

## HOMESCHOOLING IN GERMANY AND THE UNITED STATES

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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.

- *Pierce v. Society of Sisters*<sup>1</sup>

### I. INTRODUCTION

On March 30, 2009, the Georgia House of Representatives took an unprecedented move and passed a resolution exhorting the German government to legalize homeschooling.<sup>2</sup> The Tennessee Legislature followed suit two months later on May 26, 2009.<sup>3</sup> The Georgia resolution, mimicked in large part by the Tennessee resolution, exhorts “the German federal government [to] recognize the rights of parents to home school their children” and outlines a number of principles on which that right is founded.<sup>4</sup> Among those principles are that “parents hold the fundamental responsibility and right to ensure the best quality education for their children, and parental choice and involvement are crucial to excellence in education” and “the importance of religious liberties and the right of parents to determine their child’s upbringing and the method in which their education should be provided.”<sup>5</sup> Against that background, the Georgia House believes that “Germany infringes upon the parental rights of its citizens by forcing children to attend brick and mortar schools for their education and denying parents the right to home school their children” and that “the federal government of Germany justifies its policy against home schooling on a desire to prevent the

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1. 268 U.S. 510, 535 (1925).
2. H.R. 850, 149th Leg., 2d Sess. (Ga. 2009), available at [http://www.legis.state.ga.us/legis/2009\\_10/pdf/hr850.pdf](http://www.legis.state.ga.us/legis/2009_10/pdf/hr850.pdf).
3. H.R. 87, 106th Leg. (Tenn. 2009), available at <http://www.capitol.tn.gov/Bills/106/Bill/HR0087.pdf>.
4. Ga. H.R. 850, *supra* note 2.
5. *Id.*

emergence of parallel societies based on separate philosophical convictions.”<sup>6</sup> Such a justification is inadequate when it results in a “denial of the basic right of parents to choose the manner in which their child is educated [that] goes against the ideals of individual liberty and freedom.”<sup>7</sup>

Georgia and Tennessee took such an unprecedented stand because currently, homeschooling is illegal in Germany.<sup>8</sup> German students must attend school beginning at six years old and continue for at least nine years.<sup>9</sup> This “[c]ompulsory schooling involves regular attendance of lessons and other compulsory school events. Both pupils and parents are responsible for seeing that this obligation is met . . . . The school head checks on attendance records and can, if necessary, enforce attendance through various measures against the pupil, parents or the training company.”<sup>10</sup> In the mind of state legislators in the United States, the German system prioritizing state control over individual liberty is an infringement on the most basic liberties of German citizens.

But attacks on individual liberty and freedom, especially in the context of education, are not a new development in Germany. They are, in fact, vestiges of Germany’s totalitarian regime in the early 20th century. When Adolf Hitler rose to power in the early 1930s, the Nazis subordinated years of cultural progress in the arts and sciences to the predilections of the State.<sup>11</sup> Focusing on a perceived need to unify Germany, Nazi leaders proceeded systematically to attack books, music, films, and radio programs that forwarded any view of the world inconsistent with the Third Reich’s agenda.<sup>12</sup> It was during this period in Germany’s history that the rest of the world gained from Germany’s loss. Many artists and intellectuals, including Einstein and others, emigrated to the United States and elsewhere to escape Nazi persecution. One immigrant to the United States, Thomas Mann, had been an esteemed writer in Germany for many years.<sup>13</sup> A winner of the Nobel Prize for Literature, Mann articulated in his work the difficulties of life in Germany.<sup>14</sup> He discussed religious themes in his acclaimed *Joseph und seine Brüder*, and was not ashamed to exalt the virtues of other

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6. *Id.*

7. *Id.*

8. *See infra*. Part I.B.

9. SECRETARIAT OF THE STANDING CONFERENCE OF THE MINISTERS OF EDUCATION AND CULTURAL AFFAIRS OF THE LÄNDER IN THE FEDERAL REPUBLIC OF GERMANY, THE EDUCATION SYSTEM IN THE FEDERAL REPUBLIC OF GERMANY 2007, at 41–42 (2009).

10. *Id.*

11. *See* WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 333–34 (1959) (referring to this subordination as the “Nazification of Culture”).

12. *Id.* at 334.

13. *Id.* at 333.

14. *See generally* HERMANN KURZKE, THOMAS MANN: LIFE AS A WORK OF ART (Leslie Wilson trans.) (2002).

cultures.<sup>15</sup> Thomas Mann left Germany as his books were being burned, less than five months after Hitler took power.<sup>16</sup> Dr. Goebbels, the Nazi Minister of Propaganda, chose to destroy Mann's works among others because such books "act[] subversively on our future or strike[] at the root of German thought, the German home and the driving forces of our people."<sup>17</sup>

When Thomas Mann arrived in the United States in 1939, he observed an educational system largely envisioned by another Mann nearly a century before.<sup>18</sup> Horace Mann, widely regarded as the father of the American Public School System, had laid out his theory of the State-supported school and made that theory a reality through his work on the Massachusetts Board of Education.<sup>19</sup> Mann envisioned a State-run educational system focused on removing local control of schools in favor of a "common, superintending power over them."<sup>20</sup> In his view, such an educational system should not only impart knowledge, but form good citizens, even at the risk of taking from parents their rights over the upbringing of their children.<sup>21</sup>

Since Mann's time, the United States has developed parallel educational systems that allow public, private, and homeschool educational systems to coexist.<sup>22</sup> The system one enters is largely based on the individual choices of parents as they determine what is best for their children. No such system exists in Germany. This note provides a normative analysis of the constitutional implications of parental choices in education—specifically with regard to homeschooling—in the United States and Germany. This note argues against recent scholarship calling for more State intervention in education<sup>23</sup> and shows how the fundamental right of parents to direct the education of their children must be preserved to further the goals of a liberal democracy. Part One discusses the historical situation of Germany in the 1930s that led to the adoption of compulsory attendance laws. It then moves on to consider Germany's recent

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15. See R. Gafrik, *Thomas Mann's "Indian" Legend: The Transposed Heads*, 14 SLOVAK REV. 1 (2005).

16. Thomas Mann—Autobiography, [http://nobelprize.org/nobel\\_prizes/literature/laureates/1929/mann-autobio.html](http://nobelprize.org/nobel_prizes/literature/laureates/1929/mann-autobio.html) (last visited Mar. 27, 2010) (excerpting from NOBEL LECTURES, LITERATURE 1901–1967 (Horst Frenz ed., 1969)).

17. SHIRER, *supra* note 11, at 333.

18. See generally HORACE MANN, LECTURES ON EDUCATION (1855).

19. See PHILIP JAMES MCFARLAND, HAWTHORNE IN CONCORD 74–75 (2004).

20. MANN, *supra* note 18, at 19.

21. *Id.* at 56: "Education must prepare our citizens to become municipal officers, intelligent jurors, honest witnesses, legislators, or competent judges of legislation,[sic]—in fine, to fill all the manifold relations of life. For this end, it must be universal."

22. For an analysis of parallel systems based on the goals of parallel educational systems, see David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 AM. EDUC. RES. J. 39 (1997).

23. See generally Kimberly Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123 (2008).

attacks on homeschooling families and the legal battles that have led to civil and criminal sanctions for parents. Part Two considers the constitutional history of parental rights in education in the United States. Part Three discusses the policy debates surrounding homeschooling and implications of policy decisions that may impact both the United States and Germany. There, this note argues that any infringement on parental rights to homeschool is inconsistent with the principles of a robust liberal political democracy. The note concludes by acknowledging the current problems in educational policy as well as future threats to homeschooling in the United States and Germany.

## II. PART ONE: GERMANY

### **A. 1938 and the “Nazification”<sup>24</sup> of German Education**

Since the 1930s, Germany has taken Horace Mann’s idea of education *for citizenship* mentioned above to a new level.<sup>25</sup> Strains of the nationalistic tendencies of Nazi Germany still infect parts of today’s German Republic.<sup>26</sup>

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24. SHIRER, *supra* note 11, at 333. The term “Nazification” is Shirer’s. There is, however, no better way to describe Hitler’s purposeful overthrow of the existing educational systems in favor of an overly-nationalistic regime. This Nazification sent shockwaves through the country that families still feel today as they fight against laws enacted while Germany was under Nazi domination.

25. *Id.* at 343:

For education in the Third Reich, as Hitler envisaged it, was not to be confined to stuffy classrooms but to be furthered by a Spartan, political and martial training in the successive youth groups and to reach its climax not so much in the universities and engineering colleges, which absorbed but a small minority, but first, at the age of eighteen, in compulsory labor service and then in service, as conscripts, in the armed forces.

26. *Id.* at 344 (“Prior to 1933, the German public schools had been under the jurisdiction of the local authorities and the universities under that of the individual states. Now all were brought under the iron rule of the Reich Minister of Education.”); *see* FRIEDRICH PAULSEN, GERMAN EDUCATION PAST AND PRESENT 3 (T. Lorenz trans., 1908). Modern German education reflects some of Paulsen’s description of ancient education:

In ancient times social life was dominated by the State, *i.e.*, the sovereign city. Hence, the goal of education was to render the rising generation fit to serve the city efficiently in peace and war, and thus to maintain its permanent existence. This alone gave the life of the individual an object and a significance, raising him beyond the sphere of individual and temporal concerns: to serve the city meant to serve its gods.

Parents no longer have a right to educate their children at home, and procedures for setting up private schools are laborious.<sup>27</sup> In fact, the draconian policies that are on the books in Germany today were originally implemented by Hitler in 1938.<sup>28</sup>

The undulations leading to the fall of the Weimar Republic in 1933 and the resulting rise of the National Socialist Party (Nazi) carried behind them a nationalistic tsunami.<sup>29</sup> The Nazi party took over through a surreptitious chain of events.<sup>30</sup> Behind closed doors and through back room deals—or coercions—the Nazis came to power after a free election in 1933.<sup>31</sup> Through nearly all the laws put into place in the years between the fall of the Republic and its resurgence after the Second World War, the Nazi party indoctrinated the German populace to make it submissive to the new regime.<sup>32</sup> Knowing the importance of affecting impressionable children, Hitler’s educational aspirations for the Third Reich had state values at their core.<sup>33</sup> State-sponsored education was an important means to assure that the fledgling Nazi government could dispense its propaganda and thus gain the support of the people.<sup>34</sup> Every teacher joined the National Socialist

27. Telephone Interview with Michael Donnelly, Staff Attorney for Member Affairs for the Federal Republic of Germany, Home School Legal Defense Association (Oct. 2, 2008).

28. See Paul Belien, *2007 German Horror Tale*, WASH. TIMES, Feb. 28, 2007, available at <http://www.washtimes.com/news/2007/feb/27/20070227-084730-5162r/> (discussing history of homeschooling laws in Germany).

29. For background information on the Weimar Republic and its fall, see Sheri Berman, *Civil Society and the Collapse of the Weimar Republic*, 49 WORLD POL. 401, 402, 413–24 (1997).

30. See generally SHIRER, *supra* note 11, at 320–81.

31. *Id.* at 273. The Nazi Party failed to gain a two-thirds majority in the March 5, 1933 election, which was necessary to give Hitler the power he desired as head of the government. Instead, the Nazis used their influence with the other minority parties to pass an “enabling act,” giving Hitler and his cabinet full legislative authority for four years. *Id.* at 273–74.

32. See *id.* at 320.

The overwhelming majority of Germans did not seem to mind that their personal freedom had been taken away, that so much of their culture had been destroyed and replaced with a mindless barbarism, or that their life and work had become regimented to a degree never before experienced even by a people accustomed for generations to a great deal of regimentation.

For a description of the lengths to which the new Nazi government went to remove any vestige of the preceding Republic, see generally *id.* at 273–319.

33. *Id.* at 343.

34. See *id.* at 333. During the massive book-burnings, Dr. Goebbels, the Propaganda Minister, remarked: “The soul of the German people can again express itself. These flames

Teachers League, a forced association in which teachers agreed to uphold and promote Nazi ideals.<sup>35</sup> Teachers were, under the law, the “executors of the will of the party-supported State.”<sup>36</sup> The State infected every part of the educational system and, like a cancer, spread throughout the entire organism. Further, education was the path for the Nazi program to metastasize into every aspect of the larger society.<sup>37</sup> Hitler outlined his program for German education in *Mein Kampf*, saying that education was not so much about gaining knowledge, but in “building bodies which are physically healthy to the core.”<sup>38</sup> Moreover, Hitler “had stressed in his book the importance of winning over and then training the youth in the service ‘of a new national state.’”<sup>39</sup> Exalting the power of the State over children, Hitler told parents that “[y]our child belongs to us already . . . What are you? You will pass on. Your descendants, however, now stand in the new camp. In a short time they will know nothing else but this new community.”<sup>40</sup>

With its new nationalistic focus, the Nazi revolution dramatically changed the nature of German education. Education left the boundaries of traditional classroom instruction that existed under the Weimar Republic, and instead focused on extracurricular activities.<sup>41</sup> German students were not to be intellectuals, but political animals.<sup>42</sup> The Hitler Youth was the key to the new

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not only illuminate the final end of an old era; they also light up the new.” See *id.* at 333–34, describing the censorship of books by the government:

The new Nazi era of German culture was illuminated not only by the bonfires of books and the more effective, if less symbolic, measures of proscribing the sale or library circulation of hundreds of volumes and the publishing of many new ones, but the regimentation of culture on a scale which no modern Western nation has ever experienced.

One apparent fear among a minority of leaders in Germany today is that homeschooling will form a “parallel society” that threatens the “official” German culture designed by the government. The Nazis ensured their culture would take hold through propaganda, censorship, and force. Today’s Germany protects its “State culture” through inhibiting parental choice and rigorously applying mandatory attendance laws. See generally *Europe’s Anti-foreigner Mood Grows*, *ECONOMIST*, Nov. 22, 2007, available at [http://www.economist.com/world/europe/displaystory.cfm?story\\_id=10193441](http://www.economist.com/world/europe/displaystory.cfm?story_id=10193441).

35. SHIRER, *supra* note 11, at 344.

36. *Id.*

37. *Id.* at 342–54.

38. *Id.* at 343.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

German program.<sup>43</sup> In a six-year period, membership in the Hitler Youth surged from 107,956 to 7,728,259.<sup>44</sup> The Hitler Youth organization was the only youth organization allowed to operate in the Third Reich.<sup>45</sup> It sought to train the German student not in the typical subjects once taught in schools, but to educate them “physically, intellectually and morally in the spirit of National Socialism.”<sup>46</sup> This time, participation in the Hitler Youth was compulsory and parents found themselves in jail if their children were not part of the organization.<sup>47</sup> On May 1, 1937, Hitler made clear that the State was taking de facto custody of Germany’s children: “This new Reich will give its youth to no one, but will itself take youth and give to youth its own education and its own upbringing.”<sup>48</sup>

### **B. A Brief History of Homeschooling in Germany**

The homeschooling “movement” began at the turn of the 20<sup>th</sup> century when Berthold Otto, a private tutor and educational leader, started the movement by educating his own children at home.<sup>49</sup> After some time, other families brought their children to Otto’s home to be educated.<sup>50</sup> As a result, a “homeschool” developed that addressed individual students’ needs.<sup>51</sup> Prior to 1920, Germany allowed homeschooling as a valid exception to compulsory attendance requirements in certain instances.<sup>52</sup> The Constitution of the Weimar Republic (*Reichsgrundschulgesetz*) (1919–33) required obligatory school attendance as an

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43. *Id.* at 348 (“To Adolf Hitler it was not so much the public schools, from which he himself had dropped out so early in life, but the organizations of the Hitler Youth on which he counted to educate the youth of Germany for the ends he had in mind.”).

