SAFE AT HOME: ESTABLISHING A FUNDAMENTAL RIGHT TO HOMESCHOOLING

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I. INTRODUCTION

Over the past thirty years, homeschooling has exploded in popularity. The U.S. Department of Education estimates that nearly two million children were homeschooled in the United States as of 2011.[1] It is predicted that "[w]ith an increasing array of services available to homeschool students and their families, the number of homeschool students will likely increase in coming years."[2]

The homeschooling movement has experienced great success at the state level in its fight for legal recognition of the right to homeschool. Homeschooling's legal status was uncertain during the movement's early days, as many states' compulsory school attendance laws did not include exemptions for parents who educated their children at home.[3] After a long string of legislative and judicial victories, however, homeschooling is now recognized as legal in all fifty states.[4]

Despite the movement's impressive legal track record, the right to homeschooling currently rests on a precarious foundation. There is a popular misconception that the U.S.

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[1] U.S. DEP'T OF EDUC., STATISTICS ABOUT NONPUBLIC EDUCATION IN THE UNITED STATES (2015), http://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html#homeschl.

[2] Brad Colwell & Brian D. Schwartz, *Tips for Public School Administrators in Monitoring and Working with Homeschool Students*, 197 ED. LAW REP. 1 (2005).

[3] Scott Somerville, *Together for Freedom: Passing Liberty to the Next Generation*, 19 HOME SCHOOL CT. REP. 2 (2003), http://nche.hslda.org/courtreport/V19N2/V19N201.asp.

[4] Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991, 994 (2010) ("Court decisions, combined with effective lobbying by Christian homeschoolers that prompted statutory reforms, led to a legal revolution so that by 2000, homeschooling was legal under some circumstances in all fifty states, whether by judicial decree or statute.").

Constitution protects the right to homeschool,[5] but federal courts have not settled this issue.[6] Instead, the right to homeschool is based on state legislation, which can be changed at any time.[7]

It is dangerous for the homeschooling movement to rely on legislative discretion for its survival, because homeschooling has an extremely influential and well-funded political opponent: the National Education Association (NEA). This alliance of public school teachers is "the largest, most powerful union in the country,"[8] and is staunchly opposed to homeschooling.[9] The NEA lobbies for legislation that places restrictions on homeschooling,[10] which is why some consider it a "political miracle" that homeschooling is legal in every U.S. jurisdiction.[11]

In addition, legal scholars are constantly calling for greater restrictions on homeschooling.[12] Their articles seek to provide

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[5] Eric J. Isenberg, *What Have We Learned About Homeschooling?* 82 PEABODY J. EDUC. 387, 391 (2007) (noting that homeschoolers describe homeschooling in non-compliance with state truancy laws as "homeschooling under your constitutional rights").

[6] Timothy Brandon Waddell, *Bringing It All Back Home: Establishing A Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541, 545 (2010) ("No Supreme Court case and very few lower court cases squarely address the constitutional status of homeschooling as it exists today.").

[7] KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 312–15 (2011) (noting that federal courts have generally held that "parents have no fundamental right to homeschool their children" and thus "the homeschool exception to compulsory attendance laws represents a choice made by legislatures," and that "[a]s a legislative creation," these exemptions "can be modified, changed, riddled with exceptions, or simply done away with if the state legislature so decides").

[8] PAUL E. PETERSON, CHOICE AND COMPETITION IN AMERICAN EDUCATION 125 (2006).

[9] Article B-83 of the union's platform states: "The National Education Association believes that homeschooling programs based on parental choice cannot provide the student with a comprehensive education experience." NAT'L EDUC. ASS'N., 2014-2015 NEA RESOLUTIONS 38 (2015).

[10] The NEA "has voted to abolish home education every year since 1988," and made its strongest effort to suppress homeschooling in 1994. Congressmen George Miller, "a staunch supporter of the National Education Association," attempted to slip an amendment into an appropriations bill that would require all teachers to be government certified, and refused to consider an amendment that would exempt homeschooling parents. After homeschoolers mounted a campaign against the requirements, the House passed, by a 424-1 vote, an amendment deleting the teacher certification language and specifying that nothing in the bill should be construed to affect homeschooling, with Representative Miller as the only member to vote against it. Scott W. Sommerville, *Legal Rights for Homeschool Families*, in HOME SCHOOLING IN FULL VIEW: A READER 139–42 (Bruce S. Cooper ed. 2005).

[11] *Id.* at 135.

[12] *See generally, e.g.*, Kimberly A. Yuracko, *Education off the Grid:*

institutional schooling supporters with legal strategies for cracking down on the practice. The media also frequently tries to rally opposition to homeschooling.[13]

Homeschoolers continue to face challenges in the courts. As recently as 2008, a California appellate panel ruled that "'parents do not have a constitutional right to home school their children,' and added that non-credentialed parents may not home school their children" under state law.[14] Though the court reversed the ruling in a rehearing after a nationwide outcry, the case "illustrates how quickly traditional home schooling can come under attack."[15]

These "threats to the practice continue to require diligent efforts by its advocates to preserve homeschooling's [legal] status."[16] This Article argues that in order to better protect itself from efforts to suppress parents' ability to homeschool, the homeschooling movement should seek to have homeschooling recognized as a fundamental right under the Fourteenth Amendment of the U.S. Constitution. If homeschooling is established as a fundamental right, laws that infringe on parents' ability to homeschool will be subject to heightened judicial scrutiny.

A law that curtails a fundamental right must satisfy three tests: it must be (1) justified by a compelling governmental interest, (2) narrowly tailored to achieve that goal or interest, and (3) the least restrictive means for achieving that interest.[17]

Constitutional Constraints on Homeschooling, 96 CALI. L. REV. 123 (2008); Robin L. West, *The Harms of Homeschooling*, 29 PHIL. & PUB. POL'Y Q. 7 (2009); Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. 991 (2010); Waddell, *supra* note 6.

[13] *See, e.g.*, Dana Goldstein, *Liberals, Don't Homeschool Your Kids*, SLATE (Feb. 16, 2012), http://www.slate.com/articles/double_x/doublex/2012/02/homeschooling_and_unschooling_among_liberals_and_progressives_.html; Kristin Rawls, *How Christian fundamentalist homeschooling damages children*, SALON (Sept. 11, 2014), http://www.salon.com/2014/09/10/how_christian_fundamentalist_homeschooling_damages_children_partner/; Jessica Huseman, *The Frightening Power of the Home-Schooling Lobby*, SLATE (Aug. 27, 2015), http://www.slate.com/articles/life/education/2015/08/home_school_legal_defense_association_how_a_home_schooling_group_fights.html.

[14] Chad Olsen, *Constitutionality of Home Education: How the Supreme Court and American History Endorse Parental Choice*, 2009 BYU EDUC. & L.J. 399 (2009) (citing *In re* Rachel L., 73 Cal. Rpt. 3d 77 (Ct. App. 2008)).

[15] *Id.* at 400.

[16] Ronald Kreager Jr., *Homeschooling: The Future of Education's Most Basic Institution*, 42 U. TOL. L. REV. 227, 228 (2010).

[17] Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*,

Teacher certification requirements, the most common types of oppressive regulations that target homeschoolers, will likely fail to survive this level of judicial scrutiny. The "nearly universal consensus" of the states is to "permit home schooling without demanding teacher certified instruction,"[18] so if a state were to attempt to argue that governmental interests in certification for homeschooling teachers are "compelling," it would have a difficult time explaining why its sister states fail to impose such a supposedly-crucial requirement. Testing requirements would be more narrowly-tailored to state objectives, as testing directly reveals whether students are receiving a quality education, while teacher certification is (at most) indirectly connected to student performance.[19] Furthermore, certification requirements are highly burdensome on homeschooling parents,[20] and there are far less restrictive means of ensuring that children are receiving an adequate education.[21]

Part II of this Article will dispel the notion that homeschooling is currently recognized by the courts as a

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21 LOY. L.A. L. REV. 449, 453 (1988) ("[I]f strict scrutiny is applicable, the government action is unconstitutional unless: (1) it furthers an actual, compelling government interest and (2) the means chosen are necessary (narrowly tailored, the least restrictive alternative) for advancing that interest.").

[18] People v. DeJonge, 442 Mich. 266, 293 (1993).

[19] Thomas J. Kane et al., *What Does Certification Tell Us About Teacher Effectiveness? Evidence from New York City*, 27 ECON. EDUC. REV. 615 (2008) ("On average, the certification status of a teacher has at most small impacts on student test performance.").

[20] Liz Bowie, *Md.'s Teacher Certification Law Criticized as Too Tough*, Baltimore Sun (Sept. 6, 2013), http://articles.baltimoresun.com/2013-09-06/news/bs-md-teacher-certification-20130829_1_high-school-teacher-maryland-state-education-association-certification (In some states, the process for becoming a teacher is "so burdensome that it is causing teacher shortages."); *see also* Daniel Nadler & Paul E. Peterson, *What Happens When States Have Genuine Alternative Certification?*, 9 EDUCATIONNEXT 70 (2009), http://educationnext.org/what-happens-when-states-have-genuine-alternative-certification/ ("[C]ertification requirements limit the supply of certified teachers, and as a result, serious teaching shortages are regularly observed."); Bob Egelko & Jill Tucker, *Homeschoolers' Setback in Appeals Court Ruling*, SFGate (Mar. 7, 2008), http://www.sfgate.com/education/article/Homeschoolers-setback-in-appeals-court-ruling-3225235.php (Most homeschooling parents do not have the time or resources to devote to obtaining teacher certification. When a California appeals court temporarily held that homeschooling parents must comply with the state's certification laws, the president of the Home School Legal Defense Association said the ruling would "effectively ban homeschooling in the state.").

[21] *DeJonge*, 442 Mich. at 298 (striking down a teacher certification requirement as applied to homeschooling parents upon finding that "the certification requirement is not essential to nor is it the least restrictive means of achieving the state's claimed interest").

constitutionally-protected right. Some scholars are under the assumption that *Wisconsin v. Yoder*[22] establishes a right to homeschool, but this conclusion is questionable on several fronts. Others have said that the right to homeschool was recognized in *Meyer v. Nebraska*[23] and *Pierce v. Society of Sisters*,[24] but several courts have held that these decisions provide only a right to enroll a child in a private school that is "equivalent" to a public school.

Part III will show that there are two avenues available for establishing that homeschooling is a fundamental right under the Constitution. Under *Washington v. Glucksberg*,[25] the right to homeschool could be established as fundamental in its own right if it can be shown that the practice is "deeply rooted in this Nation's history and tradition."[26] Alternatively, under the Court's recent ruling in the landmark case *Obergefell v. Hodges*,[27] homeschooling could fall under the already-established fundamental right of parents to "direct" the education of children[28] if it can be shown that the Court's rationales for recognizing this right "apply with equal force"[29] to homeschooling.

Part IV will examine whether the right to homeschool is "deeply rooted" in our history and tradition. The Part will show that homeschooling has been the primary form of education for most of Western history, including at the times when the Constitution and the Fourteenth Amendment were adopted, and that states have almost always refrained from infringing on parents' ability to educate their children at home. This part will conclude that homeschooling should therefore be recognized as a "deeply rooted" fundamental right.

Part V will take a closer look at whether the right to homeschool falls under the right of parents to "direct" the education of children. The Part will show that there are two reasons behind the Court's recognition of the right to private

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[22] 406 U.S. 205 (1972).

[23] 262 U.S. 390 (1923).

[24] 268 U.S. 510 (1925).

[25] 521 U.S. 702 (1997).

[26] *Id.* at 721.

[27] 135 S. Ct. 2584 (2015).

