# NOTES

# Finding a Free Speech Right to Homeschool: An Emersonian Approach

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## INTRODUCTION

On May 25, 1993, the Supreme Court of Michigan decided that one family was constitutionally protected from the state's stringent homeschooling requirements[1] but another was not.[2] The key difference between these families was not the quality of the education each provided—the trial records indicate that the education both families' children received was as good as, if not better than, what had been provided by public schools.[3] Nor was the distinguishing factor the parents' education, the parents' criminal records, or the children's best interests generally.

What ultimately determined the different treatment of the two sets of parents was their motivations. The DeJonges began homeschooling their children "because they wished to provide them a 'Christ centered education'"[4] and believed "that scripture . . . specifically teaches that parents . . . are responsible to God for the education of their children . . . [and] to allow the State" to intervene in "God's authority . . . would be a sin."[5] The Bennetts, by contrast, did not have any underlying religious belief driving their decision to homeschool. Instead, their decision was based on "dissatisfaction with the public school system"; they "believed that they could provide their children a better education than the local public school."[6] This absence of a religious motivation would be fatal to their case.[7]

The disparity in these decisions was not the product of judges' whims or personal preferences; given the current state of the law, these cases were appropriately decided. This is startling because this difference in treatment, and the bias favoring religious motivations that it reflects, would seem to conflict with the instincts of a liberal society that values tolerance and equality.[8] How

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1. People v. DeJonge, 501 N.W.2d 127, 144 (Mich. 1993).

2. People v. Bennett, 501 N.W.2d 106, 120 (Mich. 1993).

3. *See Bennett*, 501 N.W.2d at 109 n.6 ("The results showed that Scott, who had fallen below his grade level while attending public school, had made steady progress toward his proper grade level during his year at home. Jason's test scores indicated that he was at the proper grade level, and Erika and Krista tested above their grade levels."); *DeJonge*, 502 N.W.2d at 130 ("Indeed, with respect to the DeJonge children, the trial judge noted that he was 'very impressed with the support that they have, the credentials of the witnesses that have testified and the reports that apparently are very, very favorable report[s] on the education of the children.'").

4. *Id.*

5. *Id.* at 130 n.4.

6. *Bennett*, 501 N.W.2d at 108–09.

7. *See id.* at 111–12.

8. *See* Stefan McDaniel, *Child's Play: A Simple Constitutional Route to Regulation of Home Schools*, 9 N.Y.U. J. L. & LIBERTY 580, 581 (2015) ("And as the religious and culturally traditionalist tenor of much homeschooling becomes more apparent, observers worry that the practice will harm children intellectually and emotionally, and that it may erode the tolerant, critical, and egalitarian ethos of our liberal political order.").

can these decisions be reconciled with the perceived propensity of religiously motivated homeschooling to lead to isolation and a failure to entertain the ideas of others?[9] Compare this unease with the perceptions of nonreligiously motivated homeschoolers: these families would seem to create the more inclusive and accepting learning environment more consistent with the demands of a pluralistic society.[10] A society that values equality and tolerance, it seems easy to understand, should be treating these secular environments with less skepticism than the religiously motivated ones,[11] which seem more likely to engage in unegalitarian or isolating behavior. And yet, because of the convoluted jurisprudential history of parental rights in general, and of homeschooling in particular, the opposite conclusion has been reached.

A full accounting of secular homeschoolers' woes is not complete, however, without noting the absence of a right to a public education.[12] In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that inequitable property-tax-based funding of public schools was not a violation of the Fourteenth Amendment because education is not a fundamental right under the Due Process Clause.[13] Because there is no fundamental right to public education, there are limited protections related to poor quality or unequal education. The result is that under current law, secular parents might be forced to enroll their children in a poorly performing or poorly funded school without judicial recourse for improvement or the meaningful alternative of homeschooling. This places secular parents who are dissatisfied with their public schooling options,

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9. Indeed, this propensity is more than merely "perceived"—many religiously motivated homeschoolers do "use alternative textbooks that teach creationism instead of evolution and offer a Christianity-centered view of American history," demonstrating that the feared ideological isolation can and does occur. *See* Jessica Huseman, *Small Group Goes to Great Lengths to Block Homeschooling Regulation*, PROPUBLICA (Aug. 27, 2015, 6:00 AM), https://www.propublica.org/article/small-group-goes-great-lengths-to-block-homeschooling-regulation [https://perma.cc/JU6R-SAM4].

10. It is important to note, however, that stereotypes and stigma, including an idea that even these secular homeschooling families take education less seriously than private and public schooling families, attach to nonreligiously motivated homeschoolers. *See, e.g.*, JENNIFER LOIS, HOME IS WHERE THE SCHOOL IS: THE LOGIC OF HOMESCHOOLING AND THE EMOTIONAL LABOR OF MOTHERING 2 (2013) ("I imagined . . . New Age hippies who taught their children—named Starfire and Chakra—to read auras rather than books. Regardless of on which end of the spectrum their practices lay, surely all of them were irresponsible parents who dismissed the importance of education.").

11. Despite the intuitiveness of this, Kimberly Yuracko has pointed out that the legal academic community has not spent much of its time defining what, exactly, homeschooling should look like in a liberal society: "Surprisingly, the social and legal implications of this phenomenon have received almost no scholarly attention. For decades political theorists have worried and argued about what steps a liberal society must take to protect children being raised in illiberal communities. They have focused their attention on the extent to which a liberal society must permit or condemn such practices as polygamy, clitoridectomy, and child marriage. Virtually absent from the debate has been any discussion of the extent to which a liberal society should condone or constrain homeschooling, particularly as practiced by religious fundamentalist families explicitly seeking to shield their children from liberal values of sex equality, gender role fluidity and critical rationality." Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 130–31 (2008) (internal citations omitted).

12. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

13. *Id.* at 36–37.

and for whom private schooling is unavailable, in a delicate and tenuous position when deciding if and how to homeschool.

There is, however, a way out of this conundrum: secular homeschoolers could turn to First Amendment free speech protection. This Note argues that the First Amendment should be employed when considering the legality and regulation of homeschooling because homeschooling is speech and the traditional Fourteenth Amendment Due Process approach has proven too unstable to be relied upon. Part I explores the history and current state of homeschooling, paying special attention to the growing and diversifying group of homeschooling parents in the United States and the present deregulated landscape. Part II is a survey of the uncertain, substantive-due-process-based parenting rights that have been applied to homeschooling cases and argues that exclusive reliance on that analysis is an accident of history. Part III offers, as an alternative, an argument for free speech analysis by exploring how homeschooling satisfies the justifications for free speech protection as outlined by Thomas Emerson in his influential essay, *Toward a General Theory of the First Amendment*,[14] which the Supreme Court cited when it sought to define speech.[15] This Note concludes by briefly considering the result of First Amendment analysis and stressing the need for a more consistent, predictable, and equal outcome for secular homeschoolers.

## I. THE HISTORY AND REGULATION OF HOMESCHOOLING

Homeschooling's increasing prevalence and acceptance has paralleled its profound deregulation. Section I.A traces the historical path of modern homeschooling in the United States while exploring its shifting demographics and the legacy of its dominance by the conservative Christian movement. Section I.B examines homeschooling's current deregulated status.

### A. HOMESCHOOLING BY THE NUMBERS

In the spring of 2011, approximately 1.77 million U.S. students were being homeschooled, up from 1.5 million students in the spring of 2007.[16] This increase also represented an increase in the percentage of students being homeschooled—2.9% to 3.4% in the same period.[17] This is consistent with the larger, long-term pattern of continued growth of homeschooling in the United

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14. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

15. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.11 (1978) ("Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" (quoting Emerson, *supra* note 14, at 883)).