44. *Id.* at 348, 351.

45. *Id.* at 349.

46. *Id.*

47. *Id.* at 350. The clear lack of State deference to parental control arose in situations where parents were sentenced to prison even though they wanted to remove their daughters because “cases of pregnancy [among members of the Hitler Youth] had reached scandalous proportions.”

48. *Id.* at 343.

49. Thomas Spiegler, *Home Education in Germany: An Overview of the Contemporary Situation*, 17 *EVALUATION & RES. IN EDUC.* 2 & 3, 181–82 (2003).

50. Amanda Petrie, *Home Education in Europe and the Implementation of Changes to the Law*, 47 *INT’L. REV. OF EDUC.* 477, 489 (2001).

51. Spiegler, *supra* note 49, at 182. One of the main goals of a homeschool education is an individualized education for each child. Families that homeschool for non-religious reasons often cite this fact as a motivation for their decision to homeschool.

52. Petrie, *supra* note 50, at 489.

effort to create an “equality of opportunities” among members of different social classes in Germany.<sup>53</sup>

Although Otto is typically said to be the “precursor” to the homeschooling movement in Germany, his work had a small effect on the following generations immediately following his death in 1933, likely because his influence was thwarted by the swift Nazi takeover in 1933.<sup>54</sup>

By 1938, Nazi law was in effect and specifically outlawed homeschooling under *Reichsschulpflichtgesetz*, the first general regulation in the German Reich without exceptions and with criminal consequences in case of contraventions.<sup>55</sup> After World War II, however, a renewed interest in homeschooling led educators to publish a “number of books and articles about topics like alternative learning concepts, children [sic] rights, school critics and *Antipädagogik* (anti-pedagogy).”<sup>56</sup>

Not until the 1980s, however, did German parents make the first real attempts to homeschool.<sup>57</sup> In one case, Helmut Stücher, an accountant, removed his children from the public school because he thought that the curriculum was “incompatible with his Christian belief and moral values.”<sup>58</sup> This action led Stücher through “[s]everal years of legal disputes . . . with fines, loss of child custody and a five-day prison sentence.”<sup>59</sup> In 1989, Stücher was given back “full child custody” after nine years of trying to homeschool.<sup>60</sup> In another case, a couple, teachers by training, did not send their son to school because he did not want to attend the local public school.<sup>61</sup> The couple faced “several fines and penalty payment”<sup>62</sup> for keeping their son out of school and when they challenged the constitutionality of the State’s action, their complaint was dismissed.<sup>63</sup> This family, as others have done, moved to Austria, where homeschooling is legal.<sup>64</sup> In

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53. E-mail from Dr. Thomas Spiegler, Department of Sociology, Philipps-University Marburg, Germany, to Aaron Martin, Student, University of Arizona James E. Rogers College of Law (Apr. 9, 2009, 06:59:30 MST) (on file with author).

54. *Id.*

55. *Id.*

56. Spiegler, *supra* note 49, at 182. It should be noted here that “anti-pedagogy” is still an extant theory among a small minority in the homeschooling movement. Those who advocate “non-schooling” or “un-schooling” seek to allow their children to learn without any structured schooling whatsoever. This author uses “homeschooling” in its traditional sense, referring to some form of formal education provided by the parents within the home setting. Homeschooling can also mean branching out into cooperatives among groups of families, while retaining an education with some structure, process, goals, and planning.

57. See Petrie, *supra* note 50, at 490.

58. Spiegler, *supra* note 49, at 182.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*



a third example, a boy suffered from different physical pains” while at school.<sup>65</sup> After enduring this condition for some time and receiving a doctor’s note, the family removed him from the school.<sup>66</sup> These parents did not receive any fines or imprisonment for their refusal to comply with the compulsory attendance laws.<sup>67</sup>

Stücher’s homeschool, mentioned above, has been described by Spiegler and Petrie as the “Philadelphia School,” because it uses a broader homeschooling model that has survived in the current climate in Germany.<sup>68</sup> The school is based on the Christian belief that parents have the primary duty to educate their children and that a child’s education should be consistent with the teachings of the Bible.<sup>69</sup> While the Philadelphia School exhibits some aspects of non-schooling,<sup>70</sup> it is also a testament to the success individuals and families can have in home education. Stücher’s model is ideally organized around a church or ecclesial community of families that commits to living out Christian principles in education and every other aspect of life.<sup>71</sup> Within these groups, however, there is no standard method or even a common belief system. “The ideological orientations range from strict faithfulness to the Bible, to persons with a diverse spiritual openness into several directions.”<sup>72</sup> Educational methods range “[f]rom an open ‘unschooling’ approach, which bases the learning process primarily on the child’s needs and interests, to a structured timetable for schooling at home.”<sup>73</sup> One cannot forget, however, that the many options a homeschooling family may have in other countries are not available in Germany because of the State’s compulsory education laws.<sup>74</sup> Parents approach the illegality of the situation in various ways—some educate in secret, others seek out a community school like the Philadelphia

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65. *Id.*

66. *Id.* at 183.

67. *Id.*

68. *Id.* at 183–85; Petrie, *supra* note 50, at 490.

69. Spiegler, *supra* note 49, at 183. For one Christian tradition’s approach to education, see the Catholic Church’s *Code of Canon Law*:

Parents and those who take their place are bound by the obligation and possess the right of educating their offspring. Catholic parents also have the duty and right of choosing those means and institutions through which they can provide more suitably for the Catholic education of their children, according to local circumstances.

1983 CODE c. 793, §1. Further, “Parents have the most grave duty and the primary right to take care as best they can for the physical, social, cultural, moral, and religious education of their offspring.” 1983 CODE c. 1136.

70. *See supra* note 56 on anti-pedagogy.

71. *See Spiegler, supra* note 49, at 184–85.

72. *Id.* at 185.

73. *Id.*

74. *Id.*

School, and others try to reason with State officials.<sup>75</sup> Because the State educational policies are implemented on state and local levels, parents have varied success in receiving dispensations to homeschool.<sup>76</sup> “It would seem that families who are being left alone to home educate in Germany are either German families living in small villages where they are well known or non-German families who live in large conurbations.”<sup>77</sup> To say the least, “[t]he situation for home education families is extremely unpredictable.”<sup>78</sup>

### **C. Legal Structure of Education in Germany**

After Germany unified in 1990, the Republic took strides to create a common and comprehensive educational system.<sup>79</sup> Ostensibly set up as a “democratic and social federal state,”<sup>80</sup> Germany today retains some centralized control over education through its Basic Law even though education laws are implemented through the *Länder* (German states).<sup>81</sup> Absolute local control of schools, however, had actually been the norm until the Nazification of Germany began in 1933.<sup>82</sup> Before Nazi Germany, schools varied widely depending on the location and availability of resources.<sup>83</sup> At the turn of the twentieth century, while the goals of education were uniform throughout the country, one could say, “in Germany the school is by no means an imperial institution.”<sup>84</sup> Schools were run by local officials and had the idiosyncrasies one would expect from diffuse control, experimentation with various educational methods, and institutional arrangements including “the teaching of mechanical skill . . . for boys, of housekeeping for girls, supplementary schools for backward children, as well as sanitary regulations, and medical control over all the pupils of the Elementary School.”<sup>85</sup> Germany had a policy of compulsory attendance for any child who was physically and intellectually ready.<sup>86</sup> Exceptions were made, however, for

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75. *Id.*

76. *Id.* (“The decision makers [and] the local authorities have decisive influence on whether a legal dispute arises or not.”).

77. Petrie, *supra* note 50, at 492.

78. Spiegler, *supra* note 49, at 185.

79. SECRETARIAT, *supra* note 9, at 17–18.

80. Grundgesetz [GG] [Constitution] art. 1 (F.R.G.).

81. SECRETARIAT, *supra* note 9, at 32.

82. See WILHELM LEXIS, A GENERAL VIEW OF THE HISTORY AND ORGANISATION OF PUBLIC EDUCATION IN THE GERMAN EMPIRE 89 (G.J. Tamson trans., 1904) (explaining that elementary schools in Germany during that time were far from uniform).

83. *Id.*

84. *Id.*

85. *Id.* at 90.

86. *Id.* at 91.

children who received a comparable level of education in a private setting.<sup>87</sup> The only children that remained outside of the mainstream in a public or private school were those who were from “the families of strolling actors, acrobats, and the shifting population engaged in river navigation”<sup>88</sup> whose parents worked in occupations that required extensive travel. At the beginning of the twentieth century, less than 600 students were taught outside of the public school system.<sup>89</sup> For violating these compulsory attendance rules,<sup>90</sup> parents could be fined or lose custody of their children.<sup>91</sup>

### 1. The Basic Law (the Federal German Constitution)

The German educational system under the Basic Law places the federal state over the individual *Länder*. West Germany first enacted its Basic Law on May 23, 1949.<sup>92</sup> Before 1990, Germany’s Basic Law gravitated toward a socialist structure left over from when Germany was under Soviet control at the end of the Second World War.<sup>93</sup> In the early 1990s, the new unified German government brought its education laws into conformity with the federalist organization of the Basic Law, which was revised in 1993 to reflect the unification.<sup>94</sup> German unification required the former East German *Länder* to conform to the governmental system already in place in the West German *Länder*, including the structure of the educational system.<sup>95</sup> While the Federal State has some control over education through the Basic Law,<sup>96</sup> the *Länder* still have the authority to administer the educational system in their own territories.<sup>97</sup> Amendments to the Basic Law in 2006 outline areas of education that are governed specifically by the Federal government:

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87. *Id.*

88. *Id.*

89. *Id.*; see L.R. KLEMM, PUBLIC EDUCATION IN GERMANY AND IN THE UNITED STATES 19–20 (1911) (comparing compulsory attendance laws in Germany and the United States). Although Klemm is clearly pro-German in his views throughout the book, he offers many keen insights into the differences between German and U.S. education.

90. LEXIS, *supra* note 82, at 91.

91. See *Where Home Schooling is Illegal*, BBC WORLD SERVICE, Mar. 22, 2010, [http://news.bbc.co.uk/2/hi/uk\\_news/education/8576769.stm](http://news.bbc.co.uk/2/hi/uk_news/education/8576769.stm).

92. SECRETARIAT, *supra* note 9, at 17–18 (discussing the division between East and West Germany at the end of World War II and the formation of the Basic Law).

93. See David Phillips, *Lessons from Germany?—The Case of German Secondary Schools*, 3 BRIT. J. EDUC. STUD. 228–29 (1987); SECRETARIAT, *supra* note 9, at 29–30.

94. SECRETARIAT, *supra* note 9, at 33.

95. *Id.* at 30.

96. GG art. 7.

97. SECRETARIAT, *supra* note 9, at 33.

- In-company vocational training and vocational further education
- Admission to higher education institutions and higher education degrees
- Financial assistance for pupils and students
- Promotion of scientific and academic research and technological development, including the promotion of up-and-coming academics
- Youth welfare
- Legal protection of participants of correspondence courses
- Regulations on entry to the legal profession
- Regulations on entry to medical and paramedical professions
- Employment promotion measures; occupational and labor market research<sup>98</sup>

In addition to these specific federal tasks, the federal government also contributes to funding for research institutions in cooperation with the *Länder*.<sup>99</sup> Despite the appearance of local control, the federal government controls the overarching educational policies.<sup>100</sup> The “public need for education to be coordinated and harmonised [sic] throughout the country” has led to an emphasis on the implementation of federal policies in the *Länder*.<sup>101</sup> In an agreement between the federal government and the *Länder*, the federal government seems to have much more control over local schools than the Basic Law would suggest.<sup>102</sup>

The federalization of education in Germany also takes many educational decisions out of the hands of parents and leaves them with the State.<sup>103</sup> Under the text of the Basic Law, parents have the primary responsibility over their children

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98. *Id.*

99. *Id.*

100. *Id.* at 33.

101. *Id.* at 43–44.

102. *Id.*

The so-called *Hamburger Abkommen*, an agreement which was reached by the Standing Conference in 1964 (and amended in 1971), remains the cornerstone on which the joint fundamental structures of the school system in the Federal Republic of Germany is based. It incorporates the following general provisions: the beginning and duration of full-time compulsory education, the dates for the start and end of the school year, the length of school holidays as well as the designation of the various educational institutions and their organisation (types of school etc.), the recognition of examinations and leaving certificates, and the designation of grade scales for school reports.

103. *Id.* at 68 (explaining the rights of parents and limitations on parents’ participation in decision-making bodies in schools).

and their education.<sup>104</sup> At the same time, the State watches over parents to ensure that parents are exercising their responsibilities appropriately.<sup>105</sup> In fact, under the Basic Law, the State has the same duty as parents to educate children.<sup>106</sup> When the competing interests of parents and the State collide, any purported parental rights wilt in the face of State control.<sup>107</sup> Parental rights inherent in the Basic Law are also subject to the control of local school officials who determine the extent to which parents can participate in their children's education.<sup>108</sup>

One area where the State—at both the federal and local levels—exercises ultimate control over parental rights is through compulsory education. Compulsory education had been in place since the nineteenth century in Germany, but laws enacted prior to 1938 allowed for the attendance stipulations to be satisfied through private or home schooling.<sup>109</sup> The 1938 Nazi compulsory education law, *Reichsschulpflichtgesetz*, had no alternative way of satisfying the compulsory attendance requirement, and thereby outlawed homeschooling.<sup>110</sup> Therefore, the paternal presumption that government can best educate children began under the Third Reich. Today, even after the Nazi influence has subsided, that presumption remains enshrined in German law through the compulsory attendance laws.<sup>111</sup> For example, children must attend school beginning at age six for a total of nine years.<sup>112</sup> In addition, parents are responsible for ensuring that their children are present in all classes and at other school requirements.<sup>113</sup> Further, the State still has the power to impose penalties on the students or parents who do not comply with the laws.<sup>114</sup>

Moreover, the compulsory attendance laws from 1938 harmonize with the current German Constitution (or Basic Law) in that the rights of the State

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104. GG art. 6, § 2 (“The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them.”).

105. *Id.*

106. *Id.*; Spiegler, *supra* note 49, at 186: “In accordance with the Federal Constitutional Court, the state has responsibility for education [*Erziehungsauftrag*], which is tantamount to the parental right of education.” See GG art. 7, § 1 (declaring that the state shall supervise the school system); SECRETARIAT, *supra* note 9, at 68.

107. SECRETARIAT, *supra* note 9, at 68.

108. *Id.*

109. Spiegler, *supra* note 49, at 180.

110. *See id.*

111. *See* GG. Specifically, Article 6 (Marriage and the family), Article 7 (School System), and Article 13 (Inviolability of the home) all speak to the tensions between parents and the German government in these areas.

112. SECRETARIAT, *supra* note 9, at 41. These requirements differ depending on the program each student enters.

113. *Id.* at 42.

114. *Id.*

effectively supplant any freedoms parents may have.<sup>115</sup> Parents seeking an alternative educational path for their children are subordinated to the state-controlled educational policies supported by the German Constitution. Far from allowing parents the right to direct the upbringing of their children, Germany's Basic Law promotes total State control over education:

Article 6(2): The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.<sup>116</sup>

Article 6(3): Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.<sup>117</sup>

Article 7(1): The entire school system shall be under the supervision of the state.<sup>118</sup>

Article 7(4): The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the State and shall be subject to the laws of the Länder. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.<sup>119</sup>

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115. GG art. 7. Article 7(1), for example, states: "The entire school system shall be under the supervision of the state." See SECRETARIAT, *supra* note 9, at 68 (explaining the limitations imposed on parental participation).