[28] The "liberty of parents and guardians to direct the upbringing and education of children under their control" has been recognized by the Court as one of the "rights guaranteed by the Constitution." *Pierce*, 268 U.S. at 535.

[29] *Obergefell,* 135 S. Ct. at 2599.

school education: 1) the "natural bonds of affection lead parents to act in the best interests of their children,"[30] and 2) autonomous nuclear families play a "critical role" in "developing the decentralized structure of our democratic society."[31] The Part will conclude that both of these rationales "apply with equal force"[32] to homeschooling, and thus homeschooling falls under the fundamental right of parent-directed education.

Part VI concludes by urging families to utilize the arguments presented in this Article and lay claim to their fundamental right to homeschool.

II. HOMESCHOOLING HAS NOT YET BEEN ESTABLISHED AS A CONSTITUTIONAL RIGHT

Some scholars have concluded that the right to homeschool is protected by the Fourteenth Amendment under the Supreme Court's decisions in *Meyer* and *Pierce,* and also protected by the First Amendment under *Yoder*.[33] These conclusions are not completely without basis, as a few courts have held (or at least implied) that homeschooling is, indeed, protected by the U.S. Constitution.[34] But more often than not, federal courts have concluded that U.S. Supreme Court precedent does not provide constitutional protection for homeschooling.[35]

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[30] Parham v. J. R., 442 U.S. 584, 602 (1979).

[31] Lehr v. Robertson, 463 U.S. 248, 257 (1983).

[32] *Obergefell*, 135 S. Ct. at 2599.

[33] *See, e.g.*, Louis A. Greenfield, *Religious Home-Schools: That's Not A Monkey on Your Back, It's A Compelling State Interest*, 9 RUTGERS J. L. & RELIGION 4 (2007) (listing *Meyer*, *Pierce*, and *Yoder* among the "cases from which the right to home school children in the United States has derived over the course of the last century").

[34] People v. DeJonge, 442 Mich. 266 (1993) (citing *Yoder* in concluding that "a teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to" religious homeschooling families); Delconte v. State, 329 S.E.2d 636, 646 (N.C. 1985) ("[T]he principles enunciated in *Yoder* and *Pierce* raise serious questions as to the constitutionality of statutes which prohibit altogether home instruction."); Mazanec v. N. Judson-San Pierre Sch. Corp., 614 F. Supp. 1152, 1160 (N.D. Ind. 1985), *aff'd*, 798 F.2d 230 (7th Cir. 1986) (citing *Pierce* and *Yoder* in holding that parents had "a constitutional right to educate ones [sic] children in an educationally proper home environment," and also expressing doubts as to whether early twentieth century "requirements of a formally licensed or certified teacher [. . .] would now pass constitutional muster").

[35] *See* Robin Cheryl Miller, Annotation, *Validity, construction, and application of statute, regulation, or policy governing home schooling or affecting rights of home-schooled students*, 70 A.L.R. 5TH 169 (1999) (listing a number of federal cases that ruled that homeschooling is not a constitutionally-protected right).

This brief Part will show that the constitutional status of homeschooling is unclear at this point in time. *Meyer*, *Pierce*, and *Yoder* were all decided long before homeschooling became a visible movement, so none of those decisions contemplate the existence of the modern form of homeschooling.[36] This Part will show that some federal courts have implied that homeschooling may be a fundamental right, while others have held that it is not.

A. Court Decisions Concerning a Fourteenth Amendment Right to Homeschooling

Several courts have rejected the claim that *Meyer* establishes a fundamental right to homeschooling.[37] In *Hanson v. Cushman*, for example, a federal district court concluded that *Meyer* did not support a right to homeschool because the *Meyer* Court noted that, "[p]ractically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto," and that "[t]he power of the state to compel attendance at some school [. . .] is not questioned."[38] *Hanson* concluded that *Meyer* endorsed only the parental right "to engage [a teacher] to instruct their children," but not a right to educate their children directly.[39]

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[36] Some have characterized *Yoder* as a case involving homeschooling, *see, e.g.*, Kreager Jr., *supra* note 16 at 232 (stating that "the Court directly addressed the issue of homeschooling in *Wisconsin v. Yoder*"), but the Amish did not seek the right to formally educate their children themselves; they sought an exemption from providing their children with a formal high school education *at all*. Wisconsin v. Yoder, 406 U.S. 205, 210 (1972) (describing the "Amish objection to formal education beyond the eighth grade"). The Amish sought to end their children's formal education at the eighth grade in order to prevent them from becoming self-sufficient and thus more likely to leave the community. *See* Gage Raley, *Yoder Revisited: Why the Landmark Amish Schooling Case Could—And Should—Be Overturned*, 97 VA. L. REV. 681, 702–13 (2011) (describing how the Amish "remove their children from school after the eighth grade because it helps a very strict community prevent defection," as "the lack of a high school education 'obstructs the path' to the outside").

[37] *See* Combs, 468 F. Supp. 2d 738 (refusing to apply heightened scrutiny to infringements on homeschooling under *Meyer*); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452, 461 (N.D. Ill. 1974) (citing *Meyer* in holding that "[t]he courts have held that the state may constitutionally require that all children attend some school, under the authority of its police power"); Hanson v. Cushman, 490 F. Supp. 109 (D. Kan. 1980) (holding that *Meyer* does not establish a fundamental right to homeschool); Clonlara, Inc. v. Runkel, 722 F. Supp. 1442, 1456 (E.D. Mich. 1989) (holding that *Meyer* does not provide heightened scrutiny to infringements on homeschooling).

[38] *Hanson*, 490 F. Supp. at 112 (citing Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923)).

[39] *Id.*

Likewise, courts have also concluded that *Pierce* does not establish a fundamental right to homeschooling, but only a right to enroll a child in a private school that is an "equivalent" alternative to a public school.[40] *Pierce* contains qualifying language similar to *Meyer*'s, and courts have pointed to this language in rejecting the notion that *Pierce* supports a right to homeschooling. As noted by the *Hanson* court, *Pierce* held that "[n]o question is raised concerning the power of the state [. . .] to require that all children of proper age attend some school."[41]

B. Court Decisions Concerning a First Amendment Right to Homeschooling

Courts have also frequently refused to hold that there is a First Amendment right to homeschooling under *Yoder*,[42] concluding that the ruling applied only "in view of the unique facts and circumstances associated with the Amish community."[43] There are also serious doubts as to whether *Yoder* is still good law.[44] In any case, *Yoder* is an imperfect solution for homeschoolers, because even if courts agree that it applies to non-Amish homeschooling families, the decision would still only protect those who homeschool for religious reasons and not the many parents who homeschool for secular reasons.[45]

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[40] *See, e.g.*, Maine v. McDonough, 468 A.2d 977 (Me. 1983) (concluding that *Pierce* only established a right to "an equivalent education in a private school system"); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452, 460 (N.D. Ill. 1974) (holding that *Pierce* "merely provides parents with an opportunity to seek a reasonable alternative to public education for their children," but not to homeschool).

[41] *Hanson*, 490 F. Supp. at 113 (citing Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)).

[42] Duro v. Dist. Attorney, 712 F.2d 96 (4th Cir. 1983); *In re* Lippitt, No. 38421, 1978 WL 218341, at *7–8 (Ohio Ct. App. Mar. 9, 1978); State v. Riddle, 285 S.E.2d 359, 361–62 (W. Va. 1981).

[43] *Duro*, 712 F.2d at 98. The courts' tendency to factually-distinguish *Yoder* is unsurprising, considering that the *Yoder* Court remarked that the "convincing showing" that the Amish made was "one that probably few other religious groups or sects could make." Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972).

[44] *See generally* Raley, *supra* note 36 (arguing that *Yoder* is ripe for overturning on multiple grounds).

[45] The *Yoder* Court "[gave] no weight to [. . .] secular considerations" and noted that if the Amish's decision to reject high school education was based on "philosophical and personal, rather than religious" grounds, it would not be entitled to constitutional protection. *Yoder*, 406 U.S. at 216.

C. Conclusion to Part II

As the cases above show, there is no consensus among federal courts that the right to homeschool is protected by the *Meyer*, *Pierce*, and *Yoder* trilogy. Though the three decisions strongly endorse parents' rights, they each contain dicta that has caused federal courts to question their applicability to homeschooling. As a result, the right to homeschool currently rests on state legislation rather than the Constitution.[46]

III. TWO APPROACHES TO ESTABLISHING HOMESCHOOLING AS A FUNDAMENTAL RIGHT

Most of the federal litigation concerning a constitutional right to homeschooling took place in the early days of the homeschooling movement, before its leaders switched tactics and began focusing on legalization at the state level. Since then, the U.S. Supreme Court has handed down two landmark fundamental rights cases that are highly relevant to homeschooling. In 1997 the Court ruled in *Washington v. Glucksberg* that an alleged right will be considered fundamental if claimants can show that the right is "deeply rooted in this Nation's history and tradition,"[47] and just last year the Court ruled in *Obergefell v. Hodges* that an alleged right will be considered covered by an already-established fundamental right if claimants can show that the rationales behind the established right "apply with equal force" to the alleged right.[48]

This Part will explain the procedures laid out in *Glucksberg* and *Obergefell*. First, we will examine *Glucksberg*'s procedure for establishing a right as fundamental. Second, we will look at *Obergefell*'s procedure for determining the scope of already-

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[46] KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 315 (2011) ("The homeschool exception to compulsory attendance laws represents a choice made by legislatures to accommodate parents who believe for any number of reasons that they are more capable of educating their children than established public and/or private schools. In the absence of such statutes creating homeschool exemptions from compulsory attendance laws, parents have no fundamental right to homeschool their children."). *See also* Delconte v. State, 313 N.C. 384, 397 (1985) (noting that state courts generally avoided wading into constitutional waters by construing state compulsory education statutes in such a way that homeschooling would satisfy the laws' requirements).

[47] Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

[48] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

established fundamental rights. This discussion will lay the foundation for the following two Parts, where we will investigate whether homeschooling could be established as a fundamental right under *Glucksberg* or *Obergefell*.

A. Glucksberg *Approach*

Glucksberg articulates the Court's long-established custom of referring to common law history when determining whether a right is "fundamental" under the Constitution. The justification for giving constitutional protection to unenumerated rights rests on the assumption that common law rights were incorporated by the Constitution.[49] In light of this understanding, the *Glucksberg* Court held that the Constitution "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[50]

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[49] Early nineteenth century courts often found that the Founders included the Ninth Amendment in the Constitution in order to protect "the principles maintained by the immortal British judges" concerning the "great principles of civil liberty" and the "inherent rights of man." *In re* Dorsey, 7 Port. 293, 378 (Ala. 1838). After the Supreme Court limited the Ninth Amendment's protection to federal government actions in *Barron v. Baltimore*, 32 U.S. 243 (1833), the authors of the Fourteenth Amendment sought to revive it by mirroring its "privileges and immunities" language. *See* George Thomas, *Who's Afraid of Original Meaning?* 164 POL'Y REV. 1 (2010), http://www.hoover.org/research/whos-afraid-original-meaning (stating that "[t]hose who framed the Fourteenth Amendment drew explicitly on Madison's logic and sought to complete his constitutional vision" for the Ninth Amendment, and "insisted that civil liberties included what have often been referred to as longstanding rights at common law"); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 102 (1925) (stating that "the Fourteenth Amendment [was] treated as but declaring a natural liberty which was also a common-law liberty").

