limits enforced by courts do not represent the best standard to guide a legislator as he drafts future regulations or considers a vote repealing existing regulations governing home schools. Rather, the best standard for the legislator is a case-by-case analysis of whether the continuance or existence of a particular regulation generally serves the State's interest in an educated public. That is, in the case of home schooling, what the State may do will often be broader than what the State *should* do.

What then, should the State do regarding regulation of home schools? The answer to this is found in the courts' stated purposes for education. The State should do for home schools, as for all schools, that which will result in literate, moral, patriotic, self-sufficient, and self-reliant students. As the following analysis will show, this will most often mean not regulating at all, or doing so based only on minimum legitimate outcome requirements.

The data "consistently show[s] home schooled children to be performing equal to or better than their conventionally schooled peers."¹⁶⁵ Home schoolers are literate,¹⁶⁶ they are politically active,¹⁶⁷ they are morally fit,¹⁶⁸ and they are self-reliant and self-sufficient.¹⁶⁹ In

¹⁶² *Care and Protection of Charles*, 504 N.E.2d 592 (Mass. 1987) (applying MASS. GEN. LAWS. ch. 76, § 1 (1984) over a vagueness objection).

¹⁶³ *Murphy*, 852 F.2d at 1041.

¹⁶⁴ *North Dakota v. Rivinius*, 328 N.W.2d 220 (N.D. 1982).

¹⁶⁵ *WHITEHEAD & CROW*, *supra* note 3, at 159.

¹⁶⁶ *See supra* Part III.A.

¹⁶⁷ *See, e.g.*, *FARRIS*, *supra* note 7, at 33-34. By publicly staging a "Bismarck Tea Party," after losing a court case which received national press coverage, home schoolers were able to lobby the North Dakota legislature to change its very restrictive teacher certification and truancy laws, effectively legalizing home schooling for the first time in that state. *Id.*

¹⁶⁸ "Most home-schooling parents still say they pulled their children out of school because they object to what they perceive as lax morals . . . in the public schools." Kelly Heyboer, *Home-Schooled Students Find Colleges are More Accepting*, *TIMES-PICAYUNE* (New Orleans, La.), June 4, 2000, at E4. *See also Cox*, *supra* note 127, at 181.

[Parents] are driven [to remove their children from public and private schools] by an alleged decline in the quality of public education, and by frustrations over their children's exposure to undesirable elements, including the influence of undesirable peers, growing crime

short, home schoolers are already, generally speaking, achieving all of the goals that the courts have said public education exists to help them achieve. And this is decidedly not the result of government regulation. The tremendous academic and other successes that home schoolers are now enjoying follow almost two decades of hard-fought battles to repeal or more favorably interpret home schooling regulations.

There exist two types of regulations affecting home schools. The first is ends-focused.¹⁷⁰ Such regulations can, if properly tailored, allow parents much freedom to direct their children's education, requiring only that the child demonstrate certain skills at certain times. The second is process-focused.¹⁷¹ These regulations control the way in which a parent teaches, without necessarily affecting educational outcome at all. The first achieves each of the goals that courts have said justify public regulation of education, as the State can set standards regarding literacy, civic awareness, and the like, and can measure student performance. The second, even if specific examples thereof are upheld by courts as being within the State's power, cannot be said to effect any legitimate goals of general education of the public. Home schoolers are proving, through demonstrated excellence in each of the areas that courts say justify government involvement in education, that such

rates within schools, and the general moral and religious tone of teaching styles.

Id. Moral concerns on parents' part is, of course, no guarantee of moral behavior on the part of their children. Still, it seems wholly counterintuitive to think that parents, motivated by concern for the values their children are taught, who are willing to make the personal and financial sacrifices necessary to educate their children at home, would see no improvement in moral behavior relative to that achieved by public education.

¹⁶⁹ For an interesting perspective on this, see FARRIS, *supra* note 7, at 107-122, which discusses how young adults can more quickly become competent in a variety of careers by supplementing their college experiences with formal apprenticeships, or by foregoing college altogether for the opportunity to learn a profession under one already skilled. The goal is that the "children . . . end up with both the recognized qualifications and the actual competence to assume the same career as the child's mentor." *Id.* at 107.

¹⁷⁰ Examples include the standardized testing requirement litigated in *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988). Notwithstanding other opposition to standardized tests, the State could theoretically require them without imposing any limitations on the way a home schooling parent prepared his or her child to take them.

¹⁷¹ Examples include requirements for on-site inspections by State officials, which can "be viewed as a disguised state effort to regulate educational inputs." Jon S. Lerner, Comment, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363, 381 (1995). Likewise, the common statutory requirement that education provided at home be "substantially equivalent" to that given at the public schools can be wrongly applied to effectively eliminate any distinction in curricula between public and home schools. *Id.* at 386. Minimum requirements for days or hours of home education per school year are also regulations affecting only the process of education. See, e.g., N.M. STAT. ANN. § 22-12-2(B) (Michie 1996) (requiring all students, whether attending public, private, or home schools, to "attend school for at least the length of time of the school year that is established in the school district in which the person is a resident.").

process-focused regulation, when it affects these areas at all, affects them negatively. Home schoolers, for the most part, have different study plans and regimens than do students in the heavily regulated public schools, yet they outperform them. Thus, even if the State may regulate the process of education, home or institutional, it should not, because to do so requires the best performing students to conform to the standards of those performing at a lower level.