116. GG art 6.

117. *Id.*

118. GG art. 7.

119. *Id.*

Article 7(5): A private elementary school shall be approved only if the educational authority finds that it serves a special pedagogical interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality.<sup>120</sup>

Article 7(6): Preparatory schools shall remain abolished.<sup>121</sup>

Other provisions that would seem to protect the integrity of the family and the choices made within it, such as Article 13(1) (“The home is inviolable”),<sup>122</sup> are trumped by the strong language about compulsory public education above, giving homeschooling families little actual protection from the State. Further, “education” in the Basic Law is more than simple classroom instruction—it is more aptly translated “upbringing” and pertains to the full development of the child’s character and person, rather than to rote learning.<sup>123</sup> Other sections of the Basic Law elucidate the conflict between parental control and the power of the State.<sup>124</sup> Protections for freedom of religion or conscience that most naturally lie with the individual and family also fall under the control of the State.<sup>125</sup> Thus, while the Basic Law seems to provide significant rights for parents and families, the actual protections are thin.

## 2. Other Legal Influences

In addition to the Basic Law in Germany, the structure of the European Union brings other laws to bear on the German educational system. In the mid-twentieth century, the *Universal Declaration on Human Rights* outlined the legal basis for a right to education.<sup>126</sup> Other international agreements followed in suit.<sup>127</sup> These international agreements require that education be upheld as a

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120. *Id.*

121. *Id.*

122. GG art. 13.

123. Spiegler, *supra* note 49, at 186.

124. *See id.*

125. *Id.*

126. Vernor Muñoz, Special Rapporteur on the Right to Education, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,” ¶ 8, delivered to the General Assembly, U.N. Soc. A/HRC/4/29/Add.3 (Mar. 9, 2008) [hereinafter Muñoz].

127. *Id.* (“Subsequently, the right to education was enshrined in a wide range of

human right, that it be compulsory and given without cost, and that signatories provide the structures and resources to allow people to exercise this right.<sup>128</sup> At the same time, these international agreements hold parental rights superior to the State.<sup>129</sup> Although the Convention provides a framework for strong parental rights, many other documents declare the State to be the primary educator of its children.<sup>130</sup>

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international and regional human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the European Social Charter.”); *see* Muñoz ¶ 9:

The Government of Germany has ratified the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR), as well as other major human rights treaties including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography, the European Convention on Human Rights and the European Social Charter. These treaties contain important provisions related to the right to education and provide a framework for legislation and policy at national level.

128. *Id.* ¶ 10.

129. Convention on Protection of Human Rights and Fundamental Freedoms, art. 2, Mar. 9, 1953, CETS No.: 005 (“In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”).

130. *See, e.g.*, International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (Jan. 3, 1976):

**Article 13 General comment on its implementation** 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. . . . The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such



#### **D. The German Focus on the State over Parents**

No matter what rights parents possess to direct the upbringing of their children in Germany, those rights are overshadowed by the control of the State.<sup>131</sup> Germany's constitutional structure does not address homeschooling explicitly, and some scholars dispute "whether it is possible to derive compulsory school attendance, which is grounded in the constitutions of the federal states, from the Basic Law."<sup>132</sup> As a result, the individual *Länder* direct and implement particular educational policies regarding homeschooling.<sup>133</sup> This dichotomy between parental rights and the Basic Law, as applied by the *Länder*, has been the gravamen of the cases brought before the German courts.<sup>134</sup>

The State's interest in minimal parental involvement is also clear from Germany's standardized secondary education structure. Once a student has completed his mandatory elementary education, he attends one of four types of secondary schools based on his performance in the elementary school.<sup>135</sup> Each secondary school locks the student into a particular educational track or "opportunity structure."<sup>136</sup> If the student has entered the highest-level secondary school, the *Gymnasium*, parental involvement is practically absent.<sup>137</sup> Matriculation in the *Gymnasium* leads to the *Abitur* degree, the only degree that allows a German student to enter the university system.<sup>138</sup> In the lower-level schools, the *Hauptschule* and *Gesamtschule*, parental involvement is greater if only because the lower-level schools offer fewer opportunities for future success in the most prestigious circles in society.<sup>139</sup> The *Gesamtschule* encourages

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minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

131. Spiegler, *supra* note 49, at 186.

132. *Id.*

133. *Id.*

134. *Id.* at 185–87.

135. Hans Oswald, David P. Baker & David L. Stevenson, *School Charter and Parental Management in West Germany*, 61 *SOCIOLOGY OF EDUC.* 4, 256–57 (Oct. 1988).

136. Oswald, *supra* note 135, at 257.

137. *Id.* at 257–58.

138. *Id.* at 257.

139. *Id.* at 258.

parental involvement, if only because a student's success at this level determines what degree that student will receive.<sup>140</sup> Parental involvement declines as the prestige of the secondary school increases for a number of reasons:

First, the *Gymnasium's* distinct charter and link to a narrower and more prestigious part of the labor market may lower the demand for parents' day-to-day involvement in schooling, whereas the *Realschule's* less-clear charter and the wider range of occupational choices it presents to students may raise the demand for parents' day-to-day involvement to help determine which path their children will select. Second, the elite status and sponsored organization of the *Gymnasium* may militate against informal participation by parents, while the less-elite and less-sponsored *Realschule* may facilitate both formal and informal participation. A final, more speculative reason is that parents may perceive that the *Realschule* (and thus the *Mittlere Reife*) is the cutoff educational degree for children's entrance into "modern" German citizenry. The relatively high educational cost of going from the *Realschule* to the *Hauptschule* may increase the likelihood that parents of students in the *Realschule* will be more active in the schooling of their adolescents.

Thus, the structure of secondary education and, as seen below, recent cases in Germany, elucidate the overall German rationale for restricting parental control.

Some rationales given for the State's power over the parents' ability to direct their children are to promote "the integration into and first experience with society," "to avoid the emergence of parallel societies based on separate philosophical convictions," and to "integrate[] minorities into society."<sup>141</sup> Others argue that "the task of education in the hands of the state is necessary to guarantee the function of democratic institutions, the passing on of constitutional basic values and hence by the existence of state and society."<sup>142</sup> The argument that parents cannot transmit these values to their children, however, seems to be a veiled admission that the State's interest goes beyond these stated goals. While a country may have a respectable goal of instilling civil virtues in its children, restrictions on parents actually stifle the myriad viewpoints that homeschooling

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140. *Id.* Education in the *Realschule* leads to the *Mittlere Reife* degree, allowing a student to become a full member of German society, though not through the university system: "The *Mittlere Reife* is more loosely tied to the labor market than is the *Arbitur* and, unlike the *Arbitur*, does not guarantee entrance to postsecondary education." *Id.* at 257.

141. *Konrad v. Germany*, App. No. 35504/03, 8 (Eur. Ct. H.R. Sep. 11, 2006). Recall that these were a basis for the Georgia House Resolution 850, *supra* note 2.

142. *Spiegler*, *supra* note 49, at 186.

parents and children would offer to the larger society that would benefit the overall political discussion within that country. Indeed, homeschooling parents argue that the basic level of education is better at home, and there is no evidence that homeschooled children are less prepared to function in a democratic society.<sup>143</sup> Parents homeschool their children for various reasons, and those reasons do not always contradict the larger goals of State education. For instance, many parents in Germany homeschool their children for religious reasons.<sup>144</sup> Other parents homeschool because they disagree with the public school curriculum, or because they think that they can educate their children better than the State.<sup>145</sup> None of these reasons in themselves mean that homeschooled children will not be good citizens. No matter what reason parents have for homeschooling, parents are not given the opportunity to educate their children to be well-formed citizens, but must instead subordinate their own educational desires to the State's agenda. By centralizing this control to itself, it seems more likely that the German State fears a true liberal democracy with its attendant focus on pluralism in society.<sup>146</sup>

#### **E. Recent Court Decisions on Homeschooling in Germany**

Homeschooling is not a valid reason to exempt children from current compulsory attendance laws in Germany.<sup>147</sup> Despite that, there are families who face severe recriminations and contravene the law in order to educate their children at home in the face of hostile authorities. The German government has successfully maintained before courts that this centralized education structure is necessary to protect its particular form of government.<sup>148</sup> In a recent case, *Konrad v. Germany*, the German Constitutional Court (BVR) held that it was within Germany's power to require compulsory attendance in government-run schools over and against the parents' challenge on religious freedom grounds. Decisions of German courts against homeschoolers, such as the *Konrad* decision, have been

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143. *Id.* at 188.

144. HSLDA, *HSLDA Files Asylum Application for German Homeschool Family*, Nov. 17, 2008, <http://www.hslda.org/hs/international/Germany/200811170.asp>.

145. Allan Carlson, *Homeschooling*, FIRST PRINCIPLES, May 6, 2008, available at <http://www.firstprinciplesjournal.com/articles.aspx?article=227&loc=r>.

146. See Michael Donnelly, *Homeschooling: Pluralistic Freedom, Not Parallel Society*, HSLDA, Sep. 19, 2007, <http://www.hslda.org/hs/international/Germany/200709190.asp>.

147. See Spiegler, *supra* note 49, at 180 (tracing the roots of compulsory education in Germany to the 9th century under Charlemagne to the first real enforcement by the State in the 16th century to the 1938 law that criminalized parents' refusal to send children to school).

148. *Konrad v. Germany*, App. No. 35504/03, 8 (Eur. Ct. H.R. Sep. 11, 2006).

appealed to the European Court of Human Rights (ECHR) to no avail.<sup>149</sup> In a rare move by the ECHR, the court spoke at length about its rejection of the *Konrad* application.<sup>150</sup> Akin to a denial of *certiorari* in the United States Supreme Court, the ECHR wrote that Germany was within its “margin of appreciation,” allowing the State to implement the *European Convention* as it wanted.<sup>151</sup> One of Germany’s concerns was the “general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society.”<sup>152</sup> German executive officials have used the same rhetoric when confronted on the issue.<sup>153</sup> While there may be other causes of this fear of parallel societies—such as increased Muslim immigration<sup>154</sup>—the German government remains steadfast in its perceived “duty” to eradicate homeschooling in the name of cultural and educational homogeneity.<sup>155</sup>

In the *Konrad* decision, the ECHR’s discussion is illustrative of the larger problem in Germany. There, the appellant parents argued that “it is their obligation to educate their children in accordance with the Bible and Christian values.”<sup>156</sup> Allowing their children to enter the public schools “would inevitably lead to grave conflicts with their personal beliefs” that “would therefore severely endanger their children’s religious education, especially regarding sex education.”<sup>157</sup> Even though officially recognized churches are supported by the federal government in Germany,<sup>158</sup> State schools have an “obligation of religious neutrality” that “would render it impossible to educate [the Konrad] children in a State school in accordance with the [Konrads’] beliefs.”<sup>159</sup>

The Konrads argued that various provisions of European Union and German law afford them the right to educate their children as they wish. In

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149. See Belien, *supra* note 28.

150. *Konrad v. Germany*, App. No. 35504/03, 8 (Eur. Ct. H.R. Sep. 11, 2006).

151. *Id.* at 1, 3. On the “margin of appreciation,” see Yuval Shany, *Toward a General Margin of Appreciation in International Law?*, 16 EUR. J. INT’L L. 907, 909–17 (2005).

152. *Konrad v. Germany*, App. No. 35504/03, 8 (Eur. Ct. H.R. Sep. 11, 2006).

153. Dale Hurd, *Germany Declares War on Homeschoolers*, CBN NEWS, Sep. 21, 2008, available at <http://www.cbn.com/cbnnews/425122.aspx> (quoting German Consul General Wolfgang Drautz: “The public has a legitimate interest in countering the rise of parallel societies that are based on religion or motivated by different world views and in integrating minorities into the population as a whole.”)

154. Sonia Phalnikar, *New Rules for Muslims in German State Blasted*, DEUTSCHE WELLE, Jan. 5, 2006, available at <http://www.dw-world.de/dw/article/0,2144,1840793,00.html>.

155. Katrin Bennhold, *In Germany, Immigrants Face a Tough Road*, INT’L HERALD TRIB., Dec. 25, 2005.

156. *Konrad v. Germany*, App. No. 35504/03, 6 (Eur. Ct. H.R. Sep. 11, 2006).

157. *Id.*

158. See generally Jürgen Moltmann, *Religion and State in Germany: West and East*, 483 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 110 (1986).

159. *Konrad v. Germany*, App. No. 35504/03, 6 (Eur. Ct. H.R. Sep. 11, 2006).

particular, they argued that Article 2 of Protocol No. 1 of the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>160</sup> and Article 14, Section 3 of the *Charter of Fundamental Rights of the European Union*<sup>161</sup> both provide for parental rights in the education of their children:

Article 14 - Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and *the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected*, in accordance with the national laws governing the exercise of such freedom and right.<sup>162</sup>

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Article 2 – Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, *the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*<sup>163</sup>

These provisions seem to provide discretion and liberty to parents. While one has a right to education, these articles do not in themselves create any compulsory attendance requirements. Rather, the focus of these provisions is with parents who can assure that their children are educated in accord with the parents' "religious, philosophical and pedagogical convictions."<sup>164</sup>

The broad rights created for parents, however, provide no real protection against the educational control of the German State. After quoting the language of

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160. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, protocol no. 1, as amended by Protocol No. 11, Paris, 20.III.1952 (emphasis added).

161. Charter of Fundamental Rights of the European Union, art. 14, § 3, 2000 O.J. (C 364) 1 (Dec. 7, 2000).

162. *Id.* (emphasis added).

163. Protocol, *supra* note 160, at art. 2, protocol no. 1.

164. *Id.*

the articles above in the *Konrad* decision, the ECHR shifted its discussion to show how the interests of the State trump parental rights.<sup>165</sup> The ECHR acknowledged that the language of the articles seeks to further the State's interest in "pluralism in education, which is essential for the preservation of the 'democratic society' as conceived by the Convention [for the Protection of Human Rights and Fundamental Freedoms],"<sup>166</sup> but then agreed with Germany's argument that this pluralistic goal is best achieved by the State.<sup>167</sup> Despite the clear language of the articles giving parents broad rights, the court concluded that "respect is only due to convictions on the part of the parents which do not conflict with the right of the child to education, the whole of Article 2 of Protocol No. 1 being dominated by its first sentence."<sup>168</sup> Thus, the court concluded, "parents may not refuse the right to education of a child on the basis of their convictions."<sup>169</sup>

#### **F. Is There a Future for Homeschooling in Germany?**

Other court decisions in Germany have echoed the sentiments of *Konrad*, while some courts have intimated that a change in focus may be evolving in the German courts.<sup>170</sup> Whatever the future may hold, German courts are mired in a current pro-State, anti-parent jurisprudence that is being upheld by broader European institutions, like the ECHR and the EU. But in one recent case, there seems to be a glint of hope for homeschooling families in Germany.<sup>171</sup> The case involves a former United States military member who works for a German company reviewing military contracts. He and his wife had homeschooled their children for several years. In late October of 2008, the family received a summons to go to court and answer to charges that they were homeschooling. The family was told that if they did not appear, they could be fined up to \$31,000. The mother and three children returned to the United States immediately and the father remained to fight the legal battle. When the father appeared in court, the judge stated that "[i]f the children would be tested by a school psychologist concerning their standard of knowledge, and if the children will reach the same standard as their contemporaries, I am not sure, whether I would intervene in the

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165. See *Konrad v. Germany*, App. No. 35504/03, 6–10 (Eur. Ct. H.R. Sep. 11, 2006).