16. OFFICE OF NON-PUB. EDUC., U.S. DEP'T OF EDUC., STATISTICS ABOUT NONPUBLIC EDUCATION IN THE UNITED STATES, http://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html [https://perma.cc/QL4S-VA6T].

17. *Id.*

States[18] since homeschooling has shifted from being illegal in most states to being legal in all.[19] The ever-increasing number of homeschooled students and its increasing popularity among families outside its traditional demographic groups have led some in the media to now consider homeschooling mainstream.[20] Homeschooling has become so much more visible and accepted that educational institutions have started to cater to and respond to homeschooled students' particular needs.[21]

Modern homeschooling in the United States began in the mid-twentieth century as a liberal response to a pedagogical culture perceived as too conservative and rigid.[22] It should be noted, though, that some scholars and homeschooling advocates have argued that, in the early days of the United States, homeschooling was common—as demonstrated by the abundance of homeschooling in the backgrounds of several early presidents.[23] "Homeschooling" during this period, however, mostly resulted from the lack of schools, public or private. Indeed, when public educational opportunities increased, homeschooling declined, in part "fueled by compulsory education statutes."[24] Therefore, homeschooling in the modern sense—that is, elective homeschooling—can only be reasonably traced to the middle of the previous century.

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18. In 2003, for example, only 1.096 million students were homeschooled, representing 2.2% of the student population of the United States. NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., TABLE 206.10. NUMBER AND PERCENTAGE OF HOMESCHOOLED STUDENTS AGES 5 THROUGH 17 WITH A GRADE EQUIVALENT OF KINDERGARTEN THROUGH 12TH GRADE, BY SELECTED CHILD, PARENT, AND HOUSEHOLD CHARACTERISTICS: 2003, 2007, AND 2012, http://nces.ed.gov/programs/digest/d13/tables/dt13_206.10.asp [https://perma.cc/T4PD-PBNG]. This, itself, represented an increase from the measly 850,000 students that were homeschooled in 1999, which represented only 1.7% of the student population. NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., TABLE 40. NUMBER AND PERCENTAGE OF HOMESCHOOLED STUDENTS AGES 5 THROUGH 17 WITH A GRADE EQUIVALENT OF KINDERGARTEN THROUGH 12TH GRADE, BY SELECTED CHILD, PARENT, AND HOUSEHOLD CHARACTERISTICS: 1999, 2003, AND 2007, http://nces.ed.gov/programs/digest/d11/tables/dt11_040.asp [https://perma.cc/8KKZ-FTCS].

19. Scott W. Somerville, *Legal Rights for Homeschool Families*, *in* HOME SCHOOLING IN FULL VIEW: A READER 135, 135 (Bruce S. Cooper ed., 2005) ("Hard as it is to believe, homeschooling was considered illegal in most states as late as 1975, driving families underground to hide their children at home from the public school authorities. By 1993, a political miracle had occurred: homeschooling was recognized as legal in all 50 states."); *Home-Schooling: George Bush's Secret Army*, ECONOMIST (Feb. 26, 2004), http://www.economist.com/node/2459411 [https://perma.cc/384F-5684].

20. Lauren Keiper, *Home Schooling's Appeal Spreads to Mainstream*, REUTERS (Mar. 16, 2011, 10:15 AM), http://www.reuters.com/article/us-education-homeschooling-idUSTRE72F4WS20110316 [https://perma.cc/ULS2-5DZZ]. However, others have noted that homeschooling is still subject to misconceptions "fueled by national media stories that sensationalize the role of homeschooling in unusual events." Lois, *supra* note 10, at 1–2 (pointing out that this includes both triumphs, such as spelling bee champions, and tragedies, such as postpartum violence).

21. Keiper, *supra* note 20 ("Home school is more visible than it once was, with museums catering to home-school groups, home schoolers performing in concerts and local theaters and students earning college credits while still in their early teens.").

22. Patricia M. Lines, *Homeschooling Comes of Age*, PUB. INT. (July 1, 2000), http://patricialines.com/files/homeschooling%20comes%20of%20age.htm [https://perma.cc/UU4W-CCE8].

23. *See* BRIAN D. SCHWARTZ, THE LAW OF HOMESCHOOLING 5 (2008).

24. *Id.*

The parents who sought to counteract the "stifling" traditional educational environment were primarily followers of John Holt's unschooling movement and of other progressive causes.[25] However, homeschooling eventually became dominated by the religious conservative movement, with which it is now most heavily associated.[26] Because the left-leaning pioneers of modern homeschooling persisted despite the growth of the Christian faction, what resulted was a bifurcated universe of homeschoolers in which the two groups "read different publications, attended different support groups, and heeded different kinds of advice about how to act politically."[27]

The now-dominant conservative Christian faction is represented by the Home School Legal Defense Association (HSLDA). HSLDA was founded in 1983 as the conservative religious movement started to supplant left-leaning homeschooling originators.[28] Predictably, HSLDA identifies itself as a Christian organization.[29]

The story of homeschooling does not end, however, with its widespread and overwhelming adoption by conservative, religious families. Concerns with the "environment" of other schools, a desire to provide general moral instruction, and dissatisfaction with the academic quality of other schools are all now more frequently cited as reasons parents homeschool than the desire to provide religious instruction.[30] Although statistics indicate that concern regarding the classroom environment is now the most significant reason for students and parents to pursue homeschooling, these statistics have been criticized for failing to capture what these concerns look like in practice.[31] One homeschooling organization points out that these concerns are so vague that they could conceivably include both "an agnostic parent in the South concerned about the amount of religion in the local public schools" and "a religious parent concerned about 'sexual immorality' in the public schools."[32]

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25. *See* Yuracko, *supra* note 11, at 125–26 (describing the "early pioneers" of homeschooling as arriving from leftist causes including "the women's movement, the alternative schools movement, and the La Leche League").

26. *See id.* at 126 ("The Christian homeschooling movement came to dominate its secular counterpart in size, profile and political influence.").

27. MITCHELL L. STEVENS, KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT 144–45 (2001).

28. *See About HSLDA*, HSLDA, http://www.hslda.org/about/ [https://perma.cc/APU8-BXFQ].

29. *Id.* ("Is HSLDA a Christian organization? Yes. HSLDA's officers, directors, and employees are Christians who seek to honor God by providing the very highest levels of service in defending homeschooling freedom and equipping homeschoolers.").

30. The percentages of homeschooling parents who had these concerns were 91%, 77%, 74%, and 64%, respectively. OFFICE OF NON-PUB. EDUC., *supra* note 16.

31. *Reasons Parents Homeschool*, COAL. FOR RESPONSIBLE HOME EDUC., http://www.responsiblehomeschooling.org/homeschooling-101/reasons-parents-homeschool/ [https://perma.cc/28EX-8N4M].

32. *Id.* The result of this unclear data is that, when attempting to understand why nonreligious homeschooling takes place, one must heavily rely on individual stories. The justifications are plenary, including concerns about the behavior and beliefs of peers and bullying. Bev Burgess, *Why Choose Secular Homeschooling*, ENRICHRI (July 8, 2014), http://enrichri.org/choose-secular-homeschooling/ [https://perma.cc/XC4M-TEQY]. Indeed, short-term homeschooling in response to bullying is a com-

Even so, the data bring into high relief that the pedagogical and pragmatic reasons are becoming more prevalent in making the choice to homeschool. As a result, the increasing percentage of secular homeschooling families may be at risk of being punished like the Bennetts.[33] This is compounded by the continued lobbying dominance for all homeschoolers by HSLDA[34]—an organization that has little incentive to represent the interests of secular homeschoolers because of its religious identity.[35]

### B. CURRENT STATE REGULATION OF HOMESCHOOLING

It is, at least in part, because of HSLDA's lobbying efforts that homeschooling has become legal in all states and minimally regulated in most.[36] States' homeschooling regulations vary widely with regard to notification requirements, parent education standards, mandated curriculum, and assessments, but, as explained below, homeschooling is typically not subject to significant state oversight.