The distinction between ends-focused and process-focused regulation is the first way to distinguish between regulations meriting serious consideration, based on their potential for benefit to the educational level of the public, and those which serve no legitimate public end. The second way, which, with the first, provides legislators with an appropriate standard against which to test any regulation, is a requirement that the regulation, prior to its enactment, be shown to have a likely beneficent effect on education. Though this seems obvious, the history of home schooling regulation demonstrates otherwise. For years home schoolers have worked to deregulate home schooling, with many successes.¹⁷² The striking down of regulations by courts, or the repeal of regulations by legislatures, if those regulations improved education generally, should have been followed by decreased performance by home schoolers. As this Comment has demonstrated, the opposite has been the case.

To improve the education level of its citizenry, the State, if it regulates education at all, will only regulate educational ends, and this infrequently. Still, regulations persist which can only be said to affect the process of education.¹⁷³ The very existence of such regulations indicates that some legislators cling to the notion that a given process, usually one which mirrors that of the public schools, is to be legally preferred, independent of parents' wishes. This perspective must change. The prevailing focus on what government may do must shift to what government should do. The foregoing analysis demonstrates that government should do very little by way of limiting home schooling freedom. Section V proposes model legislation by which state legislatures should effect the needed change of perspective.¹⁷⁴

¹⁷² See *supra* notes 45-49 and accompanying text.

¹⁷³ See *supra* note 168.

¹⁷⁴ While its ability to affect individuals' thinking must never be a law's *raison d'être*, all law nonetheless teaches. See THOMAS ACQUINAS, *SUMMA THEOLOGICA*, Q. 92, Art. 1 ("[T]he proper effect of law is to make those to whom it is given, good."). Thus, if a law is legitimate in its effects, it will collaterally benefit society by its causing individuals to come to see the law's end as a worthwhile goal. The drafters of the National Environmental Policy Act, upon which the proposed Home School Freedom Protection Act (HSFPA), *infra*, is modeled, recognized this: NEPA "tries to achieve cognitive change," in addition to its immediate environmental effects. William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the*

V. ENSURING LEGISLATIVE FOCUS ON "SHOULD" INSTEAD OF "COULD"

In *Mueller v. Allen*,¹⁷⁵ the United States Supreme Court said the following of private schools operating free from undue government interference: "By educating a substantial number of students such schools relieve public schools of a . . . great burden-to the benefit of all taxpayers."¹⁷⁶ This benefit is not unique to private schools. Home schools also benefit the community, relieving the public schools of over one million students and educating them at or above the level of even their privately schooled peers.¹⁷⁷ Accordingly, the State should not unduly impede the free operation of home schools, and should specifically refrain from imposing any regulation which hinders the ability of parents to provide education contoured to a child's needs. The ultimate result of this legislative restraint will be increased academic performance by home schooled students. To that end, this Comment encourages state legislatures to enact the following:

HOME SCHOOL FREEDOM PROTECTION ACT¹⁷⁸

§ 1. Legislative findings and declaration of purpose

The legislature of this State finds that parents have a fundamental right and a high duty to direct the education and upbringing of their children as they see fit. The legislature further finds that a child's education is best accomplished when his or her parents are afforded maximum freedom from governmental control or oversight of the process of the child's education. The legislature specifically finds that home schools are uniquely equipped to foster a child's fulfilling his or her educational potential; moreover, home schools have demonstrated excellence in educating children and preparing them to be responsible, self-sufficient members of society. Therefore, it is the purpose of this Act that home schools in this State shall be encouraged to operate free from any restriction or requirement not necessary to ensure basic literacy skills, and basic conceptions of civic responsibilities in a free society.

Developing World, 25 COLUM. J. EVNTL. L. 17, 40 (2000). The societal benefit of deregulated home schooling, alone, justifies passage of the HSFPFA. However, were the HSFPFA to become law, citizens would increasingly perceive the benefits of home schooling. This would be due both to the anticipated successes of the likely larger number of home schoolers which would result from the HSFPFA's passage, as well as from the State's tacit endorsement of home schooling's acceptability and desirability.

¹⁷⁵ 463 U.S. 388 (1983).

¹⁷⁶ *Id.* at 395.

¹⁷⁷ See *infra* Part III.A.

¹⁷⁸ Sections 1-2 of the proposed legislation are based on portions of the 1969 National Environmental Policy Act. 42 U.S.C. §§ 4331-4332 (1994).