[50] *Glucksberg*, 521 U.S. at 703. *See also, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding that the Constitution protects Americans' liberty "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (concluding that couples have a fundamental right to use contraceptives because it involved "a right of privacy older than the Bill of Rights—older than our political parties, older than our school system"); Roe v. Wade, 410 U.S. 113, 132–52 (1973) (tracing the history of abortion's legal status from the beginnings of Western civilization to the modern United States); Michael H. v. Gerald D., 491 U.S. 110, 122–30 (1989) (reviewing the history of the marital presumption of paternity from early English common law to contemporary U.S. law). Some have argued that in *Obergefell* the Court abandoned its long tradition of emphasizing the historicity of the rights that they declare to be fundamental. *See, e.g., Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) ("[T]he majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process."). But if the *Obergefell* Court really intended to overturn *Glucksberg*'s historical basis test, it would not have emphasized that its findings about the "essential attributes of th[e] right [to marry]" were "based in history [and] tradition." *Obergefell*, 135 S. Ct. at 2598. It appears that the Court merely

In order to determine whether a right is so "deeply-rooted" in history as to qualify as "fundamental," the Court conducted a review of the entire seven-hundred-year existence of "Anglo-American common-law."[51] In examining this history, the Court relied heavily on venerable common law treatise writers such as Bracton, Blackstone, and Kent, along with American Law Reports' summaries of common law trends.[52] The influence of these sources can be seen in Justice Brennen's dissent from *Michael H. v. Gerald D.*, in which he accused the Court of "stop[ping] at . . . Bracton, or Blackstone, or Kent" in determining whether a right was deeply rooted in the country's traditions, and of "act[ing] as though English legal treatises and the American Law Reports always have provided the sole source for our constitutional principles."[53]

Occasionally, the Court will dig even deeper into the past than just the seven hundred years of Anglo-American history. In *Roe v. Wade*, for example, the Court went to extraordinary lengths to demonstrate that the right to abortion had deep historical roots, starting its historical analysis not with English common law but with the laws of the Persian Empire, and then continuing through Greek, Roman, and early Catholic law.[54] Recognizing that common law has been influenced by Greco-Roman and canon law, *Roe* treated fundamental rights as part of a two-thousand-year continuum of Western tradition.

B. Obergefell *Approach*

The *Obergefell* ruling laid out the procedure that courts

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distinguished *Glucksberg* by holding that historical support is necessary for establishing the existence of a general right but should not be mandatory in cases concerning the applicability of the right, since courts throughout history have unjustly held that disfavored minorities are not covered by a right's protection. *See Obergefell*, 135 S. Ct. at 2589 ("History and tradition guide and discipline the inquiry but do not set its outer boundaries.") and 2602 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").

[51] *Glucksberg*, 521 U.S. at 711.

[52] *See Roe*, 410 U.S. at 134–35 (citing Bracton and Blackstone); *Glucksberg*, 521 U.S. at 711–12 (citing Bracton and Blackstone); *Michael H.*, 491 U.S. at 124–25 (1989) (citing Bracton, Blackstone, and Kent). *See also* Gage Raley, *The Paternity Establishment Theory of Marriage and Its Ramifications for Same-Sex Marriage Constitutional Claims*, 19 VA. J. SOC. POL'Y & L. 133, 138 (2011) ("[T]he Court finds these materials persuasive in due process cases, and thus these are the types of historical sources that should be consulted.").

[53] *Michael H.*, 491 U.S. at 137, 138 (Brennen, J. dissenting).

[54] *See Roe*, 410 U.S. at 130–34.

must now follow in cases involving the scope and applicability of already-established fundamental rights. In *Obergefell*, the Court distinguished *Glucksberg* by holding that the litigants were not seeking a "new and nonexistent 'right to same-sex marriage,'" but were merely seeking to exercise the already-established fundamental right to marriage.[55] When litigants seek to establish that a specific, unrecognized right (such as the right to same-sex marriage) falls under a more general, previously-recognized right (such as the right to marriage), they do not need to prove that the narrower right is "deeply rooted" in history,[56] but merely that the rationales for protecting the general right "apply with equal force" to the specific right.[57]

In *Obergefell*, the Court first noted that the right to marry had already been established as a fundamental right in previous cases, and that although "these cases presumed a relationship involving opposite-sex partners, . . . instructive precedents have expressed broader principles."[58] The Court then held that "[i]n assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected."[59] The Court ultimately discovered "[f]our principles and traditions" (corresponding with the interests of (1) individuals, (2) couples, (3) children, and (4) society, respectively) which "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[60]

C. Conclusion to Part III

As the discussion above shows, a right can be established as fundamental in its own right if it can be shown that it is "deeply rooted" in Western history, or it can be established as a derivative of an already-established fundamental right if it can be shown that the justifications for the established right "apply

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[55] *Obergefell*, 135 S. Ct. at 2602.

[56] *Id.* (stating that the *Glucksberg*'s historical roots test "is inconsistent with the approach this Court has used" in "case[s which] inquired about the right to marry in its comprehensive sense").

[57] *Id.* at 2599.

[58] *Id.* at 2589.

[59] *Id.* at 2599.

[60] *Id.* at 2589.

with equal force" to the alleged right. A fundamental right to homeschooling, therefore, can be demonstrated by showing that the practice has been freely exercised throughout Western history. Alternatively, a right to homeschooling can be proven to fall under the established right of parents to direct their children's education if it can be shown that the rationales behind *Meyer* and *Pierce* "apply with equal force" to homeschooling.

IV. HOMESCHOOLING IS "DEEPLY ROOTED" IN ANGLO-AMERICAN HISTORY

In *Yoder*, the Court observed that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[61]

This Part will show that homeschooling has always been a part of this tradition, going all the way back to our democratic society's predecessor in ancient Greece and continuing up to this very day.

First, we will examine the historical practice and legal status of homeschooling in ancient Athens, then continue on through ancient Rome, common law England, and finally to the United States. The Part will show that throughout the whole course of our "history and tradition,"[62] homeschooling has been practiced by parents and tolerated by the state. The Part will conclude by arguing that homeschooling satisfies *Glucksberg*'s historical basis test, and should therefore be recognized as a constitutional right.

A. Homeschooling in Ancient Greece

In ancient Athens "there was no state education system, so children went to school only if their parents could afford it."[63] Though there is a popular misconception that most Greek

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[61] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[62] Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

[63] JAMES RENSHAW, IN SEARCH OF THE GREEKS 221 (2nd ed. 2015). *See also* RANDALL R. CURREN, ARISTOTLE ON THE NECESSITY OF PUBLIC EDUCATION 13 (2000) ("Education in the sense of formal instruction was thus restricted to Athenians of means, and was discretionary.").

youths were taught at academies by tutors such as Plato, private education was available only to the wealthy.[64] Scholars believe that "it is highly probable that most children were home-schooled."[65]

Solonian law required fathers to teach their sons a trade, and enforced this law by relieving a son of his legal duty to support his father in the father's old age if the father failed to provide adequate vocational training.[66] Beyond that, however, Athens had no compulsory education laws and left decisions about education up to parents.[67] Aristotle noted, "[E]very one looks after his own children separately, and gives them separate instruction of the sort which he thinks best."[68]

Since early American compulsory education advocates drew their inspiration from ancient Sparta, claiming that the Spartan state "went so far as to charge itself with the entire education of all the children,"[69] the Spartan system should also be briefly addressed. Few contemporaneous accounts survive regarding Sparta's education system, but it is believed that Plato and Aristotle modeled their compulsory education proposals on the Spartan system.[70] The Athenian government, however, never adopted Sparta's education philosophy[71] and

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[64] BARRY STRAUSS, FATHERS AND SONS IN ATHENS: IDEOLOGY AND SOCIETY IN THE ERA OF THE PELOPONNESIAN WAR 84 (2002) (stating that "[u]nlike the wealthy speakers in Plato's *Laches*, a dialogue about education, the ordinary father would not have been in any position to buy his son special lessons").

[65] ROBERT GARLAND, DAILY LIFE OF THE ANCIENT GREEKS 155 (2nd ed. 2008); *see also* ANNA MISSIOU, LITERACY AND DEMOCRACY IN FIFTH-CENTURY ATHENS 132–33 (2011) (describing how "home-taught alphabetic literacy" was the method through which many Athenians learned to read).

[66] *See* STRAUSS, *supra* note 64 ("[I]t was a legal requirement [for fathers to teach their sons a trade]; according to Plutarch sons who had not been so educated were freed of the responsibility for providing for their fathers' old age.").

[67] *See, e.g.*, WALTER MILLER, GREECE AND THE GREEKS: SURVEY OF GREEK CIVILIZATION 84 (1941) (stating that "[t]he Athenians had no compulsory school laws").

[68] ARISTOTLE, POLITICS 1 (MIT 2009) (Benjamin Jowett ed.), http://classics.mit.edu/Aristotle/politics.8.eight.html (last visited Jan. 19, 2016). *See also* Roderick T. Long, *The Athenian Constitution: Government by Jury and Referendum*, 4 FORMULATIONS 1 (1996), http://www.freenation.org/a/f41l1.html (stating that Greek parents "could arrange to have their children taught what and as they pleased").

[69] COMMITTEE OF THE CITIZENS OF WEST HOBOKEN, N.J., REPORT ON COMPULSORY EDUCATION AND DRAFT OF PROPOSED LAW 3 (1873).

[70] *See, e.g.*, Long, *supra* note 68 ("Aristotle pointed to the example of Sparta, on whose education system Plato's was largely modeled."); N. JAYAPALAN, COMPREHENSIVE HISTORY OF POLITICAL THOUGHT 16 (2001) ("In his scheme of education Plato was greatly influenced by the Spartan system of education.").

[71] SIR ERNEST BARKER, GREEK POLITICAL THEORY 211 (2013) (stating that by

some scholars even suggest that Plato's depiction of Spartan education was a "utopian image" that had little basis in reality.[72]

Sparta's approach to education was specifically rejected by the Supreme Court in *Meyer*, where the Court concluded that "[a]lthough such measures have been deliberately approved by men of great genius," they would do "violence to both letter and spirit of the Constitution" if American legislators were to implement them today.[73] In any case, the Court clearly considers Athenian law, not Spartan, to be the spiritual predecessor of American law for purposes of fundamental rights analysis.[74] Homeschooling, therefore, was not only legal at the very early stages of our "history and tradition,"[75] but was also the predominate form of education.

B. Homeschooling in Ancient Rome

"As in ancient Greece, only a minority of Romans were formally educated."[76] For most Roman children, "[r]eading, writing, counting, and measuring were taught at home when parents had the time."[77] John Locke cited the great Roman historian Suetonius when observing that "Romans thought the education of their children a business that properly belong'd to the parents themselves."[78]

Mothers usually taught young Roman children at home; history indicates that "mothers took their children's education seriously."[79] In fact, Plutarch held up Alexander the Great's

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endorsing compulsory education, "Plato was definitely and consciously departing from the practice of Athens, and setting his face towards Sparta"); *See also* Long, *supra* note 68 ("Athens exercised no control over education; to the consternation of the philosophers, who favored the Spartan system of compulsory state indoctrination, parents could arrange to have their children taught what and as they pleased.").

[72] JUDITH EVANS GRUBBS ET AL., THE OXFORD HANDBOOK OF CHILDHOOD AND EDUCATION IN THE CLASSICAL WORLD 375 (2014).

[73] Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

[74] *See* Roe v. Wade, 410 U.S. 113, 130–32 (1973) (relying on Athenian sources in reviewing ancient law regarding abortion).

[75] Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

[76] ALLAN ORNSTEIN ET AL., FOUNDATIONS OF EDUCATION 75 (2013).

[77] EDWARD J. POWER, A LEGACY OF LEARNING: A HISTORY OF WESTERN EDUCATION 71 (1991). *See also* FRANK RICHARD COWELL, LIFE IN ANCIENT ROME 43 (1976) (stating that "the old tradition of home education persisted" in the Roman Empire).

[78] JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION n.1 (1692), http://legacy.fordham.edu/halsall/mod/1692locke-education.asp.