Homeschoolers in most states are required to, in some capacity, inform either the state education department or the local school district of their choice to homeschool: ten states have a one-time notification requirement,[37] twenty-nine require annual notice,[38] and the remaining eleven states have no notification

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mon reason that may itself escape measurement because of its temporary nature. *See* Lauren Brodie, *Bullying: A Reason to Homeschool?: Can Short-Term Homeschooling Defuse a Bullying Problem?*, PSYCHOL. TODAY (Mar. 24, 2010), https://www.psychologytoday.com/blog/love-in-time-homeschooling/201003/bullying-reason-homeschool [https://perma.cc/CT5U-WNT8]. Some homeschoolers want to remove their children from "what they see as the systematic racism of public schools," while others feel they must homeschool in order "to give a child with special learning needs more individual attention." Huseman, *supra* note 9. Some families homeschool for logistical purposes, often as a response to "a parent's job [that] requires constant moving." *Id.*

33. *See, e.g.*, People v. Bennett, 501 N.W.2d 106, 108 (Mich. 1993) ("In 1986, the defendants were charged with four counts of failing to send their children to school during the 1985–86 school year.").

34. *See* Huseman, *supra* note 9 (describing how HSLDA's representation of 15% of the homeschooling population is larger than what any other group can organize and how it has "[come] across as speaking for all homeschoolers"); *see also id.* ("[Ryan] Stollar, the co-founder of [Homeschool Alumni Reaching Out], said his group is constantly struggling to let legislators know there are other perspectives out there.").

35. *See id.* ("Some of these families, and almost certainly a majority of HSLDA members, have religious motivations for choosing to homeschool; many use alternative textbooks that teach creationism instead of evolution and offer a Christianity-centered view of American history.").

36. *See* Timothy Brandon Waddell, *Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Re-regulation of Homeschooling*, 63 VAND. L. REV. 541, 548–49 (2010) (crediting, implicitly, HSLDA with this "political miracle" and the movement in general for improving public perception) (quoting Somerville, *supra* note 19); Yuracko, *supra* note 11, at 128–29 ("As a result of HSLDA's work, state laws regulating homeschooling have become increasingly lenient.").

37. These states are Alabama, Arizona, Florida, Hawaii, Kansas, Maine, North Carolina, Nevada, Oregon, and Utah. *Homeschool Notification*, COAL. FOR RESPONSIBLE HOME EDUC., http://www.responsiblehomeschooling.org/policy-issues/current-policy/notification/ [https://perma.cc/92QS-MHLC].

38. These states are Arkansas, California, Colorado, Delaware, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New York, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

requirements at all,[39] and even those that do vary widely in terms of what satisfies this requirement.[40]

Requirements for parents who teach at home are also quite meager. Thirty-nine states do not require any educational background for homeschooling parents.[41] Three of those thirty-nine states require that parents be "competent"[42] or "capable of teaching,"[43] but they do not elaborate as to what that means. Ten of the remaining eleven states require a high school diploma, General Education Development (GED) equivalent, or some other training or review.[44] However, even these requirements can be avoided in several states via religious or umbrella school exemptions,[45] at the discretion of local officials,[46] or if the home educator is supervised by an appropriate person.[47] Parents are also rarely subject to requirements regarding the substance of their lessons: a majority of states have subject requirements, but most of those states have no measures to ensure that those requirements are being met.[48] Furthermore, thirty-six states either never require students to be assessed, can only assess students by special request, or can and do assess students but have no power to implement consequences for poor performance.[49] Only two states have any kind of prohibition on homeschooling by parents with criminal convictions.[50]

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39. These states are Alaska, Connecticut, Idaho, Illinois, Indiana, Iowa, Michigan, Missouri, New Jersey, Oklahoma, and Texas. *Id.*

40. These could mean merely requiring the names of the homeschooled children or it could mean including "a basic curriculum" and other identifying documentation. *Id.*

41. *Parent Qualifications*, COAL. FOR RESPONSIBLE HOME EDUC., http://www.responsiblehomeschooling.org/policy-issues/current-policy/parent-qualifications/ [https://perma.cc/9V8U-WB8M].

42. KAN. STAT. ANN. § 72-1111(a)(2) (West 2015); N.Y. EDUC. LAW § 3204.2 (McKinney 2015).

43. CAL. EDUC. CODE § 48222 (West 2015) ("Children who are being instructed in a private full-time day school by persons capable of teaching shall be exempted.").

44. *Parent Qualifications*, *supra* note 41.

45. TENN. CODE ANN. § 49-6-3050(2)(B), (3) (West 2015); VA. CODE ANN. § 22.1-254(B)(1), § 22.1-254.1(D) (West 2015); WASH. REV. CODE ANN. § 28A.195.010(4) (West 2015).

46. VA. CODE ANN. § 22.1-254.1(A)(iv) (West 2015) (describing that one way a parent can qualify to homeschool is by "provid[ing] evidence that he is able to provide an adequate education for the child"); W. VA. CODE ANN. § 18-8-1(c)(1) (West 2015) ("The instruction shall be conducted by a person . . . who, in the judgment of the county superintendent and county board, [is] qualified to give instruction in subjects required to be taught in public elementary schools in the state."); WASH. REV. CODE ANN. § 28A.225.010(4)(c) (West 2015) (explaining that a homeschooling parent can be "deemed sufficiently qualified to provide home-based instruction by the superintendent of the local school district").

47. *See, e.g.*, N.D. CENT. CODE ANN. §15.1-23-06 to 07(2) (West 2015) (explaining that the supervising parent may be qualified by being "monitored . . . for the first two years of homeschooling" by someone "licensed to teach").

48. *See* Jessica Huseman, *Homeschooling Regulations by State*, PROPUBLICA (Aug. 27, 2015), https://projects.propublica.org/graphics/homeschool [https://perma.cc/EPT3-M9BZ].

49. *See id.*

50. Jessica Huseman, *The Frightening Power of the Home-Schooling Lobby*, SLATE (Aug. 27, 2015, 6:00 AM), http://www.slate.com/articles/life/education/2015/08/home_school_legal_defense_association_how_a_home_schooling_group_fights.html [https://perma.cc/Y7D3-2AM2] ("Forty-eight states have no background check process for parents who choose to home-school. Two have some restrictions. Arkansas prevents home schooling when a registered sex offender lives in the home, while Pennsylvania bans parents previously convicted of a wide array of crimes from home schooling.").

Additionally, these scant regulations are often underenforced. As Kimberly Yuracko noted, "[s]tates are not only looking the other way when homeschoolers do not comply with state laws, but actually changing their laws to grant even greater freedom to homeschoolers."[51] Indeed, one California case demonstrates exactly this kind of deference. In 2008, an appellate court in California ruled that a family violated the state's education law by failing to have their child, who was not enrolled in public school, tutored by a person "holding a valid state teaching credential for the grade being taught."[52] In response to this reading of the statute, a quarter of a million people signed an HSLDA petition to depublish the decision.[53] The opinion was depublished and ultimately vacated.[54]

It is because of this lax oversight, however, that states have been confronted with the reality that homeschooled students "may be subject to educational neglect or abuse or may be taught in such a way as to render them dangerous or unproductive citizens"[55] so that they "lack[] even the basic skills necessary to . . . support themselves."[56] This has led some states to "reexamin[e] their existing homeschooling statutes."[57] One such reconsideration occurred in the District of Columbia in response to the murder of four children.[58] Even though the children died in the summer of 2007, their bodies were not discovered until January 2009, in part because their mother claimed they were being homeschooled.[59] In response to their deaths, homeschooling went from being essentially unregulated to requiring notice, a maintained portfolio of student work, and education requirements for the parent.[60]

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51. Yuracko, *supra* note 11, at 130.