§ 2. Policy; reports

The Legislature directs that, to the fullest extent possible: (1) all policies, regulations, and public laws of this State shall be interpreted and administered in accordance with the policies set forth in this Act; and (2) all agencies of this State shall include in every recommendation or report on proposals for legislation and other action affecting the education of children in this State, a detailed statement by the responsible official on –

- (A) the impact of the proposed action on any home school
- (B) any adverse impact to any home school which cannot be avoided should the proposal be implemented
- (C) alternatives to the proposed action, and an explanation of why each alternative is inferior to the proposed action

§ 3. Presumptive invalidity of any restriction on home schools; civil recovery

The Legislature directs that courts of competent jurisdiction shall presume any law or regulation previously or hereinafter enacted by this State or its municipalities, which in any way burdens, either on its face or as applied, home schools in their ability to direct children's education, to be invalid. This presumption shall be overcome only by the State's or municipality's showing that such a law or regulation is necessary to ensure a student's or students' basic literacy skills or basic concepts of civic responsibility, and that such a law or regulation represents the least restrictive means possible of achieving those ends.¹⁷⁹ Should a citizen of this State successfully challenge in any court of competent jurisdiction any law or regulation of this State or any of its municipalities, the citizen shall be entitled to recover compensatory damages, including, but not limited to, legal costs and fees. A court may also, in its discretion, award punitive damages.

¹⁷⁹ Though Part IV, above, demonstrates that strict scrutiny, i.e., the requirement for the State to demonstrate the necessity of the regulation in furtherance of a compelling State interest and narrow tailoring of a regulation, is constitutionally required per *Pierce* and *Yoder*, many courts apply this test without the "necessary" element included in the proposed legislation. That is, having found the education of the public to be a compelling interest, some courts find valid any regulation which "reasonably furthers the state's interest" therein. See, e.g., *State v. Schmidt*, 505 N.E.2d 627, 630 (Ohio 1987). See also *Klicka*, *supra* note 2, at 74-81. Hence, a clear state-by-state recognition of the appropriate standard of review and definition thereof is appropriate. Additionally, some courts only apply strict scrutiny in cases involving religiously-motivated home schoolers. Compare *People v. Bennett*, 501 N.W.2d 106, 120 (Mich. 1993) (holding that the right to direct children's secular education is not fundamental, such that restrictions on home schooling parents who are not religiously motivated need only pass a "rational relationship test," and finding teacher certification requirements for such parents constitutional) with *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993) (holding that the right to direct children's religious education is fundamental, such that restrictions on religiously motivated home schooling parents must survive strict scrutiny, and finding teacher certification requirements for such parents unconstitutional). As this Comment demonstrates, the benefits of home schooling are in no way limited to those students whose parents choose this option for religious reasons, so there is no reason that a state should limit its protection of home schooling rights to those so motivated. The proposed legislation would protect both sets of parents.

§ 4. Definitions

As used in this Act,

- (A) "Home school" shall be construed to include any learning environment of a child, primarily directed or operated by the child's parent(s) or legal guardian(s).
- (B) "Basic literacy skills" shall be construed to mean rudimentary reading, writing and mathematics skills, as well as basic understanding of scientific concepts and historical facts.
- (C) "Basic concepts of civic responsibilities in a free society" shall be construed to mean basic understandings of the workings of the constitutional democracy in the United States, including the process of representative government and the court systems. It shall not be construed to include any religious beliefs or views, ethical or personal value systems, or sociological opinions.

Besides the direct benefit this legislation would have on home schooled students and their parents, and the resulting benefit to the entire society of generally increased education levels, this legislation would also appropriately shape the mindset of those currently opposed to home schools for illegitimate reasons, specifically, reasons that invoke a non-existent State interest in educational processes. By allowing home schools to operate freely, that is to say, by allowing and further encouraging students schooled at home to continue to excel academically and socially, this legislation would eventually allow society to reap the full benefit of a maximally educated citizenry. As society began to observe how frequent were the successes of home schooled students, individuals would increasingly view home schooling not as a suspect form of alternative education, but rather as a wholly acceptable, even ideal one.

VI. CONCLUSION

This Comment has demonstrated that home schooling is, by overwhelming analysis, succeeding in educating children, as measured by the Supreme Court's and lower courts' dicta regarding the purposes for education and education's desired societal benefits. By analyzing the effect of existing regulations on home schooling freedom, this Comment has shown that, in spite of this documented success, many legislatures perceive proper regulation of home schooling to be limited primarily by what they may, according to the courts, do, rather than what they should, for the benefit of society, do. Resulting laws have stifled home schools by effecting a forced similarity to the very public schools the home schools are outperforming. This perspective must change, and will, as legislatures voluntarily limit their involvement in home school

regulation to that which assures only minimal, necessary requirements on the ends of home schooling, thereby allowing parents maximum flexibility to appropriately shape the processes by which students achieve those ends.

Bruce D. Page, Jr.

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