166. *Id.* at 7.

167. *Id.* (quoting *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23, pp. 24–25, § 50) ("In view of the power of the modern State, it is above all through State teaching that this aim must be realised.").

168. *Id.*

169. *Id.*

170. See *American Family Summoned to Defend Parental Rights for Homeschooling*, HSLDA, Nov. 7, 2008, <http://www.hsllda.org/hs/international/Germany/200811070.asp>.

171. *Id.*

parental custody.”<sup>172</sup> This concession is considered by some to be “an important step in providing positive precedent” for future homeschooling cases in Germany.<sup>173</sup>

Other observers have suggested that the official sanction of homeschooling in Germany would not be incompatible with the fundamental objectives of the German government.<sup>174</sup> For example, the UN Special Rapporteur on the Right to Education has stated: “Distance learning methods and home schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children, as stipulated in article 13 of the International Covenant on Economic, Social and Cultural Rights.”<sup>175</sup> Further, Germany’s “promotion and development of a system of public, government-funded education should not entail the suppression of forms of education that do not require attendance at a school.”<sup>176</sup> Some German *Länder* have made compulsory attendance an end in itself: “in some *Länder*, education is understood exclusively to mean school attendance.”<sup>177</sup> Indeed, in those *Länder*, “the Special Rapporteur received complaints about threats to withdraw the parental rights of parents who chose home-schooling methods for their children.”<sup>178</sup> Based on these complaints, the Special Rapporteur recommended that “the necessary measures should be adopted to ensure that the home schooling system is properly supervised by the State, thereby upholding the right of parents to employ this form of education when necessary and appropriate, bearing in mind the best interests of the child.”<sup>179</sup>

A change in the legal structure in Germany regarding homeschooling will necessitate a cultural transformation as well. The current climate remains difficult for German homeschooling parents.<sup>180</sup> While recommendations from the United

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172. *Id.* The difficulty, however, was that the parents taught their children using a curriculum developed in the United States and taught the children in English. It is inconceivable that the children could have passed tests in German in accord with German standards. Donnelly, *supra* note 15.

173. *Id.*

174. See Muñoz, *supra* note 126, ¶ 62.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. Muñoz, *supra* note 126, ¶ 93(g).

180. See *Highs And Lows Of Two Families Illustrate Challenges For Homeschoolers*, HSLDA, Sep. 15, 2008, <http://www.hslda.org/hs/international/Germany/200809150.asp>; *State keeps 5 kids over parents' homeschooling*, WORLD NET DAILY, Aug. 8, 2008, <http://www.worldnetdaily.com/index.php?fa=PAGE.view&pagelid=71719>; *German Court Keeps Five Kids Because Parents Are Homeschoolers*, HOME SCHOOL LEGAL DEFENSE ASSOCIATION (HSLDA), Aug. 1, 2008, <http://www.hslda.org/hs/international/Germany/200808010.asp>; Charlie Francis-Pape & Allan Hall, *Home-school Germans flee to UK*, THE OBSERVER, Feb. 24, 2008, <http://www.guardian.co.uk/education/2008/feb/24/schools.uk>;

Nations and other outside groups are helpful, real change must come from within German society. The German State must recognize or give more weight to parental rights to encourage a loosening of its antipathy toward homeschooling. Thus far, appeals to the judicial system have been fruitless. Substantial changes will only come through the legislative process, and homeschoolers will need a critical mass of supporters that can use means other than the courts to change the law and protect their rights.<sup>181</sup> Beyond that, homeschoolers in Germany seek to conduct studies that show how homeschoolers meet or exceed the public school standards.<sup>182</sup> Through these methods, homeschoolers can change public opinion about homeschooling and eventually see that opinion written into law.

The future of homeschooling in Germany is uncertain and there are many difficult hurdles to jump before changes come. German homeschoolers need the help of others—including the international community—to bring awareness to the issue, dialogue with the German government, and gain their rights.

### III. PART TWO: THE UNITED STATES

Unlike the homeschooling movement in Germany, homeschooling developed in the United States without the turbulence of major power shifts in government. Homeschooling came about in the United States organically, as a new nation sought to determine for itself what the best educational system would be. In light of this organic development, this part of the note considers homeschooling in the United States through a chronological perspective. After considering the development of educational systems in the United States more broadly, the note focuses on the normative issues surrounding parental rights and homeschooling as found in various court cases.

#### **A. The Historical Development of Education in America**

Before the American Revolution, pioneers seeking a new life in a new land brought with them various theories and methods of education. Most, if not all, of these educational theories focused in large part on religious education as the means to further the goals of religious freedom in pursuit of which many people

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Bob Unruh, *German Homeschool Advocate Says Nazis Have Returned*, WORLD NET DAILY, Dec. 23, 2006, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=53484](http://www.wnd.com/news/article.asp?ARTICLE_ID=53484); Alexandra Colen, *Germany Imprisons Mum. Dad and Kids Flee to Austria*, THE BRUSSELS JOURNAL, Sep. 9, 2006, <http://www.brusselsjournal.com/node/1330>.

181. See Michael Farris, *New Strategy for Securing Homeschool Freedom in Germany*, HSLDA, May 10, 2008, <http://www.hslda.org/hs/international/Germany/200705170.asp>.

182. See *id.*



immigrated to the new continent.<sup>183</sup> Indeed, before the establishment of a state-run educational system, the Christian Church provided the only available educational opportunities as it had done on the European continent.<sup>184</sup>

Some cities attempted to form a standard educational system to provide basic reading skills in order to further religious devotion.<sup>185</sup> Because religious leaders often ran early municipal governments, the educational system was voluntary, and secondary to the Church.<sup>186</sup> Many of these rudimentary systems relied on home instruction by parents or apprenticeship under a local master.<sup>187</sup> But because of the demands of life as a pioneer, many parents apparently neglected their duties.<sup>188</sup> The first move toward state enforcement of compulsory education of children came, ironically, from the religious hierarchy.<sup>189</sup>

Though some effort was made to compel some sort of education, the form of that education still followed the English model of home instruction or apprenticeship.<sup>190</sup> Education on a large scale was uncommon in England. There, universities and private elementary schools served to train the clergy and those who could afford the education.<sup>191</sup> For the common citizen, education, “beyond a limited ability to read and write, was not necessary for their happiness, nor indeed for the best interests of the State.”<sup>192</sup> The first law on the subject, the Massachusetts Law of 1642,

directed the officials of each town to ascertain, from time to time, if parents and masters were attending to their educational duties; if all children were being trained “in learning and labor and other employments profitable to the Commonwealth”; and if the children were being taught “to read and understand the principles of religion and the capital laws of the country.”<sup>193</sup>

Under the 1642 law, parents and masters could be fined for providing inadequate instruction.<sup>194</sup> The law also established that the principal aims of education were

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183. ELLWOOD P. CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES* 13–16 (1919).

184. *Id.* at 13.

185. *Id.* at 16.

186. *Id.*

187. *Id.* at 16–17.

188. *Id.* at 17.

189. CUBBERLEY, *supra* note 183, at 17.

190. *Id.*; ANDREW RICKOFF, *PAST AND PRESENT OF OUR COMMON SCHOOL EDUCATION* 7–8 (1877).

191. RICKOFF, *supra* note 190, at 7.

192. *Id.*

193. CUBBERLEY, *supra* note 183, at 17.

194. *Id.*

(1) religious instruction, and (2) education in citizenship.<sup>195</sup> Further, “[t]his Law of 1642 [was] remarkable in that, for the first time in the English-speaking world, a legislative body representing the State ordered that all children be taught to read.”<sup>196</sup>

Not finding the 1642 law adequate for such purposes, the legislature enacted another law a mere five years later.<sup>197</sup> The 1647 law required cities of a certain size to have a teacher appointed to provide instruction in reading and writing, and required larger cities to establish elementary schools to prepare children for higher education.<sup>198</sup> Labeled the “Old Deluder Act,” the 1647 law was meant to require children to learn how to read to prevent “that old deluder, Satan, [from] keep[ing] men from the knowledge of the Scriptures.”<sup>199</sup> Those who did not instruct their children faced fines for non-performance.<sup>200</sup> With this measure, the colonial government established something unseen before in European educational systems—an “assertion of the right of the State to require

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195. *See id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Records of the Governor and Company of the Massachusetts Bay in New England* (1853), II: 203. The full text is as follows:

It being one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures, as in former times by keeping them in an unknown tongue, so in these latter times by persuading from the use of tongues, that so that at least the true sense and meaning of the original might be clouded and corrupted with false glosses of saint-seeming deceivers; and to the end that learning may not be buried in the grave of our forefathers, in church and commonwealth, the Lord assisting our endeavors.

It is therefore ordered that every township in this jurisdiction, after the Lord hath increased them to fifty households shall forthwith appoint one within their town to teach all such children as shall resort to him to write and read, whose wages shall be paid either by the parents or masters of such children, or by the inhabitants in general, by way of supply, as the major part of those that order the prudentials of the town shall appoint; provided those that send their children be not oppressed by paying much more than they can have them taught for in other towns.

And it is further ordered, that when any town shall increase to the number of one hundred families or householders, they shall set up a grammar school, the master thereof being able to instruct youth so far as they may be fitted for the university, provided that if any town neglect the performance hereof above one year that every such town shall pay 5 pounds to the next school till they shall perform this order.

200. CUBBERLEY, *supra* note 183, at 18.

communities to establish and maintain schools, under penalty of a fine if they refused to do so.”<sup>201</sup>

The distinctly American system of State education developed along three major philosophical lines. The system developed in New England was transplanted when New Englanders migrated across the country.<sup>202</sup> One alternative system focused on parochial education by religious sects in Pennsylvania and Maryland, and another system employed in Virginia and other southern colonies retained the English tutor and private education system.<sup>203</sup> The three systems largely developed along religious lines: in New England, “settlers were dissenters from the English National Church and had come to America to obtain freedom in religious worship, the settlers in Virginia were adherents of that Church and had come to America for gain.”<sup>204</sup> Those in the middle of the Atlantic coast were very religious members of disfavored sects—smaller Protestant congregations in Pennsylvania and Catholics in Maryland.<sup>205</sup> Thus, three predominant “attitudes” of early American education developed: (1) a “strong Calvinistic conception of a religious State, supporting a system of common schools . . . both for religious and civic ends” in New England; (2) the “parochial school conception . . . [that] stood for church control of all educational effort, resented state interference, [and] was dominated by church purposes”; and (3) “the attitude of the Church of England, which conceived of public education . . . as intended chiefly for orphans and the children of the poor, and as a charity which the State was under little or no obligation to assist in supporting.”<sup>206</sup>

One might think that the events of 1776 and the unity enshrined in a common Constitution in 1787 would bring with them a standardized education system to the new United States, but such was far from reality.<sup>207</sup> The Constitution is silent on education, because education was generally still a private matter under the control of the Church rather than the State.<sup>208</sup>

The Constitution did, however, provide a few key lines that some believe established the prerequisites for the modern public education system. The Religion Clauses of the First Amendment “led to the early abandonment of state religions, religious tests, and public taxation for religion in the old States, and to the prohibition of these in the new [states]” that arguably “laid the foundations upon which our systems of free, common, public, tax-supported, non-sectarian schools have since been built up.”<sup>209</sup> Cubberley considers this “wise provision” in the Constitution as “the beginning of the emancipation of education from church

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201. *Id.*

202. *Id.* at 19–24.

203. *Id.*

204. *Id.* at 21.

205. *Id.* at 24.

206. *Id.* at 23–24.

207. See CUBBERLEY, *supra* note 183, at 53.

208. *Id.* at 53.

209. *Id.* at 55.

domination.”<sup>210</sup> Others contend that while public education moved from church to state control, the founders sought to maintain the religious underpinnings of that education.<sup>211</sup> So, while Jefferson argued that the purpose of education is to preserve “a due degree of liberty,”<sup>212</sup> that liberty was premised on the exercise of virtues inculcated through religious worship and instruction. Documents of this era bare this out. The Northwest Ordinance of 1787 stated that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>213</sup> State constitutions followed in suit.<sup>214</sup> For example, Virginia declared that to preserve liberty, people need “a firm adherence to justice, moderation, temperance, frugality, and virtue.”<sup>215</sup> Massachusetts said that “good order and preservation of civil government[] essentially depend upon piety, religion, and morality.”<sup>216</sup> Whether children were educated in such virtues through the church or the state, the founders generally agreed that education was necessary to sustain a democracy. As Washington noted, “the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right, which Heaven itself has ordained.”<sup>217</sup>

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210. *Id.* at 56.

211. *See generally* THOMAS WEST, VINDICATING THE FOUNDERS (1997).

212. CUBBERLEY, *supra* note 183, at 57.

213. WEST, *supra* note 211, at 160 (quoting Northwest Ordinance, art. 3).

214. Currently, education clauses are present in each state constitution. See Joshua Roberts, Chalk Talk, *Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics*, 38 J.L. & EDUC. 195, 197 n.8 (2009) (providing the following list: ALA. CONST. art. XIV, § 256, amended by ALA. CONST. amend. 111; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2nd, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, preamble & § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 91; MICH. CONST. art. VIII, §§ 1 & 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, §§ 201 & 205; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, §§ 1, 2; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1, 2; N.D. CONST. art. VIII, §§ 1, 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1, 4; S.C. CONST. art. XI, § III; S.D. CONST. art. VIII, § 1; TENN. CONST. art. II, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, §§ 2, 3; WYO. CONST. art. VII, §§ 1, 9.).

215. WEST, *supra* note 211, at 161.

216. *Id.*

217. *Id.* at 172; CUBBERLEY, *supra* note 183, at 58. *See also id.* at 502: “In the hands of an uneducated people democracy is a dangerous instrument.”

Nevertheless, the question of who should direct a child's education still remained. A power struggle between the State and parents began in the colonial period when "the doctrine of *parens patriae*, whereby the state was deemed the ultimate parent of the child, gradually took hold."<sup>218</sup> Though many citizens accepted significant state intervention in their lives, others sought a more limited state role. Puritans, for instance, "considered parents to be the 'natural protectors' of their children" and yet sanctioned the intervention of the state "when 'the morals, or safety, or interests' of the children required it."<sup>219</sup>

As the State sought more control of the education system, a growing tension developed between the new public school systems and strong parental control. Modest attempts by the State to gain control over the educational system manifest the underlying struggle between these competing viewpoints present at the time. The dominant view against State control was that parental duties do not come from the State, but inhere in the nature of a parent.<sup>220</sup> Notably, the thinkers who influenced the founders all had theories of parental duties in relation to the State. John Locke said that "[p]arents have an obligation to 'preserve, nourish, and educate' their children 'during the imperfect state of childhood.'"<sup>221</sup> J.S. Mill noted that while the state had some obligation to protect children, it was ultimately the parents "whose 'sacred duties' include giving the child 'an education fitting him to perform his part well in life toward others and toward himself.'"<sup>222</sup> Mill's conception of parental responsibilities brought with it an ability to determine the content of one's education without interference from the State.<sup>223</sup> So, "[a]lthough the state should require and compel education up to a certain level and provide funding for the poor, it should not take it upon itself to provide education directly."<sup>224</sup> State-run education for Mill was "a mere contrivance for molding people to be exactly like one another . . . establish[ing] a despotism over the mind."<sup>225</sup> It was this bold proposition that "social and religious conservatives would transform . . . into a philosophical foundation for parental rights and educational choice."<sup>226</sup>

While the first compulsory attendance law took effect in Massachusetts in 1852, the initial laws allowed for attendance in any school chosen by the parents.<sup>227</sup> This freedom of choice improved the quality of all schools through market-based competition.<sup>228</sup> Allowing parents to choose the means of education

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218. ROSEMARY C. SALOMONE, *VISIONS OF SCHOOLING* 46 (2002).