52. *In re* Rachel L., 73 Cal. Rptr. 3d 77, 79 (Cal. Dist. Ct. App. 2008) (depublished), *vacated, reh'g granted sub nom.* Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Ct. App. 2008).

53. *See* Céleste Perrino-Walker, *Home-School Panic*, LIBERTY MAG. (Sept./Oct. 2008), http://www.libertymagazine.org/article/home-school-panic [https://perma.cc/HQL4-9T7E].

54. *See* Seema Mehta, *Court Reverses Home-School Ruling*, L.A. TIMES (Aug. 9, 2008), http://articles.latimes.com/2008/aug/09/local/me-homeschool9 [https://perma.cc/GZ2G-R9NC].

55. Waddell, *supra* note 36, at 545–46.

56. *Id.* at 544 n.25. For examples of homeschooled children who were not given an education sufficient to support themselves, see Yuracko, *supra* note 11, at 135 n.51 (describing a homeschooler who "wasn't interested in math or composition" and thus did not do it, and another homeschooler that said he "snowboard[ed] a lot" in response to "a question about what he studied").

57. Waddell, *supra* note 36, at 546.

58. Elissa Silverman, *D.C. Adopts Oversight Regulations for Home-Schooling*, WASH. POST (July 31, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/07/30/AR2008073001173.html [https://perma.cc/3DBT-YAZH].

59. Allison Klein, Keith L. Alexander & Sue Anne Pressley Montes, *SE Woman Says Four Daughters Were 'Possessed,'* WASH. POST (Jan. 11, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/01/10/AR2008011001174.html [https://perma.cc/9PQV-UXK2] ("School officials apparently detected no problems. The oldest girl, a student at Booker T. Washington Public Charter School, stopped attending classes months ago. The other girls attended Meridian Public Charter School in Northwest Washington until March, when Jacks withdrew them, saying she planned to home-school them.").

60. Silverman, *supra* note 58.

## II. CONSTITUTIONAL PROTECTION OF PARENTAL RIGHTS & *BENNETT*

Parenting and homeschooling rights—or the lack thereof—have been derived from shifting and uncertain legal precedents, without the benefit of clear statements of applicable standards. The doctrine has wandered from substantive due process to a hybrid right theory to potential new methods for finding fundamental rights. But it has never wandered far from analysis grounded in the Fourteenth Amendment, even though the First Amendment free speech protection seems implicated because homeschooling—in the act of teaching and the process of creating lesson plans—is necessarily expressive. This Part addresses the path of the doctrine and ultimately argues that the current doctrinal thinking is insufficient to protect secular homeschoolers like the Bennetts. Section II.A addresses how the absence of First Amendment analysis in the parenting and homeschooling context is the result of an accident of history. Section II.B addresses, and ultimately rejects, arguments that the canonical parenting cases have established a fundamental right to parent and homeschool. Section II.C explores the possibility of using *Washington v. Glucksberg* and *Obergefell v. Hodges* to find a new fundamental right that protects homeschooling.

### A. THE ABSENCE OF FIRST AMENDMENT ANALYSIS: AN ACCIDENT OF HISTORY

The courts' failure to account for the First Amendment implications of homeschooling regulations seems strange because homeschooling necessarily involves expression.[61] This failure does not reflect an affirmative philosophical or jurisprudential decision. Instead, this is merely the result of *Meyer v. Nebraska*[62] and *Pierce v. Society of Sisters*[63] being decided before the First Amendment free speech protection was available as a method of challenging state regulation because that right had not yet been incorporated against the states.

It was not until June 1925 that the Supreme Court "assume[d] that freedom of speech and of the press . . . [were] among the fundamental personal rights and 'liberties' protected by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment from impairment by the States."[64] By that time, *Pierce v. Society of Sisters* had been decided for a week,[65] and *Meyer v. Nebraska* had been decided for two years.[66] Given that it was only with *Gitlow v. New York* that the process of incorporation began,[67] reversing the long and well-established precedent that

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61. This expression includes, but is not limited to, the speech parents direct toward their children when they teach.

62. 262 U.S. 390 (1923).

63. 268 U.S. 510 (1925).

64. Gitlow v. New York, 268 U.S. 652, 666 (1925).

65. *Gitlow*, 268 U.S. 652 (1925) (decided June 8, 1925); *Pierce*, 268 U.S. at 510 (decided June 1, 1925).

66. *Meyer*, 262 U.S. at 390 (decided June 4, 1923).

67. There are some arguments that *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897), incorporated the Takings Clause against the states. However, these waters are muddied

the Bill of Rights could not be applied against the states,[68] it is not surprising that the parties in either case did not challenge the state regulations on the basis of free speech.

This is not to suggest that legal conversations regarding homeschooling have completely avoided First Amendment analysis. However, these discussions have only focused on the attenuated relationship of homeschooling *to* speech, rather than understanding homeschooling *as* speech. For example, some scholars have argued that interference with education may be "as harmful to free speech interests as any direct infringement" because education is a condition "necessary to create and maintain a viable system of free expression."[69] However, when litigants have brandished these "attenuation" arguments in an attempt to seek protections of education, they have not been successful. The appellees in *Rodriguez* attempted to use this kind of argument when they sought greater constitutional protections for education because of its "peculiarly close relationship to other rights and liberties accorded protection under the Constitution."[70] They did not argue that the nexus between education and speech protects education as speech. Instead, they asserted that the nexus of education and speech meant that education had to be considered a fundamental liberty interest under the Fourteenth Amendment.[71] The Court in *Rodriguez* rejected this argument.[72] Thus, homeschooling litigants have not expressly employed First Amendment arguments. What remains, then, is the tortured path of parenting rights as fundamental rights—or not—addressed in the next Section.

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because the Court referenced natural law arguments. Eric R. Claeys, Takings: *An Appreciative Retrospective*, 15 WM. & MARY BILL RTS. J. 439, 441 n.19 (2006). In any case, incorporation via the Fourteenth Amendment of the Bill of Rights was not clearly made until *Gitlow*.

68. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (refusing to apply the Takings Clause just compensation requirement against a state government because it only applied to the federal government).

69. *See* Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 82–84 (2002) (describing the "potentially troubling First Amendment implications of the compulsory educational process"). Where government provides education, "some agent of the government will have to make substantive choices in determining what to teach and *what not to teach*." *Id.* at 82 (emphasis added). By virtue of this choice, any government that severely limits access to nongovernmental education becomes a near monopoly for curricula. It follows, then, that limiting access to homeschooling has just such an effect.

70. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

71. The appellees argued that education had to be a fundamental liberty interest because the "right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively" and the "marketplace of ideas" becomes an "empty forum for those lacking basic communicative tools." *Id.*

72. *Id.* at 36. The Court reasoned that, because it "never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice," it could not find for the appellees. *Id.* However, the Court went on to argue that even if there were, hypothetically, "some identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise of either right," the contested funding inequities "[fell] short" of that minimum. *Id.* at 36–37. Therefore, it seems the Court itself recognizes the possibility of educational deprivation so severe as to implicate harm to the First Amendment.

### B. SUBSTANTIVE DUE PROCESS ORIGINS OF PARENTING RIGHTS & DEPARTURES FROM IT

Modern parental rights jurisprudence begins with substantive due process, as evident in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Section II.B.1 begins by demonstrating that these canonical parental rights cases do not establish the robust parenting rights for which they are often cited. It continues this analysis through *Wisconsin v. Yoder*,[73] which likewise established qualified and fact-specific rights. Section II.B.2 moves to how parenting rights analysis has been expanded and confused by the hybrid rights theory in *Employment Division, Department of Human Resources of Oregon v. Smith*[74] and *Troxel v. Granville*.[75]

#### 1. The Substantive Due Process of Parenting Rights Through *Yoder*

Despite the repudiation of economic substantive due process,[76] *Meyer v. Nebraska* and *Pierce v. Society of Sisters* persist as the "only two remaining *Lochner*-era substantive due process cases that are still good law."[77] They are thus the "starting point" of much of the Supreme Court's substantive due process analysis,[78] and they were thus rightly addressed and found insufficient to support secular homeschooling protections in *Bennett*.