[79] NIGEL WILSON, ENCYCLOPEDIA OF ANCIENT GREECE 158 (2005).

grandmother Queen Eurydice I of Macedon, a homeschooling mother, as a model for Roman parents to follow.[80]

Once a Roman boy turned seven, "the boy's education was taken over by his father," who would teach his son to read and write, as well as vocational skills.[81] "This parental training continued until the son was sixteen years old," when he would be considered legally an adult.[82] Most Roman girls were taught homemaking skills by their mothers.[83]

Though education was an important principle in Roman society, Roman law on education left schooling decisions entirely up to parents:

> As there was no compulsory education in Rome, children might grow up illiterate if their parents did not choose to educate them. There was also no State control or inspection of schools throughout the Republic and early Empire. In the later Empire the most that anxious, interfering Emperors undertook was to exercise some control over teachers and perhaps to encourage municipalities and provincial governors to appoint better and more schoolmasters.[84]

Homeschooling, therefore, was widely practiced in the Roman Empire. There were no compulsory education requirements to send children to an institutional school. The law respected parents' right to educate their children as they saw fit.

C. Homeschooling in Medieval England

Throughout most of English history, institutional schooling "was a minority experience, just as it was in Ancient Greece or Rome."[85] For many English children, "home was the only place where anyone taught them anything."[86] Even wealthy parents

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[80] PLUTARCH, DE LIBERIS EDUCANDIS 20 (Frank C. Babbitt ed., Harvard U. Press 1927) ("We must [. . .] emulat[e] the example of Eurydice, who, although she was an Illyrian and an utter barbarian, yet late in life took up education in the interest of her children's studies.").

[81] V. CELIA LASCARIDES & BLYTHE F. HINITZ, HISTORY OF EARLY CHILDHOOD EDUCATION 21 (2013).

[82] *Id.*

[83] *Id.* at 21–22.

[84] FRANK RICHARD COWELL, LIFE IN ANCIENT ROME 43 (1976).

[85] Tony Jeffs, *First Lessons: Historical Perspectives on Informal Education, in* PRINCIPLES AND PRACTICE OF INFORMAL EDUCATION: LEARNING THROUGH LIFE 37 (Linda Deer Richardson & Mary Wolfe ed. 2004).

[86] Anna Dronzek, *Gendered Theories of Education in Fifteenth Century Conduct Books, in* MEDIEVAL CONDUCT 135 (Kathleen M. Ashley & Robert L. A. Clark ed.,

who could afford to send their children to a school "did not always take advantage of the opportunity."[87]

"Early common law recognized that parents were solely responsible for the education of their children."[88] Though Bracton, the earliest English treatise writer, did not write at length about education law, his writings suggest that medieval English law reflected the fact that mothers were the primary instructors of children. Bracton wrote that a dower is necessary for a woman to maintain herself in the event that her husband dies, "[f]or she herself ought to attend to nothing except the care of her house and the rearing and education of her children."[89]

Blackstone also considered education to be the task of parents, and emphasized this point repeatedly in *Commentaries on the Laws of England*. He wrote that the "duty of parents to their children is that of giving them an education suitable to their station in life, a duty pointed out by reason, and of far the greatest importance of any."[90] Blackstone stated that a father may, at his discretion:

> delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child: who is then in loco parentis, and has such a portion of the power of the parent committed to his charge [. . .] as may be necessary to answer the purpose for which he is employed.[91]

Blackstone's understanding of parents' education rights was influenced by German philosopher Samuel von Pufendorf,[92] who wrote, "the obligation to educate their children has been imposed upon parents by nature."[93] Though Pufendorf noted that "this does not prevent the direction of the same from being intrusted to another, if the advantage or need of the child require," he added that "the parent reserves to

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2001).

[87] *Id.*

[88] Gerald B. Lotzer, *Texas Homeschooling: An Unresolved Conflict Between Parents and Educators*, 39 BAYLOR L. REV. 469, 475 (1987).

[89] HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ, VOL. II 281 (Samuel E. Thorne ed. 1968).

[90] SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS, VOL. I 372 (Edward Christian et al. ed., W.E. Dean 1840).

[91] *Id.* at 374.

[92] *Id.* at 372 (discussing Pufendorf's writings on education).

[93] SAMUEL FREIHERR VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO 99 (Frank Gardner Moore ed. 1927).

himself the oversight of the person so delegated."[94] English law was in accordance with this view, as case law shows that parents and guardians exercised absolute control of their children's education well into the nineteenth century.[95]

In summary, English history shows that parents often homeschooled their children, and that the common law made no attempts to interfere with the practice. Blackstone, one of the most important English authorities the Supreme Court relies upon when examining common law history,[96] states that parents, not the state, had primary responsibility for their children's education. Furthermore, it is clear that delegation of this responsibility was discretionary.

D. Homeschooling in the United States

"Home schooling has been a feature of the American educational landscape since the colonial period."[97] During the colonial and frontier expansion periods, "the absence of a concentrated critical mass of students in a mostly agrarian society made formal schooling impractical—homeschooling was the only choice."[98] Early American education thus continued the parent-instructor model passed down from Greece, Rome, and England.[99]

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[94] *Id.*

[95] *See, e.g.*, FRANKLIN FISKE HEARD, CURIOSITIES OF THE LAW REPORTERS 210 (1871) (discussing *Teemain's Case*: "Being an infant he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge. And the court sent a messenger to carry him from Oxford to Cambridge. And upon his returning to Oxford there went another, *tam* to carry him to Cambridge, *qiiam* to keep him there").

[96] *Michael H.*, 491 U.S. at 137 (Brennen, J., dissenting) (recognizing the Court's heavy emphasis on Blackstone in accusing the plurality of "stop[ping] at . . . Blackstone" in determining whether an interest was deeply rooted in the country's traditions); Washington v. Glucksberg, 521 U.S. 702, 712 (1997) (stating that Blackstone provides "a definitive summary of the common law"); William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J.L. & RELIGION 255, 255 (2007) (describing Blackstone's *Commentaries* as "arguably the single most influential work of jurisprudence in American history").

[97] James C. Carper, *Homeschooling, in* HISTORICAL DICTIONARY OF AMERICAN EDUCATION 176 (Richard J. Altenbaugh ed. 1999).

[98] Jennifer L. Jolly et al., *Homeschooling the Gifted: A Parent's Perspective*, 57 GIFTED CHILD Q. 121, 122 (2012).

[99] *See, e.g.*, LENA SALIGER, THE HOMESCHOOLING MOVEMENT IN THE UNITED STATES OF AMERICA 2 2010 ("In most American colonies education was based on the English model which meant that many parents educated their children at home voluntarily."); Kirsten E. Phimister, *A Loving Mother and Obedient Wife: White Women in Colonial America, in* BRITISH COLONIAL AMERICA: PEOPLE AND PERSPECTIVES 65 (John A. Grigg & Peter C. Mancall ed. 2008) ("There were few schools in the American colonies, and therefore most children who were taught to read and write learned to do

There was little push for compulsory education in the colonies because "[h]ome education was successful."[100] In 1765, John Adams commented, "a native in America, especially of New England, who cannot read and write is as rare a Phenomenon as a Comet."[101] Adams's observation is backed by studies concluding that the early United States enjoyed almost universal literacy in this era when informal education was the norm.[102]

Writing in 1830, James Kent stated that U.S. law placed the duty of educating children on parents.[103] He noted that this duty "may be delegated to a tutor or instructor,"[104] but such delegation was by no means compulsory. Kent observed that, in the few states that had established public schools at that time, attendance at the school was required only when the local authorities had determined that "parents [were] not teach[ing] their children the elements of knowledge, by causing them to read the English tongue well, and to know the laws against capital offenses."[105]

"[O]ur nation began without public schools or compulsory attendance laws,"[106] and even after they did appear, the changes they brought about were very gradual. When the first public schools were established, "[t]he instruction," as noted by Kent, was "very scanty in many of the schools, from the want of school books and good teachers,"[107] and many parents

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so in the home.").

[100] Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1918 (1996).

[101] *Id.* at 1918 (citing DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS VOL. I 257 (LH. Butterfield ed. 1961)).

[102] *Id. See also* Farley Grubb, *Educational Choice in the Era Before Free Public Schooling: Evidence from German Immigrant Children in Pennsylvania, 1771-1817*, 52 J. ECON. HIST. 363 (1992) (discussing surveys that indicate that the literacy rate was high in the early United States).

[103] JAMES KENT, COMMENTARIES ON AMERICAN LAW, VOL. II 182 (New York, 8th ed. 1854) ("The duties of parents to their children, as being their natural guardians, consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life."). *See also* William C. Sonnenberg, *Elementary and Secondary Education, in* 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 25 (Thomas D. Synder ed. 1993) (regarding education laws in the American colonies, "[i]t is important to note that the responsibility for providing education was placed on parents rather than borne by the government").

[104] Kent, *supra* note 103, at 215.

[105] *Id.* at 206.

[106] Lukasik, *supra* note 100, at 1917.

[107] Kent, *supra* note 103, at 206.

continued educating their children at home.[108] When the first compulsory education laws were passed, "they focused upon the responsibility of 'parents' and 'masters' to teach children, but did not provide for schools or teachers."[109]

Massachusetts was the first state to pass a compulsory public school attendance law, but the law made exception for children who had "been otherwise furnished with the means of education."[110] Massachusetts made little effort to enforce the law during its first few decades of existence, and it was not until 1893 that the law was first tested against homeschoolers. In one of the earliest cases to address whether homeschooling complies with compulsory attendance laws, the Massachusetts Supreme Court concluded that homeschooling was permitted by the statute, noting that "[t]he great object of these provisions of the statutes has been that all the children shall be educated, not that they shall be educated in any particular way."[111]

Significantly, the right to homeschooling was recognized and unchallenged when the Constitution was drafted and when the Fourteenth Amendment was passed. "In the years following the adoption of the Constitution, people viewed homeschooling as a parental right and responsibility," and parents continued homeschooling "[w]ell into the nineteenth century."[112] Massachusetts, Vermont, and the District of Columbia were the only places to have passed compulsory public school attendance laws by the time the Fourteenth Amendment was ratified,[113] and even these laws contained exemptions for

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[108] JOHN W. WHITEHEAD & WENDELL R. BIRD, HOME EDUCATION AND CONSTITUTIONAL LIBERTIES 22–23 (1984) (stating that homeschooling "was a major form, if not the predominant form, of education in colonial America and in the early years after the adoption of the Constitution"); Kreager Jr., *supra* note 16, at 228 ("In the years following the adoption of the Constitution, people viewed homeschooling as a parental right and responsibility. Well into the nineteenth century, parents commonly used homeschooling as part of the educational process for their children.").

[109] Lukasik, *supra* note 100, at 1917.

[110] An Act Concerning The Attendance Of Children At School, 1867 Mass. Acts 240.

[111] Com. v. Roberts, 159 Mass. 372, 374 (1893).

[112] *See* Kreager Jr., *supra* note 16, at 228 ("In the years following the adoption of the Constitution, people viewed homeschooling as a parental right and responsibility. Well into the nineteenth century, parents commonly used homeschooling as part of the educational process for their children.").