219. *Id.*

220. *See generally* SALOMONE, *supra* note 218, at 1–74 (2002).

221. *Id.* at 44.

222. *Id.* at 45.

223. *Id.* at 45–46.

224. *Id.* at 46.

225. *Id.*

226. SALOMONE, *supra* note 218, at 46.

227. CUBBERLEY, *supra* note 183, at 379.

228. *Id.* at 494.

for their children did not negate parental duties imposed by the State. The State could require parents to see that their children come to school for an annual term and a period of years determined by the State.<sup>229</sup>

Establishing a system of compulsory education while allowing parents to have control and opt out of the general system balanced the competing desires of the State and parents. Most early homeschoolers opted out of the State education because of religious reasons or a counter-cultural impetus.<sup>230</sup> As the country moved into the second half of the 20<sup>th</sup> century, “[c]onservatives who felt the public schools had sold out to secularism and progressivism joined with progressives who felt the public schools were bastions of conservative conformity to challenge the notion that all children should attend them.”<sup>231</sup> In recent decades, the battle has intensified around the fundamental issue of whether the parental right or the state’s duty should prevail in the education of children.<sup>232</sup> Within a tense relationship with state officials, homeschooling has moved from being a fringe movement to a thriving mainstream practice.<sup>233</sup>

### **B. The Current State of Homeschooling in America**<sup>234</sup>

Homeschooled students in the United States today number about 2 million.<sup>235</sup> Other researchers number 2.5 million homeschoolers in the United

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229. *Id.* at 492.

230. Christina Sim Keddie, Note, *Homeschoolers and Public School Facilities: Proposals for Providing Fairer Access*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 603, 607–10 (2007). For an alternative story of the development of homeschooling, see Yuracko, *supra* note 23, at 124–31. Yuracko represents one virulent strain of anti-homeschooling rhetoric that parents—and specifically Christian fundamentalist parents—are indoctrinating their children and shielding them from the “liberal multicultural education that promotes at least minimal autonomy.” *Id.* at 131.

231. Milton Gaither, *Home Schooling Goes Mainstream*, 9 EDUC. NEXT 1, 11 (2009), [http://media.hoover.org/documents/ednext\\_20091\\_10.pdf](http://media.hoover.org/documents/ednext_20091_10.pdf).

232. *See id.* at 11–12. As we will see later, the Supreme Court’s default position throughout that generation has been to defer to parents with the understanding that parents will act in the best interests of their children. Many advocates of state intervention in and control of education argue that parents cannot possibly act in the best interests of their children because parents are ill-equipped to educate their children.

233. Keddie, *supra* note 230, at 604.

234. While a full exposition of homeschooling in the United States is beyond the scope of this note, some background information is necessary to understand the broad practice of homeschooling, the strength of its grassroots organizations influencing legislation, and the various reasons parents give for homeschooling. Further, some understanding of the thriving American version of homeschooling presents a stark contrast to the stifled German equivalent, which elucidates some of the doctrinal differences present in the laws of the two countries brought out in Part Four below.

States today.<sup>236</sup> As homeschooling enters the 21<sup>st</sup> century, parents' motivations for homeschooling are varied: over 70% of homeschooling parents cite a non-religious reason for choosing to homeschool.<sup>237</sup> Increasing numbers of professionals and highly educated parents are choosing homeschooling over traditional schools.<sup>238</sup> Many parents cite failing public schools—or a failed educational method in general—for why they homeschool.<sup>239</sup> In one candid interview, a public school administrator admitted that the school “had to teach to the 40<sup>th</sup> percentile”<sup>240</sup> while researchers note that “public schools have suffered at least since the mid-seventies from watered-down assignments and exams, politically correct textbooks, incompetent or lazy teachers who can't be fired because of union protection, and trendy educational fads like ‘New Math’ that have pushed aside the three Rs.”<sup>241</sup>

The swell of parental involvement in grassroots advocacy movements

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235. Brian D. Ray, *Research Facts on Homeschooling*, National Home Education Research Institute (Aug. 10, 2009), <http://www.nheri.org/Research-Facts-on-Homeschooling.html>.

236. See Gaither, *supra* note 231, at 12.

237. *Id.* Brian C. Anderson, *An A for Home Schooling*, CITY JOURNAL, Summer 2000, [http://www.city-journal.org/html/10\\_3\\_an\\_a\\_for\\_home.html](http://www.city-journal.org/html/10_3_an_a_for_home.html). For a unique reason to homeschool, see Louis Nappen, *The Privacy Advantages of Homeschooling*, 9 CHAP. L. REV. 73 (2005) (arguing that homeschooling protects against infringements on privacy occurring in public schools).

238. See Penelope Green, *The Anti-Schoolers*, N.Y. TIMES, D1, Oct. 16, 2008, available at [http://www.nytimes.com/2008/10/16/garden/16unschool.html?\\_r=5&page\\_wanted=1&oref=slogin](http://www.nytimes.com/2008/10/16/garden/16unschool.html?_r=5&page_wanted=1&oref=slogin); Keddie, *supra* note 230, at 609–10.

239. Gaither, *supra* note 231, at 12. See also Tony Woodlief, *Why Some Kids Aren't Heading to School Today*, PAJAMAS MEDIA, Sep. 2, 2008, <http://pajamasmedia.com/blog/why-some-kids-arent-heading-to-school-today/2/>:

Your competition [as a homeschooler] is a system that by design and necessity seeks the median. Public (and many private) school students have to move along in all subjects at a similar pace, and in the same order. Outliers—the talkative, the energetic, the gifted, the struggling—are labeled and interventions (counseling, special classrooms, tutoring, medication) prescribed. The goal is not a full realization of the child's potential, but rather the system's smooth functioning.

240. Anderson, *supra* note 237.

241. *Id.* (referring to conclusions in WILLIAM BENNETT, CHESTER E. FINN, JR. & JOHN T. E. CRIBB, JR., *THE EDUCATED CHILD* (2000)). Anderson also cites figures in *The Educated Child* that “only one out of three public school fourth-graders read[] ‘proficiently,’ 40 percent of public school eighth-graders [are] unable to do basic math, and public school 12th graders [are] the worst in the industrialized world in science.”

brought homeschooling into mainstream society. It is now a big business,<sup>242</sup> and supporters have developed a broad and powerful lobby in Congress and all fifty states.<sup>243</sup> This movement led state legislatures to enact laws allowing homeschooling in some form.<sup>244</sup>

### **C. The Legal Foundations of Homeschooling in the United States**

Just as the homeschooling movement has grown significantly over the last century, the legal principles undergirding the movement have grown and developed as well. Though the Constitution does not explicitly reference education or parental rights to direct their children's education, a consistent body of case law has developed favoring the rights of parents—to a limited extent—against the demands of the State.<sup>245</sup> This right of parents often exists in conjunction with other rights such as the First Amendment's guarantee of free exercise of religion.<sup>246</sup> Attempts to find a singular right to direct the upbringing of children without a connection to some other fundamental right have had only measured success.<sup>247</sup> As was the case in Germany, educational matters have within them a tension between the federal and local government. In the United States, educational cases are often decided in relation to the language in a state constitution. In the section that follows, this note considers both the federal and state constitutional provisions related to education and subsequently, the cases that have interpreted those provisions.

State laws have produced four main categories of regulations regarding homeschooling (see Figure 1 below), including the first category's most lenient laws that "contain 'only general education language.'"<sup>248</sup> Such provisions usually outline the state obligation to provide a free public education; the means the state

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242. HSLDA, *A Free Market in Homeschooling*, Mar. 8, 2004, <http://www.hslda.org/docs/news/hslda/200403/200403083.asp> (noting that the market for homeschooling materials has surpassed \$850 million).

243. See Anderson, *supra* note 237. The resolutions in Georgia and Tennessee are but two examples of such grassroots activism influencing legislatures to act.

244. The New Hampshire Legislature overwhelmingly voted down severe restrictions on homeschoolers in early 2010. This trend, discussed in the text, is for homeschoolers a hopeful sign of more parental direction in the education of children. See *infra* note 407.

245. Robert C. Cloud, *Balancing Parental Rights and State Interests in Home Schooling*, 235 EDUC. L. REP. 697, 705 (2008).

246. *Id.* at 704–05.

247. See generally 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).

248. Yuracko, *supra* note 23, at 135–39 (quoting Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815 (1985)). Every state in the Union has a constitutional provision regarding free public education. *Id.* at 135.



will use to pay for that education (taxation); and the basic attendance requirements for students, usually in a general statement about how many months or days are required annually.<sup>249</sup>

The second major grouping of state constitutional provisions “speak[s] of a general requirement to provide public education but also ‘emphasize[s] the quality of public education.’”<sup>250</sup> These constitutions speak to some amorphous outline for education in the state’s schools, but add little in the way of concrete standards: West Virginia’s constitution, for instance, requires “a thorough and efficient system of free schools.”<sup>251</sup>

The third category of constitutional provisions becomes more specific and demanding.<sup>252</sup> Wyoming requires “a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.”<sup>253</sup> Though this language is certainly more comprehensive than the first two categories, there is still no indication that states in this category are required to provide free public education *at the expense of other forms of education*. Under the text of these state constitutions, public, private, and home education can all peaceably coexist.

State constitutions in the fourth category “mandate the strongest commitment to education” and extend the duty of the state beyond the requirement to provide public education.<sup>254</sup> These states make explicit the duty they have to ensure all children within their borders a proper education. Washington’s constitution, for instance, states: “It is the paramount duty of the state to make ample provision for the education of children residing within its

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249. *See id.* Yuracko gives the example of North Carolina’s constitution, which states that “[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students” (quoting N.C. CONST. art. IX, § 2, cl. 1). *Id.* at 135. Yuracko further notes that Alaska, Arizona, Connecticut, Hawaii, Kansas, Louisiana, Nebraska, New Mexico, New York, Oklahoma, South Carolina, Utah, and Vermont have similar provisions in their constitutions. *Id.* at 135 n.55.

250. *Id.* at 136 (quoting Ratner, *supra* note 248, at 815). In this group Yuracko includes Arkansas, Colorado, Delaware, Florida, Idaho, Kentucky, Maryland, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin.

251. *Id.* (quoting W. VA. CONST. art. XII, § 1).

252. Yuracko, *supra* note 23, at 136.

253. *Id.* (quoting WYO. CONST. art. VII, § 1). Yuracko cites California, Indiana, Iowa, Massachusetts, Nevada, Rhode Island, and South Dakota as having similar requirements. *Id.* at 136 n.59 (quoting Ratner, *supra* note 248, at 816 n.145).

254. *Id.* at 136 (quoting Ratner, *supra* note 248, at 816 n.146). States in this category include Illinois, Maine, Georgia, Michigan, Missouri, and New Hampshire. *Id.* n.61 (quoting Ratner, *supra* note 248, at 816 n.146).

borders.”<sup>255</sup> This broad mandate explicitly covers children outside of the public education system, thus allowing for a more constitutionally rigorous foundation for arguments in favor of regulating either private or home schools.<sup>256</sup>

Some proponents of state regulation of homeschooling argue that these state constitutions provide for a child’s *right* to education, and moreover, a right to a basic (and presumably state-mandated) level of education.<sup>257</sup> But instead of asserting a right to education per se, these scholars actually argue, through a dubious application of substantive due process,<sup>258</sup> for a right to a narrowly circumscribed type of *public* education.<sup>259</sup> Thus, one’s right to a basic level of education is only found in a state-run educational system.<sup>260</sup> On the other side of the argument, homeschoolers cite a fairly consistent line of federal cases interpreting the federal Constitution in favor of parental control and limited government regulation.<sup>261</sup>

Despite the raging policy and legislative debates, the United States Supreme Court has articulated “a general view of education that has redirected its emphasis from a rights-based to a values-based ideology over time.”<sup>262</sup> This normative focus moved the Court to increasingly consider “the authority of school officials to make curricular and administrative determinations that reflect community and societal values.”<sup>263</sup> Though some argue that parents’ rights advocates rely on a line of cases that no longer reflect the Court’s jurisprudence,<sup>264</sup>

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255. *Id.* at 136 (quoting WASH. CONST. art. IX, § 1).

256. In *Pierce v. Society of Sisters*, the Supreme Court ruled that children could not be forced to attend public schools. 268 U.S. 510, 534–35. This conclusion does not foreclose the ability of a state to regulate education outside of the public schools, but it is a strong statement in favor of the role parents play in directing their children’s education.

257. Yuracko, *supra* note 23, at 136–37.

258. For examples, see *id.* at 138 n.69.

259. *Id.* at 135–42. The basic premise of such arguments is that children have a right to a minimal level of education while the state has the corresponding duty to provide such an education. The conclusion of these arguments, however, is that the state is the best entity to provide that education and that homeschoolers are somehow attempting to provide an inferior education out of sight of the state. The reality is that homeschoolers seek to provide a superior education and feel that state regulation—such as imposing curriculum requirements—is actually a hindrance to their ability to provide that superior education.

260. The ultimate question is whether, given a state’s mandate to provide an education to its children, a particular regulation on homeschooling actually furthers that goal and protects the basic “right” to education. See generally Tanya K. Dumas, Sean Gates & Deborah R. Schwarzer, *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, \_\_ WIDENER L. REV. \_\_ (forthcoming).

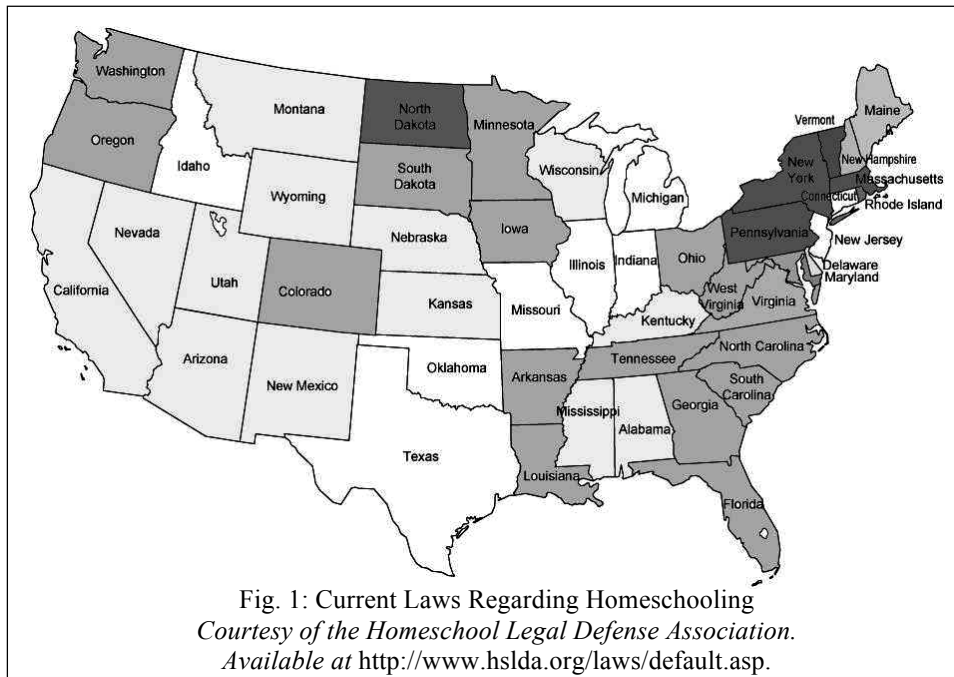
261. See *id.* Though the federal Constitution is silent on the issue, federal cases—and Supreme Court cases in particular—most often err on the side of strong parental rights over the education of children.