In *Meyer v. Nebraska*, the Supreme Court found that outlawing the teaching of foreign languages to children who had not yet reached the eighth grade was unconstitutional.[79] It was in this decision that the Court made its famous remark about the word "liberty" in the Fourteenth Amendment:

> [It denotes] not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and *bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[80]

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73. 406 U.S. 205 (1972).
74. 494 U.S. 872 (1990).
75. 530 U.S. 57 (2000).
76. *See* Washington v. Glucksberg, 521 U.S. 702, 761 (1977) (Souter, J., concurring) ("Even before the deviant economic due process cases had been repudiated, however, the more durable precursors of modern substantive due process were reaffirming this Court's obligation to conduct arbitrariness review, beginning with *Meyer* . . . .").
77. Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J. L. & FAM. STUD. 71, 72 (2006). By Lawrence's count, as of 2006, there have been fifty-nine majority opinion citations to *Meyer* since *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the case widely considered the end of the *Lochner* economic substantive due process era. *Id.* at 114.
78. *Id.* at 72.
79. 262 U.S. 390 (1923).
80. *Id.* at 399 (emphasis added).

The Court went on to describe "the natural duty of the parent to give his children education suitable to their station in life" that corresponded with their right of control over that education.[81]

Homeschooling advocates have construed this language to mean that *Meyer* is exclusively a profound statement about the rights of parents.[82] However, this reading misses the broader context of the decision. To begin, the "natural duty" of parenthood was also described as being "enforce[d] . . . by compulsory [attendance] laws."[83] Even in a statement affirming parental control, there was an acknowledgement of the role the government plays in ensuring its fulfillment. Furthermore, although the case presented an opportunity to fully examine—or reject—a state's power to compel attendance and regulate education, the Court assiduously avoided this question by stating that those powers were "not questioned" in that case.[84]

The more problematic aspect of this advocacy-influenced reading is that it eliminates the multifaceted nature of the opinion. One of the Court's main objections to the law was that it interfered with "education and acquisition of knowledge."[85] This reading also eliminates any reference to the actual facts of the case—it actually addressed the prosecution of a teacher, and this law's material interference with his calling.[86] Those previously mentioned objections to this law's interference with the parental rights actually appear in the same sentence as these professional and educational objections. Therefore, the economic and general educational justifications carry at least equal weight with the parental rights argument. Susan Lawrence has argued this point well:

> I wish to emphasize the limited and peripheral extent to which the Court actually relies on a found, yet ill-defined, Fourteenth Amendment "parental right." In the Court's reasoning, professional callings and pursuit of knowledge are at least as important as parental control of education in establishing an unconstitutional infringement of protected liberty interests. Lofty opening definitions of liberty (and their subsequent citation by the Court) notwithstanding, there is simply no right to marry, establish a home, or bear children at stake in the *Meyer* case.[87]

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81. *Id.*

82. CHRISTOPHER J. KLICKA, THE RIGHT TO HOMESCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION 34 (2002) ("This decision clearly affirmed that the Constitution protected the preferences of the parent in education over those of the State.").

83. *Meyer*, 262 U.S. at 400.

84. *Id.* at 402. This could alternatively be read as an endorsement of those powers by taking the phrasing to mean that the power to compel attendance and regulate education was "not questionable," meaning "not capable of being questioned." However, such a reading is ultimately unnecessary to undercut the theories that *Meyer* was either solely a parental rights case or a powerful statement of parental rights.

85. *Meyer*, 262 U.S. at 400.

86. *Id.* at 401.

87. *See* Lawrence, *supra* note 77, at 77 (internal citations omitted).

Therefore, although the court in *Bennett* rightly granted that *Meyer* may have included a "general statement concerning parental rights to control . . . children's education," it was correct to emphasize that *Meyer* "does not stand for the proposition that the Fourteenth Amendment guarantees parents the fundamental right to direct their children's education free from reasonable regulation."[88]

In *Pierce v. Society of Sisters*, the Supreme Court held that a state law requiring public education was unconstitutional in a challenge brought by two schools, The Sisters of the Holy Names and Hill Military Academy.[89] In part, the law was invalid because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[90] But this is, ultimately, a misleadingly incomplete picture of the mechanics of the decision. The Court only invalidated the "general power of the state to standardize its children by forcing them to accept instruction from *public teachers only*."[91] The invalidation of the law was ultimately sought as a "protection against arbitrary, unreasonable, and unlawful interference with [the plaintiffs'] patrons and the consequent destruction of their business and property."[92] The Michigan Supreme Court in *Bennett*, then, rightly understood that *Pierce* "does not, therefore, stand for the position that parents have a fundamental right to direct their children's education under all circumstances,"[93] which is the only way the Bennetts could have benefitted from it.

To homeschooling advocates, *Wisconsin v. Yoder*, in which the Supreme Court held that a state could not compel school attendance for Amish parents' children if they graduated from eighth grade, represents a continuation of an unequivocal Supreme Court admission that there exist "fundamental rights and interests" of parents.[94] Indeed, HSLDA points to this language in the opinion to argue that a fundamental right of parenting exists, but it fails to clarify that the Court only specifically describes "the traditional interest of parents with respect to the religious upbringing of their children" as a "fundamental right[] and interest[]."[95] Indeed, the Supreme Court held that compulsory education after the eighth grade violated the Free Exercise Clause and parental rights as applied to members of the Old Order Amish.[96] This parental right, however, was cabined to the "rights of parents to direct the *religious* upbringing of their

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88. People v. Bennett, 501 N.W.2d 106, 113 (Mich. 1993).

89. Pierce v. Soc'y of Sisters, 268 U.S. 510, 531–33 (1925).

90. *Id.* at 534–35.

91. *Id.* (emphasis added).

92. *Id.* at 536.

93. *Bennett*, 501 N.W.2d at 113.

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

95. Christopher J. Klicka, *Decisions of the United States Supreme Court Upholding Parental Rights as "Fundamental,"* HSLDA (Oct. 27, 2003), http://www.hslda.org/docs/nche/000000/00000075.asp#19 [https://perma.cc/TT6F-9NFN] (quoting Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990)).

96. *Yoder*, 406 U.S. at 219.

children."[97]

The opinion also relies heavily on the facts of the case—specifically the "almost 300 years of consistent practice, and strong evidence of a sustained faith pervading . . . respondents' entire . . . life."[98] It was only with these robust facts that the Court was able to find for the respondents on "the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs."[99] The Bennetts attempted to use *Yoder*, and the court rightly found that such an application was "misplaced."[100] The Court noted that "[h]ardly a page of [*Yoder*] can be read without seeing at least one reference to the parents' religious beliefs."[101] Indeed, any attempt to find a secular parenting right becomes futile when one sees that the Supreme Court framed the parental right in *Yoder* as being only "the traditional interest of parents with the respect to the religious upbringing of their children."[102]

Some have argued that these canonical cases "reflect a consistent recognition of parental privacy interests and fundamental rights in the education of children."[103] Others have similarly argued that although the so-called lofty words in *Meyer* describing the word liberty in the Fourteenth Amendment as including the right to "bring up children"[104] were dicta, they are now "dicta that have been given enhanced status by the Court's frequent references to them in later cases."[105] However, the cases that are deployed to demonstrate that the lofty words' status has been enhanced are unconvincing and cannot overcome the facts of those initial cases. In *Prince v. Massachusetts*, for example, the Court stated "that the custody, care and nurture of the child reside first in the parents" and that the Court thus "respected the private realm of family life which the state cannot enter."[106] However, it also stated that the family "is not beyond regulation" and that the state may thus "requir[e] school attendance, regulat[e]