[113] M. S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 17 (1976) ("By 1870 Massachusetts was joined only by the District of Columbia (1864) and Vermont (1867) in passing compulsory school attendance laws.").

children who received an education elsewhere.[114]

Progressive Era reforms saw compulsory school attendance laws enacted in every state by 1918.[115] A "significant amount of Americans," however, continued to practice homeschooling after these laws were passed.[116] In fact, the Calvert homeschooling program, which was developed in 1905 and still exists today, enjoyed phenomenal growth in the first half of the twentieth century and spawned many imitators.[117]

Compulsory education laws quickly caused friction between homeschoolers and school officials:

> The shift in educational responsibility from parents to the states created an antagonistic relationship between parents who wished to continue to home school their children and public school administrations that sought to enforce their authority to educate via compulsory attendance laws. This conflict in interests led to a number of lawsuits beginning in the 1920s and continuing through recent times.[118]

Conflicts between homeschoolers and school officials did not begin in earnest, however, until the modern homeschooling movement took off in the '60s.[119]

Ironically, considering its association with religious conservatives, the modern homeschooling movement has roots

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[114] Massachusetts's compulsory education law exempted children who had "been otherwise furnished with the means of education for a like period of time, or ha[d] already acquired those branches of learning which [we]re taught in common schools." An Act Concerning The Attendance Of Children At School, 1867 Mass. Acts 240. Vermont's compulsory education law had an exemption identical to the Massachusetts exemption. GILBERT A. DAVIS, VERMONT SCHOOL LAWS, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY 1874 71 (1875). The District of Columbia's compulsory education law provided exemptions for parents who were unable "for *any* cause" to send their child to the local public school, or whose child was educated at "*any* other school." Act To Provide for the Public Instruction of Youth in the County of Washington, District of Columbia, and for other Purposes., ch. 156, 13 Stat. 187 (1864) (emphasis added).

[115] Lukasik, *supra* note 100, at 1919.

[116] ALEXANDRA G. LONGO, THE IMPORTANCE OF MUSEUMS IN A HOME SCHOOL CURRICULUM: A CLOSER LOOK AT THREE NEW JERSEY MUSEUMS 8 (2013) (citing MILTON GAITHER, HOMESCHOOL: AN AMERICAN HISTORY 74–75 (2008).

[117] *Id.* at 77–78.

[118] Lukasik, *supra* note 100, at 1920.

[119] *See* Somerville, *supra* note 3 (stating that "it was not until 1967 that the term 'homeschooling' emerged to describe the underground phenomenon of parents who chose not to send their children to public or traditional private schools," and that conflict arose at that time because "homeschooling appeared on the scene just as the National Education Association was being transformed from an organization of professionals and scholars to a tough and disciplined labor union that wielded its increasing political power to protect the special interests of public school teachers.").

in hippie communes, which "viewed schools as the primary means of assimilating children to 'the establishment.'"[120] Anti-establishment leftists such as John Holt, "the most famous early leader of the modern homeschooling movement," promoted homeschooling as a more natural and humane approach to education.[121] When some '60s-era hippies grew into '80s-era "Jesus freaks," the counter-cultural left brought homeschooling to the counter-cultural right.[122]

Some school districts attempted to crack down on the burgeoning homeschooling trend by claiming that Progressive-era compulsory education laws did not permit the practice. During the early days of the modern homeschooling movement, some courts ruled that homeschooling was not permitted by law.[123] As the movement gained in numbers and political power, however, courts began interpreting compulsory education laws as permitting homeschooling, and some state legislatures amended the laws to exempt homeschoolers.[124]

In conclusion, homeschooling has always been continuously practiced throughout U.S. history. It was a dominant form of education during the nation's early years, and has experienced a remarkable revival in recent years. Though legality was uncertain for a brief period during the mid-twentieth century, homeschooling is now accepted as a legitimate alternative to institutional schooling by all fifty states.

E. Conclusion to Part IV

Homeschooling is, without a doubt, "deeply-rooted in our Nation's history and tradition," as it has been permitted and

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[120] Milton Gaither, *Why Homeschooling Happened*, 86 EDUC. HORIZONS 226 (2008).

[121] SETH DOWLAND, FAMILY VALUES AND THE RISE OF THE CHRISTIAN RIGHT 80 (2015).

[122] Gaither, *supra* note 120, at 229.

[123] *See supra* notes 33–45 and accompanying text. The early cases may reflect judicial unease with an unorthodox practice that judges were unfamiliar with. In 1981, Holt gave the following advice to parents who found themselves in court:

> Most judges in family or juvenile courts, where many unschooling cases will first be heard, probably don't know this part of the law either, since it is not one with which they have had much to do. This means that when we write up home schooling plans, we are going to have to cite and quote favorable rulings. The more of this we do, the less schools will want to take us to court, and the better the chances that if they do we will win.

JOHN HOLT, TEACH YOUR OWN 272 (1981).

[124] *See* ALEXANDER, *supra* note 46.

practiced for the entire duration of Western history. It is "apparent that, at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century,"[125] the right to homeschool was recognized and unchallenged, and today, despite a recent trend to strengthen compulsory education laws,[126] all states permit homeschooling. Homeschooling, therefore, almost certainly qualifies as a fundamental right under the test laid out in *Glucksberg*.

It should be pointed out that in *Roe*, the Court found that abortion was a fundamental right even though the recent trend among states was to add greater restrictions on the practice. The fact that "abortion was viewed with less disfavor [in the past] than under most American statutes currently in effect" was sufficient to establish abortion as a fundamental right.[127] In this regard, the evidence supporting a right to homeschooling is even stronger than evidence supporting the Court's decision in *Roe*, as states have consistently refrained from infringing on homeschooling all the way up to the present day.

V. RATIONALES BEHIND PARENTS' RIGHT TO "DIRECT" A CHILD'S EDUCATION APPLY WITH "EQUAL FORCE" TO HOMESCHOOLING

There are two major rationales underlying *Meyer*, *Pierce*, and their progeny that give parents the right to send their children to a private school and to choose the subjects they will be taught.[128] First, the Court has held that the "natural bonds of affection lead parents to act in the best interests of their children."[129] Second, the Court has held that autonomous nuclear families play a "critical role" in "developing the

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[125] Roe v. Wade, 410 U.S. 113, 140 (1973).

[126] *See* Raley, *supra* note 36, at 695–96 (discussing how, over the past forty years, states have raised the age requirements for compulsory education laws in response to a global "educational arms race").

[127] *Roe*, 410 U.S. at 140.

[128] *See* Farrington v. Tokushige, 273 U.S. 284, 298–99 (1927) (citing *Meyer* and *Pierce* in holding that parents have the right to enroll their children in private schools, and that the state has no right to bring private schools "under a strict governmental control" or give "affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks").

[129] Parham v. J.R., 442 U.S. 584, 602 (1979).

decentralized structure of our democratic society."[130] This Part will argue that these rationales "apply with equal force"[131] to homeschooling, and therefore, under *Obergefell*, the right to homeschool is covered by the right of parents to direct their children's education.

A. Rationale 1: Parent-Directed Education is in the Best Interest of Children

In *Parham v. J.R.*, during a discussion of parental rights under *Meyer* and *Pierce*, the Court cited Blackstone and Kent in finding that:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.[132]

The right of parents to direct their children's education, therefore, rests on the assumption that parents have a natural instinct to act in their child's best interest, and are the ones best suited to make "the great wealth of decisions" related to a child's development.[133]

Parham rejected the argument that some parents' abuse of their rights justifies allowing the government to supersede parental authority generally, calling this a "repugnant" and "statist notion":

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attest to this. That some parents "may at times be acting against the best interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is

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[130] Lehr v. Robertson, 463 U.S. 248, 257 (1983).

[131] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[132] *Parham*, 442 U.S. at 602.

[133] Abbott v. Abbott, 560 U.S. 1, 27 (2010) (Stevens, J. dissenting).

repugnant to American tradition.[134]

The rationale that parents who enroll their child in a private school are assumed to be acting in the best interest of the child "applies with equal force" to homeschooling. Parental affection has long been cited as an advantage of homeschooling. As discussed in the following paragraphs, educational commentators have been asserting for over two thousand years that parents are more dedicated teachers than paid educators because they are naturally invested in their children's wellbeing.

Going all the way back to ancient Greece, Aristotle cited parents' natural affection in concluding "Private training has advantages over Public."[135] Some Romans also believed that parents' natural affection for their children made them better educators than paid tutors. In his essay *The Education of Children*, for example, Plutarch recommended that Roman mothers educate their very young children themselves rather than entrust them to nannies, arguing that "the good-will of foster-mothers and nursemaids is insincere and forced, since they love for pay."[136]

England did not have compulsory education laws because "the common law presum[ed] that the natural love and affection of the parents for their children would impel them to faithfully perform this duty."[137] The common law was also concerned that those "without any ties of blood" are more likely to "abuse the delicate and important trust of education."[138]

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[134] *Parham*, 442 U.S. at 602–03.

[135] ARISTOTLE, THE ETHICS OF ARISTOTLE 330 (W. Scott 1890) (Rev. D.P. Chase ed.).

[136] PLUTARCH, MORALIA VOL. I 15 (Loeb 1927). Though Plutarch made this remark in the context of breastfeeding, it is clear that his primary concern about "foster-mothers and nursemaids" was in regard to education. At the end of the passage, he states:

> For just as it is necessary, immediately after birth, to begin to mould the limbs of the children's bodies in order that these may grow straight and without deformity, so, in the same fashion, it is fitting from the beginning to regulate the characters of children. For youth is impressionable and plastic, and while such minds are still tender lessons are infused deeply into them; but anything which has become hard is with difficulty softened. . . . Plato, that remarkable man, quite properly advises nurses, even in telling stories to children, not to choose at random, lest haply their minds be filled at the outset with foolishness and corruption.

Id. at 16–17.

[137] Sch. Bd. Dist. No. 18, Garvin Cty. v. Thompson, 103 P. 578, 581 (Okla. 1909).

[138] FRANCIS HARGRAVE, SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS, VOL. II 71 (Edward Christian ed. 1818); SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 88.b. n.13 (J. &

When the modern mass education system was just beginning to take root in Victorian England, many parents continued homeschooling because they were deeply skeptical about the motives behind these institutions.[139]

Like parents throughout Western history, homeschooling parents today express doubts about whether institutional schools are capable of looking out for their children's interests as well as they do. In fact, many homeschoolers believe that schools put their own interests ahead of their children's interests,[140] and statements by education officials often do little to quell these concerns.[141] Courts have also noted that school districts may have a conflict of interest when it comes to policing parents who opt out of public education since many states fund local schools on a per-pupil basis,[142] which may lead

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W.T. Clarke 1823).

[139] Tony Jeffs, *First lessons: Historical perspectives on informal education, in* PRINCIPLES AND PRACTICE OF INFORMAL EDUCATION: LEARNING THROUGH LIFE 37 (Linda Deer Richardson & Mary Wolfe ed. 2004) (stating that one reason the "[i]nformal education survived alongside the growing formal" schooling movement was because many "profoundly distrusted the motives of those advocating a national system of education").

[140] Louis P. Nappen, *The Privacy Advantages of Homeschooling*, 9 CHAP. L. REV. 73, 104 (2005) ("Some contemporary grass-roots movements question whether public schools truly act in citizens' best interests. Many homeschooling proponents and civil libertarians stress that public schools are more likely to promote rules and teach subjects that preserve government not citizen interests.").

[141] For example, NEA General Counsel Bob Chanin made the following remarks during the NEA's annual meeting in July 2009:

> Despite what some among us would like to believe . . . it is not because we care about children; and it is not because we have a vision of a great public school for every child. The NEA and its affiliates are effective advocates because we have power. And we have power because there are more than 3.2 million people who are willing to pay us hundreds of millions of dollars in dues each year because they believe that we are the unions that can most effectively represent them; the union that can protect their rights and advance their interests.

Teachers Union Big Wig Says It's Not About Kids, It's About Power!, FOX NEWS (Feb. 23, 2011), http://nation.foxnews.com/culture/2011/02/23/teachers-union-big-wig-says-its-not-about-kids-its-about-power.