262. SALOMONE, *supra* note 218, at 76.

263. *Id.*

264. *Id.*

there is enough language in recent decisions to trace a consistent line of decisions in favor of parental rights.



LEGEND

- States requiring no notice: No state requirement for parents to initiate any contact with state officials.
- States with low regulation: State requires parental notification to state only.
- States with moderate regulation: State requires parents to send notification, test scores, and/or professional evaluation of student progress.
- States with high regulation: State requires parents to send notification or achievement test scores and/or professional evaluation, plus other requirements (e.g. curriculum approval by the state, teacher qualification of parents, or home visits by state officials).

### I. Foundational Cases

Throughout the 20<sup>th</sup> century, the Supreme Court was “a major force in shaping educational policy through constitutional interpretation.”<sup>265</sup> In such decisions, the Court “has been called upon to resolve the tensions among competing constitutional values and balance the interests of individual students and their families against those of the local community and the larger society.”<sup>266</sup> The line of cases favoring parental rights—from *Meyer*<sup>267</sup> and *Pierce*<sup>268</sup> through *Yoder*<sup>269</sup> and *Troxel*<sup>270</sup> to today—have been discussed at great length in other places.<sup>271</sup> Many now contend that those cases are outdated and do not reflect the Court’s approach to education policy.<sup>272</sup> In this section, we look at these cases and more recent, yet perhaps equally foundational, cases that show a consistent approach to parental rights by the Court.

The Court’s decision in *Meyer v. Nebraska* was perhaps the first decision to acknowledge the tension between parents and society surrounding education. There, the Court noted that education has commonly been considered a fundamental part of a democratic society.<sup>273</sup> Moreover, the Court indicated that education is not only meant to increase one’s knowledge, but should also be focused on training citizens in the principles of our democratic form of government: “Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>274</sup> Though the Court thought education is for a public good, the responsibility of educating a child fell to the parent who should “give his children education suitable to their station in life.”<sup>275</sup> The Court contrasts this duty of parents with “[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools.”<sup>276</sup> The key provision in the Court’s decision is that such regulations must be “reasonable.” The government lost in *Meyer* because “the means adopted . . . exceed[ed] the

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265. *Id.* at 75.

266. *Id.* at 76.

267. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

268. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

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

270. *Troxel v. Granville*, 530 U.S. 57 (2000).

271. See generally SALOMONE, *supra* note 218; see also Yuracko, *supra* note 23, at 133 n.44 (citing these cases as the “upper limit to states’ control over children’s education”); see also Dumas, *supra* note 260.

272. SALOMONE, *supra* note 220, at 76.

273. *Meyer*, 262 U.S. at 400 (noting that “[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”).

274. *Id.* (quoting the Ordinance of 1787).

275. *Id.*

276. *Id.* at 402.

limitations upon the power of the state and conflict[ed] with rights assured to [the parents].”<sup>277</sup> The means the state employs must fit the end of measured regulation on parental choice.

A similar issue arose a mere two years later in *Pierce v. Society of Sisters*, in which a private school challenged an Oregon law requiring all children between ages six and eighteen to attend public school.<sup>278</sup> After the District Court in Oregon held “that parents and guardians, as a part of their liberty, might direct the education of children,” a unanimous Supreme Court went on to say that

[n]o question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.<sup>279</sup>

The Court allowed that, although the State may regulate schools to varying degrees, it may not “standardize its children” in a way that makes a child “the mere creature of the state.”<sup>280</sup> So, the Court held that both the State and “those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>281</sup>

In the more than eighty years since *Pierce*, the Court has struggled to balance the educational interests of parents and the State, all the while claiming to be mindful of children’s best interests. The Court has admitted that “[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.”<sup>282</sup> This difficulty comes at least in part, the Court notes, because “public education in our Nation is committed to the control of state and local authorities.”<sup>283</sup> Showing the Court’s reluctance to enter the educational debate, *Epperson* acknowledged that courts should show restraint in

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277. *Id.*

278. 268 U.S. 510. For a good discussion of the underlying issues at work in the case, see Rick Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000).

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

280. *Id.* at 535.

281. *Id.* To understand the decision completely, it is important to contextualize *Pierce* in its historical setting. See Stephen Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1203 (1997) (“[*Pierce*] must be understood in a historical context in which the Justices knew as well as anybody that the Oregon law was, in large part, an effort to destroy Roman Catholicism.”).

282. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

283. *Id.*

this area unless cases “directly and sharply implicate basic constitutional values.”<sup>284</sup>

Such constitutional values came to a crossroads in the 1972 case of *Wisconsin v. Yoder*.<sup>285</sup> Amish parents brought suit arguing that compulsory education laws violated their Free Exercise rights under the First Amendment.<sup>286</sup> The Amish community “believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children.”<sup>287</sup> The Court spent significant time explaining the particular nature of the Amish’s religious claim and the parents’ reservations about public education.<sup>288</sup> In the end, it seems that the addition of a Free Exercise claim won the day for the parents in that case.<sup>289</sup> The Court recognized that “[p]roviding public schools ranks at the very apex of the function of a State.”<sup>290</sup> And “[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”<sup>291</sup> But, following *Pierce*, the Court respected that “the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.”<sup>292</sup>

It is perhaps easy to criticize *Yoder* on a number of grounds. First, the Court’s deference to *Yoder*’s Free Exercise claim is unmatched in the Court’s treatment of that issue in other cases.<sup>293</sup> It would be easy for a state education administrator to exempt the Amish because their beliefs include the need to purposely remove themselves from the larger society.<sup>294</sup> Because they do not

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284. *Id.*

285. 406 U.S. 205 (1972).

286. *Id.* at 209.

287. *Id.*

288. *Id.* at 207–13.

289. *Id.* at 229–36. Others note the significance of arguing for parental rights in conjunction with a Free Exercise claim as opposed to the parental rights claim alone. See Cloud, *supra* note 245, at 699–705. Cloud compares two Michigan cases to make the salient point that the parents in one case (*People v. DeJonge*, 442 Mich. 266 (1993)) succeeded while parents in another case with substantially similar facts (*People v. Bennett*, 442 Mich. 316 (1993)) failed at least in part because they did not include a Free Exercise claim in their argument. Thus, arguing in terms of “parental rights” alone often does not suffice in the post-*Yoder*, hybrid rights context.

290. *Yoder*, 406 U.S. at 213.

291. *Id.*

292. *Id.* at 213–14.

293. See *Employment Division v. Smith*, 494 U.S. 872 (1990) (removing the vitality of any Free Exercise claim made in response to a “neutral law of general applicability”).

294. See Rick Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1846–47 (2001).

participate in mainstream public life,<sup>295</sup> the State's argument that Amish children must be educated into a democracy is much less compelling than in other situations.<sup>296</sup> So, the Court's deference to the Amish in this case seems warranted, but it also seems *sui generis*. A second criticism of *Yoder* is that its precedential value foreshadows the "hybrid rights" schema established in the *Smith*<sup>297</sup> decision that has had an uneven application in the lower courts.<sup>298</sup> *Yoder* may be mostly confined to its facts after the *Smith*-induced confusion over hybrid-rights situations.<sup>299</sup> Hybrid-rights cases arise when one constitutional right that may not garner strict scrutiny is combined with another constitutional right that also may receive a lower level of scrutiny; when combined in the same claim, the resulting combination of rights then receives strict scrutiny review.<sup>300</sup>

Some more recent decisions have not relied on the hybrid claim to justify parental rights over the upbringing of children, though admittedly, not in the education context. The Court's modern appeal to "substantive due process" could provide parents some relief as it "provides heightened protection against government interference with certain fundamental rights and liberty interests."<sup>301</sup>

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295. See WILLIAM W. ZELLNER & RICHARD T. SCHAEFER, EXTRAORDINARY GROUPS: AN EXAMINATION OF UNCONVENTIONAL LIFESTYLES 5–37 (8th ed. 2007).

296. If the goal of education is to educate citizens for democracy, there is no compelling reason to force an entire religious sect to participate in the democracy when that sect complies with the government's demands and poses no threat to the democratic order. For a description of Amish practices and the Amish's relation to government, see JOHN ANDREW HOSTETLER, AMISH SOCIETY 255–272 (1993).

297. 494 U.S. at 872 ("The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections.").

298. *E.g.*, Peterson v. Minidoka County Sch. Dist., 118 F.3d 1351, 1356 (9th Cir. 1997) (noting that "as to the exercise of religion by parents in their choice of schooling for their children, the right is established by *Wisconsin v. Yoder*"); see Cloud, *supra* note 245; Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 J. L. EDUC. 505, 508 (2008) ("While some courts have acknowledged at least theoretical if not practical protections for religious students in *Smith*'s so-called 'hybrid rights' exception, others have construed the exception narrowly or dismissed it as *dicta*."); SALOMONE, *supra* note 218, at 69.

299. See Roberts, *supra* note 214, at 195 (citing *Yoder* and an article for the proposition that "the United States Supreme Court and all states recognize the rights of parents to homeschool their children").

300. See *infra*, Part III.C.2.b. In the homeschooling context, the most common hybrid rights claim involves Free Exercise and parental rights over the upbringing of children. In such cases, Free Exercise claims on their own typically receive rational basis review because the laws enacted are neutral laws of general applicability.

301. *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

On its own, “the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>302</sup> Later decisions continued to employ the broad language of *Meyer* and *Pierce* on the reach of parental rights, solidifying their value outside of the education context and in isolation from a hybrid-rights scenario.<sup>303</sup> Some scholars still contend that “the Court’s use of a mere reasonableness standard in *Meyer* and *Pierce* combined with its failure to explicitly identify such rights as fundamental in later parental decisions which would trigger more exacting judicial scrutiny have led lower federal courts to either avoid ‘fundamental’ terminology altogether or uphold state action as long as it is reasonable.”<sup>304</sup> Thus, for some, parental rights seem to exist in a no man’s land of contemporary constitutional law.

## 2. Recent Homeschooling Decisions

Though the Supreme Court provides general language about parental rights under the federal Constitution, decisions affecting education are still mostly decided based on the local law. Since the federal constitutional provisions at issue are incorporated to the states through the Fourteenth Amendment, difficulties arise when state constitutional language and federal constitutional rights conflict in some manner. The result is that homeschooling decisions are a patchwork of federal and local law and policy.

The next two sections consider two cases that highlight the issues at play in homeschooling decisions. While each case deals with the interplay between State and parental interests, the courts come to different conclusions.

### *a. In re Jonathan L.*

One decision that brought these underlying issues to the fore was the 2008 *Jonathan L.* decision in California.<sup>305</sup> When the case was first decided in March of 2008 (under the name *In re Rachel L.*)<sup>306</sup> in favor of the State, the court held that the parent in question did not have a right to homeschool her children.<sup>307</sup>

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302. *Troxel*, 530 U.S. at 65.

303. *See, e.g., Glucksberg*, 521 U.S. at 720; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”).

304. SALOMONE, *supra* note 218, at 69.

305. *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571 (Ct. App. 2008).

306. *In re Rachel L.*, 73 Cal. Rptr. 3d 77 (Ct. App. 2008).

307. *Id.* at 84.



The decision determined that homeschooling parents must be certified teachers. Prior to the initial decision, the California Department of Education had interpreted the state's education code to allow homeschooling if the home school could not be qualified as a private school,<sup>308</sup> an option not considered by the court in the first decision.<sup>309</sup> The 2008 decision led to a public outcry among homeschoolers and politicians alike<sup>310</sup> and under the weight of public pressure, the intermediate appellate court voluntarily rescinded its decision and quickly scheduled a rehearing.<sup>311</sup>

Upon rehearing, the court reversed its prior decision, saying that homeschooling qualified as a form of private schooling compatible with the California statutes.<sup>312</sup> The court held to a very textualist position throughout its decision: "It is important to recognize that it is not for us to consider, as a matter of policy, whether home schooling *should* be permitted in California. That job is for the Legislature. It is not the duty of the courts to make the law; we endeavor to interpret it."<sup>313</sup> The court then noted that the political situation had changed since the California laws outlawing homeschooling were enacted.<sup>314</sup> These developments in homeschooling itself were accompanied by legislative recognition, leading to "the Legislature's apparent acceptance of the proposition that home schools are permissible in California when conducted as private

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308. Joshua Dunn & Martha Derthick, *Home Schoolers Strike Back*, 8 EDUC. NEXT 4, 11 (Fall 2008), [http://media.hoover.org/documents/ednext\\_20084\\_11.pdf](http://media.hoover.org/documents/ednext_20084_11.pdf).

309 *Id.*

310. Press Release, Governor of California, Gov. Schwarzenegger Issues Statement Regarding Court of Appeals Home Schooling Ruling (Mar. 7, 2008) (*available at* <http://gov.ca.gov/press-release/8951/>) ("Every California child deserves a quality education and parents should have the right to decide what's best for their children. . . . This outrageous ruling must be overturned by the courts and if the courts don't protect parents' rights then, as elected officials, we will."); Seema Mehta, *Bill on Home School Rights Urged*, LOS ANGELES TIMES, Mar. 8, 2008, at B-1; Kristin Klobberdanz, *A Homeschooling Win in California*, TIME, Aug. 13, 2008, <http://www.time.com/time/nation/article/0,8599,1832485,00.html?xid=feed-cnn-topics>; Jill Tucker & Bob Egelko, *Governor Vows to Protect Homeschooling*, S.F. CHRON., Mar. 8, 2008, at A.1, *available at* [www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/03/07/MNCHVG0SD.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/03/07/MNCHVG0SD.DTL).

311. Bob Egelko, *California Homeschooling Case to be Reheard*, S.F. CHRON., Mar. 27, 2008, at B-1, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/03/26/BA7CVR0TG.DTL&tsp=1>.

312. *Jonathan L.*, 81 Cal. Rptr. 3d at 576.

313. *Id.* at 577.

314. *Id.* ("Thus, as of [1929], given the history of the statutes and the Legislature's implied concurrence in the case law interpreting them, the conclusion that home schooling was not permitted in California would seem to follow. However, subsequent developments in the law call this conclusion into question.").

schools.”<sup>315</sup> Even though home schools may satisfy the private school requirement, the court noted that there was still room for state involvement.<sup>316</sup>

The fact that *Jonathan L.* raised the homeschooling issue within a larger custody battle makes it an imperfect precedent for homeschoolers to use to forward their arguments in the future. *Rachel L.* dealt primarily with a dependency hearing in which homeschooling was a tangential, though important, issue.<sup>317</sup> In such a custody case, the state’s interest is far greater than in a facial challenge to compulsory education laws.

b. *Combs v. Homer-Center School District*<sup>318</sup>

While the outcome of the *Jonathan L.* case seemed largely influenced by public pressure and the interpretation of state law, the *Combs* case presents a more nuanced discussion of the tensions at play in these decisions and a fuller treatment of the tension between state and federal laws. In *Combs*, the court attempted to balance the parents’ Free Exercise claims under the federal Constitution with the Pennsylvania compulsory education laws requiring homeschoolers to “provide instruction for a minimum number of days and hours in certain subjects and submit a portfolio of teaching logs and the children’s work product for review.”<sup>319</sup> Review is conducted by the local school district to “determine[] whether each student demonstrates progress in the overall program.”<sup>320</sup> In its review process, “[t]he school district does not review the educational content, textbooks, curriculum, instructional materials, or methodology of the program.”<sup>321</sup> The parents in *Combs* challenged the state’s reporting requirements under a Free Exercise rationale, asking for “an exemption from the Act 169 [reporting] requirements” in addition to a declaration that the requirements themselves violated the Federal Constitution and Pennsylvania’s Religious Freedom Protection Act.<sup>322</sup>

In Pennsylvania, the Legislature allows for “four alternative categories of education to satisfy the compulsory attendance requirement . . . [including] a ‘home education program.’”<sup>323</sup> The Legislature expressly allowed this homeschooling option in Act 169, which it enacted in 1988.<sup>324</sup> That Act, which is at issue in the suit, required that homeschoolers meet the same hour and subject

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315. *Id.* at 578.