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97. *Id.* at 233 (emphasis added).
98. *Id.* at 219.
99. *Id.*
100. People v. Bennett, 501 N.W.2d 106, 113 (Mich. 1993).
101. *Id.*
102. *Yoder*, 406 U.S. at 214.
103. Kara T. Burgess, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69, 74–75 (1986); *see* Dwight Edward Tompkins, *An Argument for Privacy in Support of the Choice of Home Education by Parents*, 20 J.L. & EDUC. 301, 308–11 (1991) (proposing that reasonable construction of Supreme Court decisions supports fundamental right of privacy protecting parental choice of home education). It is also important to note that one of these articles predates *Employment Division, Department of Human Resources of Oregon v. Smith*, and both predate *Troxel v. Granville*. These two cases provide extra ammunition for the proposition that there is no fundamental parenting right. *See infra* Section II.B.2.
104. Meyer v. Nebraska, 262 U.S. 390 (1923).
105. David M. Wagner, *Homeschooling as a Constitutional Right: A Close Look at* Meyer *and* Pierce *and the* Lochner*-Based Assumptions They Made About State Regulatory Power*, 39 OKLA. CITY U. L. REV. 385, 405 (2014).
106. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

or prohibit[] the child's labor, and in many other ways" intervene.[107] Thus, a thorough examination of the content and context of these decisions suggests there has not been a robust and unequivocal endorsement by the Court of parenting as a fundamental right. At the very least, "the case law language is so confused that it is susceptible to widely divergent interpretations."[108]

2. Hybrid Rights in *Smith* & Renewed Confusion in *Troxel*

In more recent cases, parental rights have been described in new, confusing, and inconsistent ways that further highlight how erratic the current parental rights doctrine is. *Employment Division v. Smith*, in which the Supreme Court held that a state could deny unemployment benefits for religious use of peyote,[109] made clear, with the introduction of the hybrid right theory, that parental rights alone were not enough to warrant strict scrutiny of a fundamental liberty interest.[110] Homeschooling advocates point to that opinion's acknowledgement that "the right of parents . . . to direct the education of their children" is a "constitutional protection[]."[111] However, under the hybrid right theory, it is only "when the interests of parenthood are combined with a free exercise claim . . . [that] more than merely a reasonable relationship to some purpose within the competency of the State" is required to withstand an attack on its validity.[112] Therefore, under *Smith*, parenting alone is not enough to warrant heightened scrutiny.

The Court has introduced yet another dimension of confusion concerning the status of parenting rights since the *Bennett* and *DeJonge* cases were decided. In *Troxel v. Granville*, the Court described the Due Process Clause as "[protecting] the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[113] This would seem to bring an unequivocal end to the debate about the status of the parental right in favor of a "fundamental right" status. Under this language, a modern *Bennett* case would seem to be resolved in favor of the parents. However, the opinion was only issued by a plurality of the Court[114] and, even though Justice O'Connor identified the parental right as fundamental, she did not invoke the strict scrutiny analysis traditionally afforded to fundamental rights.[115] This inconsistency provides

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107. *Id.*

108. Daniel E. Witte, People v. Bennett*: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 195 (1996).

109. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874, 890 (1990).

110. *See id.* at 881, 881 n.1.

111. Klicka, *supra* note 95 (quoting *Smith*, 494 U.S. at 881).

112. *Smith*, 494 U.S. at 881 n.1.

113. Troxel v. Granville, 530 U.S. 57, 66 (2000). The Court cited to *Meyer*, *Pierce*, and *Yoder*, along with other cases including *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Parham v. J. R.*, 442 U.S. 584, 602 (1979), as support for this fundamental parental right. *See id.*

114. *Troxel*, 530 U.S. at 60.

115. Instead, Justice O'Connor merely noted that "a court must accord at least some special weight to [a fit] parent's . . . determination." *Id.* at 70.

another reminder of how unstable and tenuous the fundamental rights approach is for secular homeschoolers.

### C. MAKING A NEW RIGHT WITH *GLUCKSBERG* OR *OBERGEFELL*

Another avenue in the fundamental rights framework for finding greater protections for homeschoolers would be to argue that, even if parenting has not been definitively given the status of a fundamental right in the "canonical" cases, it should be given such status under the logic of *Washington v. Glucksberg*[116] or *Obergefell v. Hodges*.[117] The first argument is that homeschooling is a tradition that satisfies the *Washington v. Glucksberg* two-tiered test for finding a fundamental liberty interest.[118] For there to be such an interest in parenting, there must be a "careful description of the asserted fundamental liberty interest" and that interest must be "objectively, 'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty.'"[119] It is not clear, though, that homeschooling is sufficiently rooted in the history and tradition of the United States to be a fundamental right under *Glucksberg*. After all, as mentioned in Part I, modern elective homeschooling did not begin until the middle of the last century.[120]

A second, and newer, approach potentially became available last year—the emerging fundamental right concept endorsed in *Obergefell v. Hodges*.[121] The limitation that a *Glucksberg* fundamental interest need be deeply rooted in the history of the United States seems to have been substantially lessened given the Court's own admission that although "[h]istory and tradition guide and discipline this inquiry," they "do not set its outer boundaries."[122] It could be argued that homeschooling's growing acceptance[123] mirrors the growing acceptance of same-sex marriage.[124] However, hoping the Court would be willing to extend that reasoning to homeschooling seems to be, at best, a shot in the dark; the Court in *Obergefell* relied heavily on its own recent history involving the rights of those in same-sex relationships as well as on the combination of the Equal Protection and Due Process Clauses.[125]

In any case, the precarious prospect of finding a fundamental parenting right to homeschool in these new methods further illustrates just how uncertain the

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116. 521 U.S. 702 (1997).

117. 135 S. Ct. 2584 (2015).

118. *See* Waddell, *supra* note 36, at 574–75.

119. *Glucksberg*, 521 U.S. at 721 (internal citations omitted).

120. *See supra* note 22 and accompanying text.

121. *See* 135 S. Ct. 2584 (2015).

122. *Id.* at 2598.

123. *See supra* Section I.A.

124. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2596 ("In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance.").

125. *See id.* at 2598–99, 2602–03.

rights of secular homeschoolers are under any Fourteenth Amendment understanding. As a result, energy should be spent finding alternative and additive protections, such as in the free speech protection of the First Amendment discussed in the next Part.

## III. THE FREE SPEECH ALTERNATIVE

The First Amendment of the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[126] Thomas Emerson, a leading and influential First Amendment scholar,[127] described the underlying rationale for this protection by arguing that the benefits of free expression in a democratic society are individual self-fulfillment, the attainment of truth, participation in decision making, and a balance of social control.[128] These justifications for the First Amendment's speech protections have also been invoked by the Supreme Court when determining that those protections apply.[129] Thus, homeschooling's satisfaction of those justifications buttresses the argument that it should be treated as speech. Each of the following Sections discusses, in turn, how homeschooling does perform these functions, with the final Section in this Part briefly addressing the associational implications of homeschooling. As a result, homeschooling should be analyzed and protected as speech.

### A. INDIVIDUAL SELF-FULFILLMENT

Homeschooling, just like other speech, is essential for individual self-fulfillment because it "is an integral part of the development of ideas, of mental exploration and of the affirmation of self."[130] Thomas Emerson was the scholar responsible for introducing this dimension to the modern understanding of the First Amendment.[131] Effectively, he extended free speech theory beyond just its political importance into a realm of "intrinsic 'human' value."[132] Ultimately, the argument is that free speech is protected because "[r]estrictions on what we are allowed to say and write, or (on some formulations of the theory) to hear and read, inhibit our personality and its growth."[133] Considered against this back-

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126. U.S. CONST. amend. I.