Though Chanin probably meant only to emphasize the importance of collective action rather than imply that the union was disinterested in children's welfare, many took his words to mean that the NEA prioritized its own interest over children's interests. The remarks caused such a backlash that the NEA was forced to issue a statement claiming that critics were taking the comments out of context. *NEA Executive Director John Wilson responds to misleading 'Crossroads' ad*, NAT'L EDUC. ASS'N. (March 09, 2011), http://www.nea.org/home/42823.htm.

[142] Fellowship Baptist Church v. Benton, 620 F. Supp. 308, 318 (S.D. Iowa 1985) ("There may be problems when the responsibility of determining equivalent education is placed on local school boards, . . . [because] local school boards have an inherent conflict of interest since each student in a private school is potentially a source of additional state aid.").

school officials to oppose homeschooling even when it is in a child's best interests.

Critics of homeschooling often claim that religious parents abuse the right to homeschool and fail to provide their children with an adequate education, and argue that states should crack down on or even ban homeschooling in order to prevent such abuses.[143] Though some parents may abuse their right to homeschool, research indicates that homeschooling parents, on average, are acting in their children's best interests in regard to education.[144] With evidence showing that most homeschooling parents are providing their children with an adequate or even superior education, the fact that some homeschooling parents "may at times be acting against the best interests of their children [. . .] is hardly a reason to discard wholesale"[145] the right to homeschool.

In addition to the general assumption that parents act in the best interest of their children, it has long been recognized that homeschooling provides several inherent advantages over institutional schooling. Despite the stereotype that

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[143] *See supra* note 13; Michelle Goldberg, *The Sinister Side of Homeschooling*, DAILY BEAST (Sept. 20, 2013), http://www.thedailybeast.com/articles/2013/09/20/the-sinister-side-cf-home-schooling.html; MarkH, *Homeschooling needs either tighter regulation or to be banned*, SCIENCEBLOGS (Mar. 15, 2012), http://scienceblogs.com/denialism/2012/03/15/homeschooling-needs-either-tig/; Ennuiandthensome, *CMV: Homeschooling should no longer be an option*, REDDIT (Apr. 2, 2015), https://www.reddit.com/r/changemyview/comments/317cs6/cmv_homeschooling_should_no_longer_be_an_option/.

[144] Brian D. Ray, *Homeschoolers on to College: What Research Shows Us*, 185 J. COLLEGE ADMISSIONS 5 (2004) ("Evidence to date points to a high success rate in adulthood in general, and in college in particular, for these individuals who have been raised and educated outside mainstream institutional schools."). *See also, e.g.*, Haley Potter, *Do home-schoolers do better in college than traditional students?* USA TODAY (Feb. 18, 2012), http://college.usatoday.com/2012/02/18/do-home-schoolers-do-better-in-college-than-traditional-students/ (stating that homeschoolers "are about as likely to go to college as their public-schooled peers. . . . Research shows that home-schooled students are certainly capable of adjusting to the college curriculum academically – home-schooled students generally score slightly above the national average on both the SAT and the ACT and often enter college with more college credits. Studies have also shown that on average home-schooled students have higher grade point averages in their freshman years and have higher graduation rates than their peers. In addition to academic competence, research also asserts that home-schooled students are able to cope well with the emotional transition to college."); Kelsey Sheehy, *Home-Schooled Teens Ripe for College*, U.S. NEWS & WORLD REPORT (June 1, 2012), http://www.usnews.com/education/high-schools/articles/2012/06/01/home-schooled-teens-ripe-for-college ("Myths about unsocialized home-schoolers are false, and most are well prepped for college, experts say.").

[145] Parham v. J.R., 442 U.S. 584, 602–03 (1979).

homeschooling is mostly practiced by "religious fanatics" who are not acting in the best interest of their children,[146] "research [. . .] shows that parents homeschool for a variety of reasons that are consistent with the States' interest of providing an adequate and appropriate education for individual children."[147] Parents have legitimate educational reasons for choosing homeschooling over institutional schooling, as it can provide an alternative to poor local schools, smaller classroom size and more individualized instruction, and a better social environment.

The fact that homeschooling provides an alternative to poor local schools has long been recognized as a benefit of legal homeschooling. Aristotle wrote that parents "should have the power" to educate their own children because "in most states [educational] matters have been neglected."[148] Today, "dissatisfaction with academic instruction at other schools" is

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[146] Lynn Schnaiberg, *Staying Home From School*, EDUC. WEEK (June 12, 1996), http://www.edweek.org/ew/articles/1996/06/12/38home.h15.html (quoting a state official who characterized homeschoolers as "David Koresh types . . . who keep their children home because they don't want them to mix with children of other races or faiths"); Anonymous, Comment to *Home Schooling: What's up with that?* DATA LOUNGE (Feb. 19, 2012), https://www.datalounge.com/thread/11317354#11317853 (last visited Jan. 14, 2016) ("Home schooling is a way for religious fanatics (and occasionally, pedophiles and child abusers) to shield their children from a world they view as hostile. . . . Home schooling has its advantages when done right, but book smarts does nothing to obscure social retardation."); Superwinner, Comment to *"They make the anti-vaxxers seem rational." A story about the powerful Home-Schooling lobby in the US*, REDDIT (Aug. 28, 2015), https://www.reddit.com/r/skeptic/comments/3iogdj/they_make_the_antivaxxers_seem_rational_a_story/cuiqwgm (last visited Jan. 15, 2016) ("The only home schooling I have ever seen has been by religious fanatics and religions [sic] sects wanting to keep their kids away from satans [sic] science.").

[147] Tanya K. Dumas et. al., *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, 16 WIDENER L. REV. 63, 66 (2010). Dumas explains that "[h]omeschooling families span political, religious, economic, educational, ethnic, and geographic spectra," and that there are "many homeschoolers who simply seek the highest quality education for their child, which they believe public and even private schools can no longer provide." *Id.* at 69.

[148] *Id.* A passage in Book VIII of *Politics* is often cited as showing that Aristotle was a proponent of compulsory public school education, but it is unclear whether he was in favor of state administered education, or merely a law requiring parents to teach their children certain subjects. Though he considered it indisputable that "education should be regulated by law," he conceded that "what should be the character of this public education, and how young persons should be educated, are questions which remain to be considered." Later on in the passage, when discussing which subjects should be mandatory, he makes reference to the "sort of education in which parents should train their sons," suggesting that he understands compulsory education to be administered by parents. ARISTOTLE, POLITICS (MIT 2009) (Benjamin Jowett ed.), http://classics.mit.edu/Aristotle/politics.8.eight.html (last visited Jan. 20, 2016).

one of the most commonly-cited reasons parents give to explain their motives for homeschooling.[149]

Small classroom size is highly correlated with educational quality,[150] and homeschooling parents frequently cite individualized instruction as a motive for homeschooling.[151] Even the largest of homeschooling families, such as the Duggars, have a lower teacher-student ratio than the average institutional school class.[152] Modern homeschooling parents are not alone in concluding that home education provides a more optimal classroom size than those found in schools; many of the most important educational theorists in Western history, including Aristotle,[153] Quintilian,[154] and Locke,[155] have cited

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[149] U.S. DEP'T EDUC. NAT'L CTR. EDUC. STATISTICS, HOMESCHOOLING IN THE UNITED STATES 2003: STATISTICAL ANALYSIS REPORT 13 (2006) (stating that 68 percent of parents cited "dissatisfaction with academic instruction at other schools" as a reason for homeschooling, second in frequency only to "[c]oncern about environment of other schools").

[150] *See*, e.g., MATTHEW M. CHINGOS & GROVER J. "RUSS" WHITEHURST, CLASS SIZE: WHAT RESEARCH SAYS AND WHAT IT MEANS FOR STATE POLICY 1 (2011) ("The most influential and credible study of [classroom size reduction] is the Student Teacher Achievement Ratio, or STAR, study which was conducted in Tennessee during the late 1980s. In this study, students and teachers were randomly assigned to a small class, with an average of 15 students, or a regular class, with an average of 22 students. This large reduction in class size (7 students, or 32 percent) was found to increase student achievement by an amount equivalent to about 3 additional months of schooling four years later.").

[151] CHERYL M. LANGE & KRISTIN KLINE LIU, HOMESCHOOLING: PARENTS' REASONS FOR TRANSFER AND THE IMPLICATIONS FOR EDUCATIONAL POLICY 17 (1999) (stating that a "frequently reported reason [parents gave for homeschooling] was in the area of individualized instruction. Findings suggest parents believe they can provide more educational stimulation and material through the individualized instruction in the homeschooling model").

[152] The Dugger family has nineteen children (not all of whom are school age), while the average U.S. school class size is 22.8 students. JANA DUGGAR ET AL., GROWING UP DUGGAR 244 (2016) (stating that the Duggar family has nineteen children and describing the family's homeschooling practices, in which older siblings help tutor school-aged siblings); OECD, EDUCATION AT A GLANCE 402 (2011) (listing 22.8 as the average class size for public and private institutions).

[153] ARISTOTLE, THE ETHICS OF ARISTOTLE 330 (Rev. D.P. Chase ed., W. Scott 1890) ("It would seem then that the individual will be most exactly attended to under Private care, because so each will be more likely to obtain what is expedient for him.").

[154] QUINTILIAN, INSTITUTIO ORATORIA, BOOK I 38 (H.E. Butler ed. 1920), https://archive.org/stream/institutioorator00quin/institutioorator00quin_djvu.txt (stating that some Roman parents homeschool their children because an instructor "seems likely to give a single pupil more of his time than if he had to divide it among several").

[155] JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (1692), http://legacy.fordham.edu/halsall/mod/1692locke-education.asp ("[H]e who is able to be at the charge of a tutor at home, may there give his son a more genteel carriage, more manly thoughts, and a sense of what is worthy and becoming, with a greater

individualized attention as an advantage of home education over institutional education.

Finally, homeschooling can provide a better social environment for children than they would experience in a school. Parents have been concerned about negative influences at school for as long as schools have existed. Institutional schooling in the West originated in Ancient Greece,[156] and these early academies were highly controversial. Athenians viewed schools as "seminaries of sophistry" and "thought it necessary to put [them] down by public edict" because "the schools were found to be detrimental to the morals of youth." Laconia "never suffered a master of philosophy to open school in their realm and jurisdiction, [. . .] proscribing their academies as seminaries of evil manners, and tending to the corruption of youth."[157] Socrates, of course, was famously executed for corrupting the youth, and one of the chief complaints against him was that children attending his school became disrespectful towards their parents.[158]

Roman parents also worried about bad influences at schools. Quintilian, when discussing "whether it is better to have [a child] educated privately at home or hand him over to some large school," stated that one reason some Roman parents rejected institutional schooling in favor of homeschooling was because "they are making (they think) better provision for morality by avoiding the crowd of persons of an age which is particularly liable to vice," a concern that he conceded was legitimate.[159]

Like Roman homeschooling parents, English parents were

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proficiency in learning into the bargain, and ripen him up sooner into a man, than any at school can do. Not that I blame the schoolmaster in this, or think it to be laid to his charge. The difference is great between two or three pupils in the same house, and three or four score boys lodg'd up and down: for let the master's industry and skill be never so great, it is impossible he should have fifty or an hundred scholars under his eye, any longer than they are in the school together: Nor can it be expected, that he should instruct them successfully in any thing but their books; the forming of their minds and manners requiring a constant attention, and particular application to every single boy, which is impossible in a numerous flock.").

[156] JENNIFER M. GIDLEY, POSTFORMAL EDUCATION: A PHILOSOPHY FOR COMPLEX FUTURES 73 (2016).

[157] THE NEW ANNUAL REGISTER, OR GENERAL REPOSITORY OF HISTORY, POLITICS, AND LITERATURE 109 (1788).