316. *Id.*

317. *Id.* at 578–80.

318. 540 F.3d 231 (3d Cir. 2008).

319. *Id.* at 233.

320. *Id.* at 233–34.

321. *Id.* at 234.

322. *Id.*

323. *Combs*, 540 F.3d at 236 (quoting 24 PA. STAT. ANN. §13-1327.1).

324. *Id.* at 237.

requirements as a religious school.<sup>325</sup> State officials monitor student progress under these requirements by reviewing students' portfolios. In addition to the presentation of a portfolio, the state requires that student work be evaluated by a third party under Act 169.<sup>326</sup> While some parents consider this review an onerous burden, the court noted that "[i]n practice, the school districts engage in a limited level of oversight."<sup>327</sup> What is more, the Pennsylvania regulations seemed to the court to be less of a substantive check on parents and more an administrative hoop for parents to jump through: as long as those administering homeschooling programs submit the required documentation, their plans are approved.<sup>328</sup>

Though it is beyond our present purposes, one additional layer in *Combs* came with the invocation of Pennsylvania's *Religious Freedom Protection Act* (RFPA).<sup>329</sup> Similar to Congress's *Religious Freedom Restoration Act*<sup>330</sup> passed after the infamous *Smith* decision and later struck down in *City of Boerne v. Flores*,<sup>331</sup> the Pennsylvania RFPA attempted to forbid the imposition of a "substantial burden" on religion through facially neutral laws.<sup>332</sup> To survive a challenge, the state had to prove that it had a compelling interest to impose a substantial burden on someone's religious exercise.<sup>333</sup>

At the heart of *Combs* is the court's discussion of the parents' federal constitutional claims.<sup>334</sup> The court labeled Act 169 "a neutral law of general applicability" under *Smith*.<sup>335</sup> According to the court, this neutral law "neither targets religious practice nor selectively imposes burdens on religiously motivated conduct. Instead, it imposes the same requirements on parents who home-school

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325. *Id.*

326. *Id.* at 238–39.

327. *Id.* at 239.

328. *Id.* at 239–40.

329. 71 PA. STAT. ANN. §§ 2401–2407 (2009).

330. 42 U.S.C. § 2000bb.

331. 521 U.S. 507 (1997).

332. *Combs*, 540 F.3d at 240.

333. *Id.* In Pennsylvania, the definition of religious exercise is based on the strong wording of the Pennsylvania Constitution in favor of freedom of conscience in all things religious:

All men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

*Id.* at 240, n.18 (quoting PA. CONST. art. 1, § 3).

334. *Id.* at 241.

335. *Id.* at 242.

for secular reasons as on parents who do so for religious reasons.”<sup>336</sup> The court was also not convinced that religiously-minded parents were actually harmed as a result of their belief.<sup>337</sup> In response, the parents argued that there was a *Sherbert*-like exception, that they had been targeted as part of a licensing scheme that allowed for individual determinations of applicability.<sup>338</sup> The Court, however, interpreted the Act as applying to all Pennsylvania children equally and allowing homeschooling as one valid method to satisfy the compulsory school attendance requirement.<sup>339</sup>

With the specter of *Smith* lurking in the background, the *Combs* court reviewed the parents’ claim under rational basis review.<sup>340</sup> Under that standard, the state only needed to prove a rational relation to some legitimate governmental interest.<sup>341</sup> Since government acts are presumed constitutional under rational basis review, it is an uphill battle for anyone arguing against the state regulations.<sup>342</sup> The *Combs* court sided with the State under rational basis review by stating that “[t]he Commonwealth has a legitimate interest in ensuring children taught under home education programs are achieving minimum educational standards and are demonstrating sustained progress in their educational program.”<sup>343</sup>

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336. *Id.*

337. *Combs*, 540 F.3d at 242 (“[N]othing in the record suggests Commonwealth school officials discriminate against religiously motivated home education programs (e.g., denying approval of home education programs because they include faith-based curriculum materials).”).

338. *Id.* *Sherbert v. Verner*, 374 U.S. 398 (1963), involved a denial of unemployment benefits to a Seventh-day Adventist who refused to work on Saturdays rather than violate her Sabbath. *Sherbert* set the substantial burden test for Free Exercise claims, though the Court only invalidated laws similar to that in *Sherbert* and *Yoder*.

339. *Combs*, 540 F.3d at 242.

340. *Id.* at 242–43.

341. *Id.* at 243; *Heller v. Doe*, 509 U.S. 312, 321 (1993) (“Finally, courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.”); see *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

342. *Combs*, 540 F.3d at 243.

343. *Id.* The Court also cites *Pierce* and *Brown* for the proposition that the state has a legitimate interest in the education of its citizens. The aspirational language of *Brown* is particularly poignant:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any

After granting a victory to the state under rational basis review, the court considered the parents' hybrid-rights claim.<sup>344</sup> As the court notes from the outset, hybrid-rights claims rest on a rather shaky foundation in the courts of appeals.<sup>345</sup> For example, some circuits consider hybrid claims as mere dicta while others use different standards to determine whether a hybrid-rights claim will move forward.<sup>346</sup> Meanwhile, other circuits have called hybrid-rights claims "completely illogical"<sup>347</sup> while still others "can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."<sup>348</sup> Indeed, these criticisms have been lodged against *Smith* before in various contexts.<sup>349</sup> The logic of hybrid rights, if not

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child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

347 U.S. 483, 493 (1954).

344. *Combs*, 540 F.3d at 243.

345. *Id.* at 244.

346. *Id.*

347. *Id.* (quoting the 6th Circuit's conclusion in *Kissinger v. Bd. of Trs. of Ohio State Univ.*, Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir.1993)).

348. *Id.* (quoting *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003)).

349. Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses* 1995 SUP. CT. REV. 323, 335 ("Justice Scalia's implicit claim—that free exercise claims are a *necessary* component of some successful "hybrid" challenges but that claims of the same type can *never* succeed on their own—approaches, and possibly achieves, incomprehensibility."); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 267 (The hybrid-rights argument "is the foundation of *Wisconsin v. Yoder*, and because it depends upon the judge-made right of parental control as a boost to the textual right of free exercise, it is the most controversial member of the hybrid rights set. In addition, a great many free exercise claims involve the parent-child-state triangle, so *Yoder's* fate is of crucial significance to the development of the law in the field.").

Just three years after *Smith*, Justice Souter questioned the entire hybrid-rights rationale:

[T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

untenable, is at least questionable: if *one* right is insufficient in itself, it is unclear how that right suddenly becomes sufficient and subject to higher scrutiny when other rights are added to it.<sup>350</sup>

In the face of this and other criticisms of hybrid rights, some courts have presented a tentative approval of the hybrid-rights scenario so long as each asserted right is “independently viable.”<sup>351</sup> Some circuits have applied the hybrid-rights scheme if the plaintiff meets certain strict requirements<sup>352</sup> while others have approved the hybrid-rights scheme and are more lenient in their hybrid-rights analysis.<sup>353</sup> Nevertheless, after assessing all the prior circuit rulings on the issue, the Third Circuit in *Combs* decides that “[u]ntil the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta.”<sup>354</sup>

The Third Circuit hesitated to apply the hybrid-rights analysis in *Combs* partly because it did not recognize a second, independently viable claim other than the parents’ Free Exercise claim.<sup>355</sup> Though it acknowledged the parental right to direct the upbringing of children mentioned in *Meyer*, *Pierce*, *Yoder*, and *Troxel*, the Third Circuit distinguished the parental right over the upbringing of children from the right asserted by the parents in *Combs*: “[T]he particular right asserted in this case—the right to be free from all reporting requirements and ‘discretionary’

Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

350. Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PART 192 (2007).

351. *Combs*, 540 F.3d at 245: “See *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C.Cir.2001) (rejecting the ‘hybrid claim’ argument that ‘the combination of two untenable claims equals a tenable one’); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (finding that the EEOC’s violation of the Establishment Clause triggered the hybrid-rights exception); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 18–19 (1st Cir. 2004) (citing *Gary S. v. Manchester Sch. Dist.*, 241 F.Supp.2d 111, 121 (D.N.H. 2003)) (affirming, for the same reasons, the district court’s rejection of a hybrid-rights claim because the free exercise claim was not conjoined with an independently viable companion claim); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid-rights claim because “[plaintiff’s] free exercise challenge is . . . not conjoined with an independently protected constitutional protection’.” If each claim is “independently viable,” however, one wonders why we need the combination of issues or what that combination adds to the analysis.

352. *Combs*, 540 F.3d at 245 (“The United States Courts of Appeals for the First Circuit and District of Columbia have acknowledged that hybrid-rights claims may warrant heightened scrutiny, but have suggested that a plaintiff must meet a stringent standard: the free exercise claim must be conjoined with an independently viable companion right.”).

353. *Id.* (“The United States Courts of Appeals for the Ninth and Tenth Circuits recognize hybrid rights and require a plaintiff to raise a ‘colorable claim that a companion right has been violated.’” (quoting *San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004))).

354. *Id.* at 247. The Court also notes that in this case, the parents’ challenge would also fail under the other circuits’ tests requiring independently viable claims.

355. *Id.*

state oversight of a child's home-school education—has never been recognized.”<sup>356</sup> It further noted that the parental right to direct the upbringing of one's children “is a limited one”<sup>357</sup> that is neither “absolute nor unqualified.”<sup>358</sup> Though parents may direct the upbringing of their children, the Third Circuit explained that they are subject to the parameters established by state authorities: “The case law in this area establishes that parents simply do not have a constitutional right to control *each and every aspect* of their children's education and oust the state's authority over that subject.”<sup>359</sup> It highlighted that states have asserted authority over parents in many educational circumstances.<sup>360</sup> Accordingly, the court held that parents have “no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”<sup>361</sup>

Though parents have a general right to direct the religious upbringing of their children, the Third Circuit concluded that there was no infringement on the parents' rights in *Combs*. The court concluded: “Parents are unable to point to even one occasion in which the school districts have questioned their religious beliefs, texts, or teachings.”<sup>362</sup> Thus, “[e]ven though parents are required to keep records and submit them for review, they are in complete control of the religious upbringing of their children.”<sup>363</sup> Because the court found no real harm to the parental rights in question, it ruled in favor of the state law regulating homeschooling.

The law regulating parental rights over the education of their children in the United States is far from settled.<sup>364</sup> Scholars have suggested various avenues of reform,<sup>365</sup> but no one route has been uniformly adopted. Because of recent failures in courts,<sup>366</sup> parental rights supporters have moved the fight to state

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356. *Id.*

357. *Id.*

358. *Id.* at 248 (quoting *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005)).

359. *Combs*, 540 F.3d at 248 (quoting *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998)) (emphasis added).

360. *Id.* n.24.

361. *Id.* at 248 (quoting *Runyon v. McCrary*, 427 U.S. 160, 178 (1976)); see *Combs*, 540 F.3d at 248 n.25 (“Parents who home-school their children may be subjected to standardized testing to ensure the children are receiving an adequate education. See *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) (upholding state standardized test requirement over home-schooling parents' First and Fourteenth Amendment objections).”).

362. *Id.* at 251.

363. *Id.*

364. Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 J. L. & EDUC. 83, 96–106 (2009).

365. One interesting example is Jon S. Lerner, *Protecting Home Schooling through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363 (1995).

366. Bob Unruh, *Judge Orders Homeschoolers into Public District Classrooms*, WORLD NET DAILY, Mar. 11, 2009, available at <http://www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=91397> (discussing a

legislatures.<sup>367</sup>

#### IV. PART THREE: PUBLIC POLICY, PARENTAL RIGHTS, AND THE FUTURE OF HOMESCHOOLING

The normative question of what rights parents should exercise over their children and how that question should influence discussions about education and homeschooling baffles scholars, courts, and legislatures today in Germany and the United States alike.<sup>368</sup> Although the United States has a far more developed body of law on the subject, the future of homeschooling is as uncertain in the United States as it is in Germany. Courts and legislators in both countries are hesitant to draw clear and distinct lines demarcating where parental rights end and state interests begin.<sup>369</sup> Scholars writing about homeschooling in the United States are willing to put forth bright-line rules<sup>370</sup> and largely agree with the Third Circuit's determination in *Combs*: as long as government regulation of homeschooling is "reasonable," that regulation should withstand challenges from parents seeking to circumvent those regulations.<sup>371</sup> In Germany, educational policy is less developed and those writing on the issue note that even though government schools and homeschoolers have similar aims, "[t]he competent authority (primarily the school authority) has to decide which point of view to accept."<sup>372</sup> What "reasonable" restrictions and allowances might mean in each country is another question in light of the different historical and public policy debates surrounding the power of parental rights and the place of homeschooling in an educational panoply. This section discusses how these differences in policy developed in Germany and the United States and makes some predictions about how these policy issues will be handled in the future.

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recent decision by a North Carolina state court judge requiring children to attend public school to receive a "more well-rounded education" even though he thought the mother "had done a good job" teaching her children at home).

367. Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise* 60 GEO. WASH. L. REV. 818, 819 (1992) ("More significantly, the battle has shifted away from adversarial winner-take-all litigation towards legislative reform. Since 1982, thirty-four states have adopted home school statutes or regulations.").

368. See generally Miller, *supra* note 247. (discussing issues in the United States); see Spiegler, *supra* note 49, at 183–89 (discussing the situation in Germany).

369. DeGroff, *supra* note 364, at 101 (discussing different treatments of parental rights in recent United States Supreme Court decisions).

370. See, e.g., Yuracko, *supra* note 23; Devins, *supra* note 367; Louis A. Greenfield, Note, *Religious Home-Schools: That's Not a Monkey on Your Back, It's a Compelling State Interest*, 9 RUTGERS J. L. & RELIGION 4 (2007).

371. See Devins, *supra* note 367.

372. Spiegler, *supra* note 49, at 187.



### **A. Historical Primacy of the Family and Parental Rights**

When one looks at the history of liberal democracies, there is implicit in them a foundation for strong parental rights that applies in the United States just as well as it does in Germany in light of the historical understanding of the family's place in society.<sup>373</sup> Under English Common Law, and under the United States' adoption of the Common Law, society "placed considerable responsibility upon parents, particularly fathers, for the care and welfare of their wards."<sup>374</sup> Before the child reached the age of majority, parents were "absolutely bound to provide reasonably for the child's maintenance, protection, and education."<sup>375</sup> This parental duty extended beyond providing for his basic needs—food, shelter, clothing—and went specifically to the child's needs that most promoted human flourishing: education.<sup>376</sup> The way a parent raises a child also influences how that child will act in the larger society, making this duty superior to others.<sup>377</sup> The duty was considered to be so important that it took precedence over the desires of the child and the State.<sup>378</sup> Because the family was seen as a microcosm of society, yet distinct from it and metaphysically prior to it, a hierarchy of parental duties over those of the State developed.<sup>379</sup> As a result of the prominence given to the family in society, "the educational preferences of parents were considered sacred."<sup>380</sup> Derived from that sacred source, "[t]he right of the father to direct the religious and moral training of his child" was so primary "that the law required a child to be raised according to the traditions and wishes of the father even if the father had died."<sup>381</sup> The parental right over their children was near "absolute" in the nineteenth century.<sup>382</sup> There is also evidence that the American founders left to parents substantial power over the direction of their children.<sup>383</sup>

In the Civil Law heritage of Germany and the European continent,

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373. DeGroff, *supra* note 364, at 108–24.