127. KEITH WERHAN, FREEDOM OF SPEECH 36 (2004).

128. Emerson, *supra* note 14, at 879, 881, 882, 884.

129. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.11 (1978) ("Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" (quoting Emerson, *supra* note 14, at 883)); Branzburg v. Hayes, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society." (citing Emerson, *supra* note 14)).

130. Emerson, *supra* note 14, at 879.

131. *See* CHRIS DEMASKE, MODERN POWER AND FREE SPEECH: CONTEMPORARY CULTURE AND ISSUES OF EQUALITY 11 (2009).

132. *Id.*

133. ERIC BARENDT, FREEDOM OF SPEECH 13 (2005).

drop, a restriction on homeschooling would inhibit the personal growth of both the parent who teaches and the child who is homeschooled.

Homeschooling serves a parent's individual self-fulfillment. Secular parents often justify their choice to homeschool as a method of "strengthening family ties"[134] and "as a way to be ultraresponsible parents."[135] Others have cited their desire to "live as creative of a life as possible."[136] These are fundamental issues of personal identity being expressed in the choice to homeschool.

Homeschooling also serves a child's need for self-fulfillment by offering the child an opportunity to receive an education tailored to her needs, instead of being tied to the inflexible structures of public school.[137] Research has suggested that homeschooling, and the resulting strong family ties it fosters, "allow[s] children to learn at their own pace, to maintain a heightened level of curiosity and to be involved in intense learning processes."[138] The rationale is that the parents of these children are "fully aware of what [their children] already know and of the next step to be learned" so that their "children spend most of their time at the frontiers of their learning."[139]

### B. ATTAINMENT OF TRUTH & THE MARKETPLACE OF IDEAS

Homeschooling also satisfies the Emersonian justification for free speech in that its practice aids in the attainment of truth by contributing to the Marketplace of Ideas.[140] Under Thomas Emerson's theory, free expression is "the best process for advancing knowledge and discovering truth."[141] Even those who do not describe free speech as the preeminent method of attaining truth accept its importance because "[i]f restrictions on speech are tolerated, society prevents the ascertainment and publication of accurate facts and valuable opinion."[142]

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134. Keiper, *supra* note 20.

135. LOIS, *supra* note 10, at 2.

136. Huseman, *supra* note 9.

137. For example, one secularly homeschooled alumna described her family's decision to homeschool her as a direct result of her elementary school's apparent loss of interest "in intellectually challenging [her] and [her] more advanced peers after the 2nd grade." Sam Mauceri, *I Was a Secular Homeschooler*, AM. HUMANIST ASS'N (July 2013), http://americanhumanist.org/HNN/details/2013-07-i-was-a-secular-homeschooler [https://perma.cc/F4TC-NNLN].

138. A. Bruce Arai, *Homeschooling and the Redefinition of Citizenship*, EDUC. POL'Y ANALYSIS ARCHIVES 8 (Sept. 6, 1999), http://epaa.asu.edu/ojs/article/viewFile/562/685 [https://perma.cc/GSZ8-KDFT].

139. ALAN THOMAS, EDUCATING CHILDREN AT HOME 46 (1998).

140. Justice Holmes, in his dissent in *Abrams v. United States*, characterized the availability of competing viewpoints as the best method for finding truth and gave it the "Marketplace of Ideas" moniker. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

141. Emerson, *supra* note 14, at 881.

142. BARENDT, *supra* note 133, at 7.

The act of homeschooling is a de facto challenge to mainstream pedagogy, and so its practice automatically contributes a different perspective to the Marketplace of Ideas. Also, in homeschooling "parents have . . . broad latitude to adapt their pedagogy and learning environment to the needs of the child."[143] Indeed, parents who homeschool are more likely to implement successful "strategies . . . to promote autonomous motivation" that result in higher achievement than teachers in traditional education settings.[144] This is, in part, due to the specialized focus that homeschoolers are able to afford the smaller number of students for whom they are responsible.[145]

Homeschoolers contribute to the Marketplace of Ideas not just how they homeschool, but what they homeschool—including an emphasis on philosophy, art, religion, and practical job skills not commonly taught in public or private school settings. Thus, the substantive education choices that can be made in the homeschool setting offer a healthy challenge to mainstream thinking regarding what ought to be taught. Furthermore, homeschooled students contribute their unique perspective to the Marketplace of Ideas as they enter society, both by having learned differently and by having learned different things.

### C. PARTICIPATION IN DECISION MAKING & CITIZENSHIP

Homeschooling enhances society and contributes to the open discussion that "provide[s] for participation in decision making."[146] Despite the easy assumption that homeschoolers are nonparticipants in society because they withdraw their children from a foundational part of it (that is, school), homeschoolers do value and foster citizenship. However, they use homeschooling to "construct[] an alternative vision" of it.[147] Whereas traditional schooling arrangements "emphasize[] history, geography and social studies" as the basis for citizenship education, homeschooling more highly values "participation in the public sphere."[148] This, research suggests, results in homeschool graduates participating in cultural activities and voting at higher rates than their traditionally educated peers.[149]

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143. Debra A. Bell, Types of Home Schools and Need-Support for Achievement Motivation 109 (Jan. 2013) (unpublished Ph.D. dissertation, Temple University).

144. *Id.* at 115.

145. *See id.* at 7 ("A home school differs from a conventional setting along many dimensions—classroom teachers must meet the needs of many students; while homeschool parents are working with only a few; though often at multi-grade levels at once. Classroom teachers must also work within the prevailing structure and standards dictated by the local, state and federal agencies.").

146. Emerson, *supra* note 14, at 882.

147. Arai, *supra* note 138, at 8.

148. *Id.*

149. *See* DEANI A. NEVEN VAN PELT, ET AL., FIFTEEN YEARS LATER: HOME-EDUCATED CANADIAN ADULTS, A SYNOPSIS 4 ("Home education graduates were most frequently (82%) involved in religiously-related groups, compared with only 13% of young Canadian adults in general. They were also more active in sports-related groups (48% compared with 36%). They were more active in cultural groups, educational groups, and political parties, but somewhat less active in unions or professional associations. Taken together, home-educated adults were more socially engaged than other young Canadians, engaging in

Speech is important to the political process because the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . [and] protection against the dissemination of noxious doctrine."[150] Homeschooling enhances these beneficial public conversations, then, by fostering increased involvement in communities by homeschooled students who can share their different experiences with others.

It could alternatively be argued that by homeschooling, parents are necessarily participating in the kind of expression that contributes to informed participation in the decision making process. If they choose to speak with their children about political or ideological concepts, they are participating in the kind of "[p]ublic discussions of public issues . . . [that] must have a freedom unabridged."[151] This would contribute a "checking value" that makes speech so valuable in protecting against government abuse of power.[152] However, they need not have their own speech "get political" for it to satisfy this rationale. Rather, Alexander Meiklejohn argues, "there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, [and] sensitivity to human values."[153] This would include the "philosophy and the sciences" because they allow for understanding of the world and "literature and the arts" because they lead to the "sensitive and informed appreciation" necessary in political decisions.[154] Further, because all education is the "attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen," it is a form of expression that "must suffer no abridgment."[155]

### D. SOCIAL CONTROL

There are two alternative frameworks for understanding free expression as essential for social control and stability—and homeschooling satisfies both. The first is that protection of free expression is a negative right against the state and is simply a protection against the risk of totalitarianism. The second is that permitting dissenters actually legitimates and stabilizes a society.

Under the first framework, homeschooling is a prophylactic against totalitarianism. As has been noted in other scholarship, government-provided education provides such robust opportunity to engage in totalitarian behavior that "there are particularly strong reasons to be suspicious of government in this con-

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more types of group activities and doing so more often. They were also twice as likely to have voted in a federal election, and much more likely to have voted in a provincial election.").

150. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

151. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961).

152. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 542 (1977).

153. Meiklejohn, *supra* note 151, at 257.

154. *Id.* at 256–57.

155. *Id.*

text."[156] Those who have control over the school curriculum and environment exercise tremendous influence over the students in their care. If the government is able to limit the ability of others to provide education, it could wield that influence monopolistically. It is for this reason that David Wagner described the "legal availability [of homeschooling as] a critical check-and-balance on the government's heavy-handed power to educate children."[157] Without homeschooling, accountability as to both the content and quality of education would be reduced. For example, state-promoting materials would be more difficult to challenge and more readily imposed on a larger captive audience.

Legal homeschooling also contributes to social stability, as understood under the second framework, because it legitimizes society by providing a meaningful process by which the majority and dissenters interact, increasing all of society's satisfaction with the outcome. Ideological and pedagogical dissenters are allowed to express themselves without fear by being able to legally remove children from traditional schooling situations. It provides a "channeling of resistance into courses consistent with law and order."[158] In this way, the availability of homeschooling does not "caus[e] society to fly apart" but rather "stimulates forces that lead to greater cohesion."[159] Dissenters are able "to let off steam," resulting in "lessening of frustration."[160] Instead of feeling forced to secretly homeschool,[161] they can do so openly without being "drive[n] . . . underground, leaving [them] either apathetic or desperate."[162] Indeed, the threat of regulating homeschooling to extinction is that it would conceal from many the "extent of opposition" to the dominant educational form and would "harden[] the position of all sides."[163]

### E. HOMESCHOOLING AS AN ASSOCIATIONAL RIGHT

Implicit in the First Amendment is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[164] Freedom of speech "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[165] Homeschooling is easily

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156. BARENDT, *supra* note 133, at 21.
157. Wagner, *supra* note 105, at 385.
158. Emerson, *supra* note 14, at 885.
159. *See id.*
160. *See id.*
161. Homeschooling in secret, away from any regulations for the protection of children, has occurred in the United States' recent past. *See* Waddell, *supra* note 36, at 543 ("Twenty-five years ago, parents like the Riddles who chose to homeschool would have been subject to prosecution in nearly every state. Although there may have been tens of thousands who nonetheless homeschooled their children, they often did so in secret, under shadow of criminal penalties.").
162. Emerson, *supra* note 14, at 884.
163. *Id.*
164. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).
165. *See id.*

understood as such a group effort toward the kind of educational pursuit contemplated in the jurisprudence of associational rights and consequently should also be subject to associative protections. Indeed, groups abound in the homeschooling context: they exist in the relationship between parent-teacher and child; the relationships among parent, tutor, and child; and also in the extended social networks of parents and children that provide support and guidance to develop curricula and opportunities.[166] Preventing these groups from operating prevents them from practicing their vision of what pedagogy should be.

## CONCLUSION

Once homeschooling is understood as speech, restrictions and demands on who can homeschool and how[167] become either unconstitutional abridgements on speech or constitutional regulations that survive the network of free speech doctrine. Ultimately, once viewed through the framework of speech, homeschooling becomes protected, but regulable, so long as those regulations satisfy the limitation of strict scrutiny for content-based regulations and intermediate scrutiny for content-neutral regulations.[168] Although homeschooling regulations have never been successfully challenged under the First Amendment, it makes sense that much of the regulation would be content-neutral.[169] Criminal background checks for homeschooling parents, for example, have no effect on the content of a school plan.[170] Minimum education requirements for parents who had decided to teach at home would not affect it either. These regulations would survive the intermediate scrutiny requirements that (1) they are "within the constitutional power of the Government," (2) they "further[] an important or substantial governmental interest," (3) "the governmental interest is unrelated to the suppression of free expression," and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[171] Certainly these two exemplar regulations would be for the purpose of protecting the "substantial government interest" of ensuring the physical and mental well-being of homeschooled children.

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166. *See, e.g.*, Huseman, *supra* note 9 ("Secular homeschooling groups exist in every state, but their primary role is to offer support and resources, not to lobby politicians.").

167. *See supra* Section II.B.

168. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994).

169. Notification requirements, parent education standards, and criminal background checks, as described in Section I.B., would not affect the content of a lesson plan, unlike assessment or curriculum requirements, which, for example, might affect content by preferencing evolution over creationism.

170. Forty-eight states have no such limitation on homeschooling, and the two that do only prevent homeschooling when a registered sex offender lives in the home or when the parents have been "previously convicted of a wide array of crimes." Huseman, *supra* note 9.

171. United States v. O'Brien, 391 U.S. 367, 377 (1968).

A requirement that homeschooled students be evaluated would be an indirect content restriction of the school plan[172] and could also lead to compelled speech that could potentially be considered violative of the First Amendment.[173] Similarly, any requirements as to the mandated content of lesson plans would likewise implicate content-based regulation and compelled speech. Here, the regulation must survive strict scrutiny to survive Free Speech analysis. Under this framework, content-based regulation of speech is only constitutional if it is narrowly tailored to serve a compelling state interest.[174] This raises substantial questions about how to define the state interest and how narrowly the regulation would have to be drawn. The government should be able to readily show its compelling interest in providing that some "degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system" so as "to preserve freedom and independence."[175] Still, it is unclear how much and what kind of education can be required on these grounds so as to satisfy the "narrowly tailored" requirement of the strict scrutiny standard. One might argue that the most the state could demand is a basic level of reading and arithmetic. Others might contend that because the only sufficiently compelling interest of the state is in the political ability of the student, mandated education should be limited to the information necessary for the student to eventually exercise her franchise. And if this premise were accepted, there would be yet another debate about the breadth of information required for even this limited function.[176]

Even with these unresolved questions, though, what becomes clear is that there is a readily available framework that would permit at least some regulation of homeschooling just as it would protect the practice. And—make no mistake—secular homeschoolers need this protection. There are signs that the effectiveness of the homeschooling lobby in deregulation has reached its apogee.[177] Indeed, it could be argued that one threat to secular homeschoolers is the

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172. This is consistent with the Fourth Circuit's holding that not allowing homeschooled students to use community center space violated their right of free expression. Goulart v. Meadows, 345 F.3d 239, 257 (4th Cir. 2003). Although it focused on viewpoint discrimination in designated public fora, the logic in the opinion parallels the logic of determining whether much of the regulation discussed above is content-neutral: "The plaintiffs first argue that the exclusion is viewpoint-based because it discriminates against the 'homeschooling' viewpoint. There is nothing in the record, however, to suggest that the plaintiffs' proposed instruction contained a particular or unique viewpoint in the areas of geography or fiber arts, or in any other area that they might wish to offer classes. The plaintiffs would presumably have shaped their courses according to their particular pedagogical [sic] goals, but they have not identified some viewpoint on these (or other topics) that is unique them, to homeschoolers as a group, or to private educators as a group." *Id.*

173. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

174. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

175. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

176. *See supra* Section III.C (discussing Alexander Meikeljohn's broad understanding of the speech necessary for effective democratic participation).

177. *See supra* notes 55–60 and accompanying text (describing the shift in D.C. homeschooling regulation); *cf.* Huseman, *supra* note 9 (describing the reluctance of staff of a state assemblyman who was proposing a "study of the state's [homeschooling] religious exemption law" to interact with

effectiveness of the religiously motivated lobbyists who may be inviting a return to heavier regulation with their vociferousness.[178] The protection of secular homeschoolers should not be left to this mercurial political process. This First Amendment analysis achieves this by preventing secular homeschoolers' rights from being voted or legislated away.[179]

homeschoolers who actually came to support the study because of negative experiences with "difficult" opposition).

178. Huseman, *supra* note 9 (describing a legislative assistant's experience with "downright difficult" and obstinate HSLDA-inspired callers).

179. *See* W. Va, Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").