[158] LUCIUS ANNAEUS SENECA & JUSTUS LIPSIUS, THE WORKES LUCIUS ANNAEUS SENECA: BOTH MORRALL AND NATURALL 436 (1614, Thomas Lodge ed.).

[159] QUINTILIAN, *supra* note 154 ("I only wish that the view that [peer pressure in schools] has often been a cause of shameful behaviour were false!").

also worried about negative social influences in school. One scholar notes that "[r]ecurrent scandals of maladministration or morally offensive behaviour produced considerable unease among those concerned about a shift of the locus of education from family to school."[160] English parents were particularly concerned about student immorality in schools.[161]

The English philosopher John Locke, in one of the most influential educational treatises in the Western tradition,[162] advised parents to educate their children at home due to the negative social environment at schools. Though he recognized the possibility that children's social skills might be stunted if they were taught at home, he argued that the dangers of moral corruption at school outweighed that risk.[163] He concluded that if parents consider the "mal-pertness, tricking, or violence learnt amongst schoolboys, [they] will think the faults of a privater education infinitely to be preferr'd [. . .] and will take care to preserve [their] child's innocence and modesty at home."[164]

Early Americans were also worried about the moral atmosphere in schools. William Penn, for example, instructed

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[160] BRIAN COOPER, FAMILY FICTIONS AND FAMILY FACTS: HARRIET MARTINEAU, ADOLPHE QUETELET AND THE POPULATION QUESTION IN ENGLAND 1798-1859 83 (Routledge, 2007). *See also* M. Crotty, *Sporting Violence in Australian Public Schools, 1850-1914*, *in* ANTHONY POTTS & TOM A. O'DONOGHUE, SCHOOLS AS DANGEROUS PLACES: A HISTORICAL PERSPECTIVE 36 (Cambria Press, 2007) (stating that "English public schools in the first half of the 19th century were frequently plagued by riots, sexual immorality, and a spirit of violent hostility between masters and boys").

[161] EDWARD B. FOOTE, HOME CYCLOPEDIA OF POPULAR MEDICAL, SOCIAL AND SEXUAL SCIENCE 168 (Murray Hill Pub. Co. 1900) (warning about the "dangers of school-life" for boys, and also stating that "writers on this subject agree that boarding-schools and colleges are the main hot-beds for the planting of the seeds of early vice and perversions"); ANNA M. LONGSHORE-POTTS, DISCOURSES TO WOMEN ON MEDICAL SUBJECTS 47–48 (A.M. Longshore-Potts 1895) (observing that "[b]oarding schools may become the very hot-beds of [sexual immorality]," and some represent a "most unfavorable atmosphere for the training of childhood").

[162] *See*, e.g., BRIAN MCGRATH, THE POETICS OF UNREMEMBERED ACTS: READING, LYRIC, PEDAGOGY 128 (2013) (noting that Locke's *Some Thoughts on Education* was widely read throughout Europe and "has had a lasting effect on the philosophy of education").

[163] LOCKE, *supra* note 155 (stating that "[s]heepishness and ignorance of the world, the faults imputed to a private education, are neither the necessary consequences of being bred at home, nor if they were, are they incurable evils. Vice is the more stubborn, as well as the more dangerous evil of the two; and therefore in the first place to be fenced against." Locke also argued that parents who "think it worth while to hazard [their] son's innocence and virtue for a little Greek and Latin" place a "strange value" on education.).

[164] *Id.*

his wife to homeschool because he thought it better to keep the children "in the house to teach them than send them to schools, too many evil impressions being commonly received there."[165] Concerns about the moral environment in schools were so paramount that teacher hiring requirements in the colonial era "had very little to do with the teacher's intelligence, and everything to do with the teacher's character."[166] Schools usually hired female teachers because they were thought to be "better models of virtuous behavior."[167]

Modern homeschooling parents continue to express concern about negative peer influences in school. According to the National Center for Education Statistics, the most common reasons that parents turn to homeschooling are fears about "safety, drugs, or negative peer pressure. Eighty-five percent of homeschooled students were being homeschooled, in part, because of their parents' concern about the [social] environment of other schools."[168]

John Locke argued that homeschooling can provide a richer, healthier social environment than children would encounter at school (which is ironic, since critics of homeschooling often express concerns about socialization).[169] Locke pointed out that "houses are seldom without variety of company," and encouraged parents to familiarize their children with "all the strange faces that come here, and engage them in conversation with men of parts and breeding, as soon as they are capable of it."[170] He also advised parents to take their children with them

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[165] MILTON GAITHER, HOMESCHOOL: AN AMERICAN HISTORY 19 (Palgrave Macmillan, 2008).

[166] William B. Russell, Contemporary Social Studies: An Essential Reader 101 (2011).

[167] *Id.*

[168] NAT'L CTR. EDUC. STAT., HOMESCHOOLING IN THE UNITED STATES—2003 STATISTICAL ANALYSIS REPORT 14 (2003).

[169] Some suggest that these education officials are being disingenuous when they express concerns about socialization. As one scholar notes, even though many homeschooling parents wish to take advantage of the socialization opportunities provided by public school extracurricular activities, school boards have sought to deny part-time attendance of otherwise homeschooled students. Nappen, *supra* note 140, at 103. *See also* Andrew J. Rotherham, *Tim Tebow Debate: Should Homeschoolers Be Allowed on Public-School Sports Teams?* TIME (Feb. 16, 2012), http://ideas.time.com/2012/02/16/tim-tebow-debate-should-homeschoolers-be-allowed-to-play-sports/ ("I don't understand the self-anointed public school advocates who are simultaneously decrying homeschoolers for being separatists while throwing up walls to keep them from participating in high school athletics, an activity that brings communities together.").

[170] LOCKE, *supra* note 155.

"when they make visits of civility to their neighbours" as part of the socialization process.[171]

Susan Wise Bauer, a William & Mary professor, who the *Washington Post* referred to as one of the homeschooling movement's leading intellectuals,[172] believes, like Locke, that a homeschool environment is more beneficial than a traditional school. Bauer argues "the socialization that best prepares a child for the real world can't take place when a child is closed up in a classroom or always with his peer group."[173] Bauer concludes that children should rather be regularly exposed to "people who vary widely in age, personality, background, and circumstance," and that this is more likely to happen when children are homeschooled and accompany their parents as they go about their daily social activities.[174]

In summary, homeschooling is entirely consistent with the rationale that parents are the best-suited to direct their children's education because they can be trusted to act in their children's best interests. Parents, due to natural instinct, may be more motivated to educate their children than an unrelated school instructor would be. Furthermore, homeschooling has several inherent advantages over institutional schooling that provide parents with legitimate reasons for concluding that homeschooling is in their child's best interests.

B. Rationale 2: The Nuclear Family Plays a "Critical Role" in the "Decentralized Structure of our Democratic Society"

The second rationale behind a parent's right to privately educate their children involves democratic concerns. In *Pierce*, the Court held that:

> [t]he fundamental theory of liberty upon which all governments in this Union repose *excludes any general power of the State to standardize its children* by forcing them to

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[171] *Id.*

[172] Julia Duin, *Home-Schooling Pioneer Susan Wise Bauer is Well-Versed in Controversy*, WASH. POST (Nov. 1, 2012), https://www.washingtonpost.com/lifestyle/magazine/home-schooling-pioneer-susan-wise-bauer-is-well-versed-in-controversy/2012/10/29/521a3070-da80-11e1-9745-d9ae6098d493_story.html (describing Bauer as a "home-schooling pioneer" and "one of the forces behind America's burgeoning home-schooling movement").

[173] SUSAN WISE BAUER & JESSIE WISE, THE WELL-TRAINED MIND: A GUIDE TO CLASSICAL EDUCATION AT HOME 624 (W.W. Norton 2004).

[174] *Id.*

> accept instruction from public teachers only. *The child is not the mere creature of the State*; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[175]

The Court has often cited *Pierce* when expressing its concern about what Justice Douglas described as "the authoritarian philosophy favoring regimentation."[176] The Court has recognized that autonomous nuclear families play a "critical role" in "developing the decentralized structure of our democratic society."[177] It has also stated that parents' educational rights provide a safeguard against "[t]he desire of the legislature to foster a homogeneous people."[178]

The Court has repeatedly noted that parental-directed education provides "preparation for obligations the state can neither supply nor hinder,"[179] including "the inculcation of moral standards, religious beliefs, and elements of good citizenship."[180] Due to the Establishment Clause, the state is strictly forbidden from providing religious instruction to children, so state schools cannot provide guidance about the deepest questions facing human existence. This is a reason the Court has observed that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural,"[181] whether through direct parental instruction or through moral instructors chosen by the parent.

The U.S. Supreme Court is not alone in recognizing the importance that parent-guided education plays in preserving democratic values; even the United Nations, which many conservative parents view as a threat to parental authority,[182]

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[175] Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (emphasis added).

[176] Olff v. E. Side Union High Sch. Dist., 404 U.S. 1042, 1043 (1972) (Douglas, J. dissenting).

[177] Lehr v. Robertson, 463 U.S. 248, 257 (1983).

[178] Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

[179] Prince v. Massachusetts, 321 U.S. 158, 166 (1944), *cited by* Ginsberg v. State of N. Y., 390 U.S. 629, 639 (1968); Troxel v. Granville, 530 U.S. 57, 66 (2000); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 865 n.31 (1997); Hodgson v. Minnesota, 497 U.S. 417, 447 (1990); Lehr v. Robertson, 463 U.S. 248, 258 (1983); H. L. v. Matheson, 450 U.S. 398, 410 (1981); Bellotti v. Baird, 443 U.S. 622, 638 (1979); Parham v. J.R., 442 U.S. 584, 621 (1979); F.C.C. v. Pacifica Found., 438 U.S. 726, 758 (1978); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Carey v. Population Servs., Int'l, 431 U.S. 678, 708 (1977); Smith v. Org. of Foster Families For Equal. & Reform, 431 U.S. 816, 843 (1977); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[180] Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

[181] Moore v. East Cleveland, 431 U.S. 494, 503–04 (1977).

[182] Karen Attiah, *Why won't the U.S. ratify the U.N.'s child rights treaty?* WASH.

has emphasized the importance of parent-guided education as a bulwark against tyranny. When the UN General Assembly declared that elementary education is a human right and therefore should be compulsory, it was careful to qualify this statement by recognizing that "[p]arents have a prior right to choose the kind of education that shall be given to their children."[183] The drafters of the *Universal Declaration of Human Rights* felt that putting control of education in the hands of parents would help prevent a repeat of the type of state indoctrination that took place in public schools in Nazi Germany.[184]

The Court has cited the work of Professor Bruce C. Hafen in emphasizing the importance of family in inoculating diverse viewpoints and democratic values.[185] In the articles cited, Hafen writes that government control of education poses a threat to free societies.[186] Hafen argues democracies must seek "to sustain as many particularities as possible, in the hope that most people will accept, discover, or devise one that fits," and that families are integral this process.[187] He also argues that "state involvement with childrearing would invest the government with the capacity to influence powerfully, through socialization, the future outcomes of democratic political processes," and thus "[m]onolithic control of the value transmission system is a hallmark of totalitarianism, [and] the state nursery is the paradigm for a totalitarian society."[188]

POST, Nov. 21, 2014, https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/.

[183] UN General Assembly, *Universal Declaration of Human Rights*, Art. 26, 10 December 1948, 217 A (III).

[184] JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 90 (University of Penn. Press 2010) ("The defense [for including the parental rights clause] was that the Nazis had usurped the prerogative of parents when they demanded that all children enroll in poisoned state-controlled schools, the paragraph was especially necessary because the word 'compulsory' had been used in the first paragraph.").

[185] Lehr v. Robertson, 463 U.S. 248, 257 n.12 (1983) (citing Hafen in concluding that families have a "critical role" in "developing the decentralized structure of our democratic society"); Bellotti v. Baird, 443 U.S. 622, 639 n.17 (1979) (citing Hafen in noting that "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding").

[186] Bruce C. Hafen, *Marriage, Kinship, and Sexual Privacy*, 81 Mich. L. Rev. 463, 479–81 (1983).

[187] *Id.* at 480.

[188] *Id.* at 480–81. *See also* Martin H. Redish & Kevin Finnety, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-*

The rationale that private schooling promotes moral instruction and diversity of thought applies with "equal force" (and perhaps even greater force) to homeschooling. Some esteemed thinkers have argued that it is more effective for parents to directly provide moral instruction than to delegate this responsibility to private instructors. Homeschooling also provides greater educational privacy than schools,[189] which helps homeschooling parents resist the forces of "contemporary society exerting a hydraulic insistence on conformity to majoritarian standards."[190]

As noted previously, the state relies on parents to provide the moral and spiritual education that the government "can neither supply nor hinder." The right to private education allows parents to delegate that responsibility to teachers of their choosing. Several scholars have argued, however, that direct parental instruction is the best way of instilling moral and democratic values.

Hafen, for example, writes that families teach "obedience to the unenforceable" in ways that school instructors cannot.[191] Parental love helps children learn to trust benevolent authority, which encourages law-abiding behavior and reduces the need for authoritarian measures to control public behavior.[192] Montesquieu, who has also been cited by the Supreme Court when it attempts to determine "traditional Anglo-American judgment" regarding various issues,[193] made a similar argument, writing that parents are the ones best suited

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Educational Paradox, 88 CORNELL L. REV. 62 (2002–2003).

[189] *See generally* Nappen, *supra* note 140.

[190] Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

[191] Hafen, *supra* note 186, at 476 ("[T]he sense of family duty has an uncanny power to produce obedience to the unenforceable in ways that defy Adam Smith's assumption that self-interest is man's dominant value," and this "sense of voluntary duty is the lifeblood of a free society.").

[192] *Id.* at 477 (citing CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD 123 (1977) ("[T]he best argument for the indispensability of the family [is] that children grow up best under . . . conditions of 'intense emotional involvement' [with their parents]. . . . Without struggling with the ambivalent emotions aroused by the union of love and discipline in his parents, the child never masters his inner rage or his fear of authority. It is for this reason that children need parents, not professional nurses and counselors.")).

[193] Bronston v. United States, 409 U.S. 352, 360 (1973) (referring to Montesquieu's *The Spirit of Laws* to determine what the "traditional Anglo-American judgment" was regarding perjury. Montesquieu is most often cited regarding separation of powers issues, but his writings have also been quoted when the Court addresses other constitutional issues.).

to educate children about democratic values because they inspire imitation in their children, and that the "surest way" to promote "love of the laws and of our country" is through parental example.[194]

Homeschooling also promotes the diversity of thought that is crucial to stimulating the debate a democratic society relies upon, as it allows parents to tailor instruction to their beliefs. Parents of all religious and ideological stripes homeschool their children in order to better impart their values, which helps encourage the evolution of a broad range of beliefs and lifestyles.[195] For example, in *Yoder*, which some characterize as a type of homeschooling case,[196] the Court found that Amish education helped to cultivate an "idiosyncratic separateness [which] exemplifies the diversity we profess to admire and encourage."[197]

The *Yoder* Court also approvingly compared the Amish to "Jefferson's ideal of the 'sturdy yeoman,'" those "fiercely-independent"[198] farmers "who would form the basis of what [Jefferson] considered as the ideal of a democratic society."[199] The Court also likened the Amish to the medieval "religious

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[194] CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS, VOL. I 39 (1762) ("It is in a republican government that the whole power of education is required [to instill] the love of the laws and of our country. Everything therefore depends on establishing this love in a republic; and to inspire it ought to be the principal business of education: but the surest way of instilling it into children is for parents to set them an example. People have it generally in their power to communicate their ideas to their children; but they are still better able to transfuse their passions.").

[195] Though there is a stereotype that the homeschooling movement is overwhelmingly composed of conservative Christians, "an increasing proportion of agnostics, atheists, Buddhists, Jews, Mormons, Muslims, and New Agers are homeschooling their children." Brian D. Ray, *A Homeschooling Research Story*, HOME SCHOOLING IN FULL VIEW: A READER 139–42 (Bruce S. Cooper ed. 2005). In regard to political ideology, even though many think of homeschooling as a conservative's form of education, the modern form of homeschooling initially began as a leftist social experiment. *See supra* notes 119–21. Today, so many politically-progressive parents have taken up homeschooling that some media commentators have begun imploring them to stop. *See* Goldstein, *supra* note 13. These facts illustrate that homeschooling is supporting the development of a broad and increasingly-diversified spectrum of worldviews.

[196] *See* Kreager Jr., *supra* note 16.

[197] Wisconsin v. Yoder, 406 U.S. 205, 226 (1972).

[198] *See* ALBERT J. SCHMIDT, THE YEOMAN IN TUDOR AND STUART ENGLAND 45 (1961) (stating that the yeomen's "fiercely independent spirit played a sizable role in the evolution of democratic institutions in New England just as in Old England across the seas").

[199] *Yoder*. 406 U.S. at 225–26.

orders who isolated themselves from all worldly influences against great obstacles" and in the process helped to preserve "important values of the civilization of the Western World."[200] The *Yoder* Court's observations about separateness could also be applied to homeschooling families. Like the yeomen, homeschoolers are inherently independent, exhibiting the nonconformist spirit that Jefferson considered vital to democracy. Many homeschooling families also believe that by educating their children themselves, they are helping to preserve traditional Western values that are being lost to "political correctness" and "multiculturalism" in state schools,[201] and thus may be playing the same role in preserving the "important values of the civilization of the Western World" as the separatist medieval monks.

Homeschooling also promotes development of the diverse skill sets necessary for a free market to function, as it allows parents to tailor instruction to their child's talents and interests.[202] States have less control over homeschooling than institutional schools, because "students tend to retain more constitutional protections behind 'picket fences' than behind 'schoolhouse gates,'" and this provides parents with the flexibility to experiment with highly-customized curriculums.[203] Parents of child actors, musicians, and athletes, for example, often choose to homeschool their children in order to dedicate more time to honing their child's skills.[204]

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[200] *Id.* at 224.

[201] *See, e.g.*, William S. Lind, *Who Stole our Culture?*, *in* TED BAEHR & PAT BOONE, THE CULTURE-WISE FAMILY: UPHOLDING CHRISTIAN VALUES IN A MASS MEDIA WORLD 178–85 (2007) (stating that "America's traditional culture, which had grown up over generations from our Western, Judeo-Christian roots, was swept aside by an ideology. We know that ideology best as 'political correctness' or 'multi-culturalism'") (giving homeschooling as an example of a "movement to secede from the corrupt, dominant culture and create parallel institutions" dedicated to preserving Western values).

[202] Nappen, *supra* note 140, at 104 ("[E]ducator John Holt created the term 'unschooling' to describe the burgeoning 'homeschooling' movement whereby students study topics in which the students show individual interests, as opposed to following cookie-cutter curriculums mandated by school systems.").

[203] *Id.* at 73. Nappen explains that "[a]lthough the Fourth Amendment right against unreasonable searches and seizures traditionally protected 'people, not places,' the contemporary standard is determined by a 'reasonable expectations of privacy' test. Nowhere else do people expect privacy more than in their homes; consequently, most homeschooled students preserve more personal privacy than those who attend public schools." *Id.*

[204] *See, e.g.*, Sal Ruibal, *Elite take Home-School Route*, USA TODAY (Jun. 7, 2005), http://usatoday30.usatoday.com/sports/preps/2005-06-07-home-school-cover_x.htm

The individualized instruction that homeschooling can provide is so effective that some have complained that homeschoolers have an unfair advantage in competitions involving specialized skills. When homeschoolers dominated the Scripts Spelling Bee in the early 2000s, media backlash was so intense that even *Salon* (which is not usually supportive of homeschooling[205]) remarked that the debates had revealed an "ugly undercurrent of resentment from critics of home schooling."[206] Likewise, opponents of "Tim Tebow laws," which allow homeschoolers to join high school sports teams, have argued that homeschooled children should be banned from participating in high school athletics because their ability to dedicate more time to practice gives them "an enormous edge" over institutionally-schooled athletes.[207]

In conclusion, homeschooling helps families fulfill their "critical role" in "developing the decentralized structure of our democratic society."[208] It helps resist "[t]he desire of the legislature to foster a homogeneous people"[209] and "the authoritarian philosophy favoring regimentation."[210] As such, this rationale supporting parents' right to direct the education of their children applies with "equal force"[211] to homeschooling.

(profiling homeschooling parents of Olympians, X Games athletes, and NBA players, and also commenting on "child actors, musicians and other specialists").

[205] *See* Rawls, *supra* note 13.

[206] Helen Cordes, *Sour Grapes, Anyone?* SALON (Jun. 7, 2000), http://www.salon.com/2000/06/06/homeschool/.http://www.salon.com/2000/06/06/homeschool/. For other media reports that contain criticism of homeschoolers' success in the spelling bees, see Jessica Wehrman, *Homeschoolers Dominate Spelling Bees (Some See Unfair Advantage)*, Scripps Howard News Service (Mar. 28, 2002); Joe Soucheray, *Those "Bee" Kids have Created Quite a Buzz Among the Rest of Us*, ST. PAUL PIONEER PRESS (Jun. 4, 2000).

[207] Tom Danehy, *Poor Sports: Home-Schooled Kids Shouldn't Be Playing High-School Athletics*, TUSCAN WEEKLY (Nov. 11, 1999) (The columnist did admit from the outset that he was not a supporter of homeschooling, stating, "Let me make this as clear as possible. I hate home schooling."). *See also, e.g.*, Jeff Sentell, *Can the "Tim Tebow Bill" Work? Examining Home School Eligibility Across Alabama High School Sports*, AL.com (Mar. 19, 2014), http://highschoolsports.al.com/news/article/-8766051513666179571/can-the-tim-tebow-bill-work-examining-home-school-eligibility-across-alabama-high-school-sports/ ("Houston County Superintendent Tim Pitchford spoke to WDHN-TV in Dothan about the bill. 'Studies have shown in other states, that because of that unfair advantage of practice time, home school students have extra time to practice,' Pitchford said.").

[208] Lehr v. Robertson, 463 U.S. 248, 257 (1983).

[209] Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

[210] Olff v. E. Side Union High Sch. Dist., 404 U.S. 1042, 1043 (1972) (Douglas, J. dissenting).

[211] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

C. Conclusion to Part V

This Part demonstrates that the right to homeschool should be covered by parents' general right to direct the education of their children. Although *Meyer* and *Pierce* presumed that parents would "engage [a school] to instruct their children"[212] rather than teach them directly, "instructive precedents have expressed broader principles."[213] Because parents may rationally conclude that homeschooling is in their child's best interest, and because homeschooling helps develop the "decentralized structure of our democratic society," the rationales underlying the established right to private education apply with "equal force" to homeschooling.

VI. CONCLUSION

In conclusion, this article provides the groundwork for establishing that homeschooling is a fundamental right. The next time a legal challenge to homeschooling arises, homeschooling advocates should employ the arguments laid out in this article in making that case. Since threats to homeschooling occur with perennial consistency, such an opportunity will probably arise in the not-so-distant future.

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[212] *Meyer*, 262 U.S. at 401–02.

[213] *Obergefell*, 135 S. Ct. at 2589.