374. *Id.* at 109.

375. *Id.*

376. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 438–39 (Legal Classics Library 1983); JOHN STUART MILL, ON LIBERTY 112–13 (Macmillan 2008).

377. BLACKSTONE, *supra* note 376, at 438–39.

378. DeGroff, *supra* note 364, at 110.

379. *Id.* (quoting J. Bohl, "Those Privileges Long Recognized:" *Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323, 328 (1994)).

380. *Id.* at 111.

381. *Id.*

382. *Id.* at 111–12.

383. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?* 87 TEX. L. REV. 7, 109–110 (2008). For a view the founders would have known, see MILL, *supra* note 375, at 112 (stating that it is the duty of the parents, and not the state, to provide children an education).

parental rights also held a primary place over the state.<sup>384</sup> Pufendorf (1632–94) and Grotius (1583–1645) agreed with the Common Law tradition in England that would later be transplanted to the United States.<sup>385</sup> Education was central to a parent’s duty toward his children, which required “[t]hat they maintain their Children handsomely, and that they so form their Bodies and Minds by a skillful and wise Education, as that they may become fit and useful Members of Human and Civil Society, Men of Probity, and good Temper.”<sup>386</sup> This understanding of parental rights has continued through to the present-day Europe and has been codified in many modern documents.<sup>387</sup> In the mid-twentieth century, the Universal Declaration on Human Rights stated that “parents have a prior right to choose the kind of education that shall be given to their children.”<sup>388</sup> Other international agreements granted “[t]he widest possible protection and assistance . . . to the family, which is the natural and fundamental group unit of society.”<sup>389</sup> In particular, one UN document acknowledged that a child “shall not be compelled to receive teaching on religion or belief against the wishes of his parents.”<sup>390</sup>

Whatever the historical basis for parental rights, however, these lofty sentiments are now being called into question through policy statements confusing the relationship between parent and child.<sup>391</sup> For clarity, limits to parental rights should be plainly defined.

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384. DeGroff, *supra* note 364, at 122.

385. *Id.*

386. SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN, ACCORDING TO THE LAW OF NATURE* 184 (Knud Haakonssen, ed., 2003) (1735).

387. DeGroff, *supra* note 364, at 122.

388. Universal Declaration of Human Rights, G.A. Res. 217A, art. 10 §11, art. 13 §3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), *available at* <http://www.un.org/Overview/rights.html>. For a superb explanation of the Declaration, its development, and historical significance, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001). A similar treatment is found in JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2000).

389. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6 316 (Jan. 3, 1976), *available at* [http://www.c-fam.org/docLib/20080625\\_ICESCR.pdf](http://www.c-fam.org/docLib/20080625_ICESCR.pdf).

390. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 5, § 2, U.N. Doc. A/RES/36/55 (Nov. 25, 1981), (emphasis in De Groff) *available at* <http://www.un.org/documents/ga/res/36/a36r055.htm>.

391. See Chris Lubienski, *A Critical View of Home Education*, 17 EVAL. & RESEARCH IN EDUC. 167, 169–70 (2003).

### **B. Emerging Public Policy on Homeschooling**

The family is widely regarded “as a training ground for democratic values, where children first learn lessons of cooperation, sacrifice and submission to legitimate authority.”<sup>392</sup> Further, as part of its fundamental mission, the family serves as the filter through which children experience the world and society.<sup>393</sup> In this capacity, “the most critical function of the family is the transmission of fundamental moral, religious and cultural values between the generations.”<sup>394</sup> In free societies like the United States and Germany, however, some argue that democratic government itself has the task of forming its citizens, including forming the moral and social dimensions of each person.<sup>395</sup> Such formation in democracy, it is thought, is essential to the preservation of individual liberty.<sup>396</sup> Thus, many will not respect the rights of families unless there is some showing that the “asserted liberty interest [of parental rights over the education of children] must be critical, or central, to the preservation of liberty.”<sup>397</sup> Prior to the twentieth century, there was general worldwide consensus that the family played a pivotal role in educating children and educating them *for* citizenship and participation in a civil society.<sup>398</sup> Families that were able to maintain their own set of core values contributed to pluralism in society, adding to the diverse set of viewpoints that

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392. DeGroff, *supra* note 364, at 124–25.

393. *Id.* at 125.

394. *Id.* As DeGroff notes, this argument for the protection of parents transmitting values to children was raised unsuccessfully in *Mozert v. Hawkins County Board of Education*, in the context of a public school curriculum. There, parents asked the school district to exempt their child from the school’s reading curriculum that included themes repugnant to the parents’ religious beliefs including “passages in the readers that dealt with magic, role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes, and emphasis on one world or a planetary society.” 827 F.2d 1058, at 1062 (6th Cir. 1987). The Sixth Circuit considered “whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person’s religion as forbidden by the First Amendment.” *Id.* at 1063. The court concluded that the school board’s adoption of a particular curriculum was not an attempt to indoctrinate students in a particular belief structure, but “to offer a reading curriculum designed to acquaint students with a multitude of ideas and concepts, though not in proportions the plaintiffs would like,” but in proportions consistent with the tenets of a pluralistic society. *Id.* at 1069.

395. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 108 (1962); A. Bruce Arai, *Homeschooling and the Redefinition of Citizenship*, 7 *EDUC. POL’Y ANALYSIS ARCHIVES* 27 (1999), available at <http://epaa.asu.edu/epaa/v7n27.html> (leveling many criticisms against homeschoolers, among them the claim that homeschooled students do not fit into the larger society in “the proper ways”).

396. HAYEK, *supra* note 395, at 108–09.

397. DeGroff, *supra* note 364, at 126.

398. *Id.* at 127.

sustains a healthy democracy.<sup>399</sup> But when these parental rights confronted state-run public education systems, the clash between the two interests required policy makers to create a hierarchical structure in which they situated these values.<sup>400</sup>

If society first recognizes parental rights over the education of children as a good, the next step in the process is to determine where parental rights end (if at all) and states' rights begin.<sup>401</sup> In the context of public schools, states may put forth whatever curriculum they choose as a form of government speech.<sup>402</sup> As a result, parents who send their children to public schools must operate within the curricular framework set out by individual school districts.<sup>403</sup> But what about the parental rights just before parents decide to send children to a public school? What rights do parents have to send their children to one school over another, or one type of school over another?

The United States and Germany will each have to resolve these issues within its own legal and cultural structure. In the United States, parents have wide latitude to choose where their children attend school.<sup>404</sup> That parental discretion may be state-supported,<sup>405</sup> or simply tolerated,<sup>406</sup> but it is present nevertheless. Also, the battle for parental rights in the United States will likely be fought in the legislatures of various states and in local governments.<sup>407</sup> In Germany, by

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399. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 333 (2008); see Julien Brygo, *Homeschooling: America's Hidden Breeding Ground for Conservative Ideology*, LE MONDE DIPLOMATIQUE, Feb. 12, 2009, [http://www.alternet.org/story/96685/homeschooling:\\_america's\\_hidden\\_breeding\\_ground\\_for\\_conservative\\_ideology/](http://www.alternet.org/story/96685/homeschooling:_america's_hidden_breeding_ground_for_conservative_ideology/).

400. See Miller, *supra* note 247 (discussing various attempts to rank parental and state rights).

401. See EAMONN CALLAN, CREATING CITIZENS 153–57 (1997) (putting forth a “servility” theory that children are essentially slaves of their parents who choose to raise them within the parents’, usually religious, worldview).

402. See *Meyer*, 262 U.S. at 402 (noting “the state’s power to prescribe a curriculum for institutions which it supports”).

403. See *generally Mozert*, 827 F.2d 1058; *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008) (listing cases that stand for limited parental rights when children receive public education). For another facet of this, see *Board of Regents v. Southworth*, 529 U.S. 217 (2000) (concluding that by matriculating in a public university, students could not challenge the school’s funding of student activities because it was repugnant to their own beliefs so long as the scheme was viewpoint neutral).

404. See CALLAN, *supra* note 401, at 155–56. This remains the case despite those, like Callan, who argue that parents should have no authority over the education of their children because “[a]n interpretation of any right, such as a parents’ right to educational choice, which arbitrarily assumes that autonomy or any other particular criterion must be everyone’s paramount concern is oppressive.” *Id.*

405. See *generally Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding an Ohio school voucher program allowing for broad parental choice even when such choices largely benefit religiously-affiliated institutions).

406. See the state constitutional language discussed above in pages 32–35.

407. See, e.g., H.B. 368, 2009 Leg. (N.H. 2009), *available at* <http://www.leg.state.vt.us/docs/2010/bills/Intro/H-368.pdf>.

contrast, change will likely come as individual states develop their own educational policies after succumbing to grassroots pressure.<sup>408</sup> In either country, public policy goals for education should focus on parents' desires and the needs of individual children.<sup>409</sup>

The United Nations' Special Rapporteur's recommendations to Germany focus on such parental rights and on individualized education.<sup>410</sup> The State, because it recognizes a basic human right to education, needs to settle issues plaguing the German educational system.<sup>411</sup> One such issue is the seemingly tense relation between the state and federal governments.<sup>412</sup> The clash between state and federal educational interests "has often led to policy debates, while the need for national coordination resulted in the creation of various federal level bodies."<sup>413</sup> These discrepancies between various levels of government created a "[f]ragmented and selective approach" that provides unequal education to children in various states.<sup>414</sup> Rather than classifying students at age ten for one of three educational tracks, the Special Rapporteur suggests

that the educational system should be structured in such a way as to render it more permeable—in other words, more responsive to the needs and rights of the pupils, bearing in mind that children develop in different ways and come from different cultural backgrounds and, most important, that any educational system should proceed from the principle of diversity as the cornerstone of its operation.<sup>415</sup>

This individualized approach to education is at the heart of homeschooling.<sup>416</sup>

And to ensure these individualized approaches, the Special Rapporteur suggests more active parental involvement in the educational decisions over their children: "[m]others and fathers, together with the pupils themselves, should have

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408. Muñoz, *supra* note 126, ¶ 2.

409. *See id.* ¶ 49 ("Seven priorities should be highlighted: (1) move from a selective education system to a system which supports the individual and focuses on the person's specific learning abilities . . .").

410. *See id.* ¶ 15.

411. *Id.* ¶ 2–5.

412. *Id.* ¶ 16.

413. *Id.*

414. *Id.* ¶ 14.

415. *Id.* ¶ 60.

416. *See* Arai, *supra* note 395 (noting that some argue this individualized attention is a great advantage of homeschooling over public or private education, while others fear that it will lead to distortions in curriculum or the presentation of a skewed worldview). Interestingly, Arai approves without qualification the notion that the worldview children receive in public schools is "reality" and not the "'distorted' or erroneous view of the world" offered by homeschoolers.

a real possibility to participate in the adoption of decisions relating to classification and other essential aspects of the educational system. This possibility should be established in law.<sup>417</sup> This suggestion sounds largely like an endorsement of homeschooling, or at least a support for stronger parental rights over the education of children. And if it were not clear enough, the Special Rapporteur ends this part of his discussion by saying:

According to reports received, it is possible that, in some Länder, *education is understood exclusively to mean school attendance*. Even though the Special Rapporteur is a strong advocate of public, free and compulsory education, it should be noted that *education may not be reduced to mere school attendance* and that educational processes should be strengthened to ensure that they always and primarily serve the best interests of the child. Distance learning methods and *home schooling* represent valid options which could be developed in certain circumstances, bearing in mind that *parents have the right to choose the appropriate type of education for their children*, as stipulated in article 13 of the International Covenant on Economic, Social and Cultural Rights. The promotion and development of a system of public, government-funded education *should not entail the suppression of forms of education that do not require attendance at a school*. In this context, the Special Rapporteur received complaints about threats to withdraw the parental rights of parents who chose home-schooling methods for their children.<sup>418</sup>

These same suggestions are distilled in the Rapporteur's final set of recommendations: "[N]ecessary measures should be adopted to ensure that the home schooling system is properly supervised by the State, thereby upholding the right of parents to employ this form of education when necessary and appropriate, bearing in mind the best interests of the child."<sup>419</sup> Although the Special Rapporteur is clear in his suggestions to German officials, it is still very uncertain whether Germany will move to tolerate, much less embrace, homeschooling.<sup>420</sup>

Regardless of any action by the German government, some scholars posit that homeschooling in Germany will continue to grow organically.<sup>421</sup> Parents are adamant about securing their rights over and against the monolithic German educational system; parents' arguments for homeschooling appeal to a broader

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417. Muñoz, *supra* note 126, ¶ 61.

418. *Id.* ¶ 16 (emphasis added).

419. *Id.* ¶ 23.

420. *See* Spiegler, *supra* note 49, at 189.

421. *See id.*

perspective when the German education system is no longer serving German citizens well; and, movement toward homeschooling and self-directed education is consistent with the general trends of German educational policy in recent years.<sup>422</sup> Finally, in what may be the best argument for making homeschooling a viable option for students, homeschoolers are performing at or above their public school peers.<sup>423</sup> If homeschooling creates well-educated citizens, it is difficult for the government to argue against homeschooling based on its purported interests.<sup>424</sup>

American liberalism respects the pluralistic influences on society that enrich a democracy.<sup>425</sup> But even in an established democracy like the United States, many commentators want to disregard the contributions of some groups. Opponents of religion both argue that religious groups add nothing to pluralism and tend to dichotomize the interests of religious parents and the state in a way that makes any state interest reasonable and any parental interest a legal fiction.<sup>426</sup> Kimberly Yuracko attacks the Home School Legal Defense Association (HSLDA), a group “[a]t the heart of the Christian homeschooling movement.”<sup>427</sup> HSLDA’s promotion of homeschooling, Yuracko says, is based on “two core ideological beliefs. The first is a belief in parental control—indeed ownership—of children . . . [and] the need for Christian families to separate and shield their children from harmful secular social values.”<sup>428</sup> The purpose of this paper is not to defend the HSLDA from outside attacks, but even a cursory reading of HSLDA materials shows that Yuracko exaggerates this first “belief” to the point of absurdity. The HSLDA and Christian parents in general do not see their role in raising children as a question of *ownership* but one of *stewardship*. They believe that children are a blessing, gifts from God.<sup>429</sup> And as with other blessings—e.g., riches, friends, good health—children are to be guarded and respected as gifts.<sup>430</sup> Parents, therefore, are not considered property owners, but those who safeguard

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422. *See id.*

423. *See id.*

424. This point is widely disputed. *See* CALLAN, *supra* note 401, at 146–47; *see also* Arai, *supra* note 395.

425. *See generally* NUSSBAUM, *supra* note 399.

426. Scholars’ false characterization of the “war between state regulators and *religious* parents and educators” is but one example. Devins, *supra* note 367, at 818 (emphasis added). Similar divisions overlook the increase in secular reasons parents give for homeschooling. The debate is no longer between religious “fundamentalists” and the state, but between those with a more libertarian view of the ideal relationship between individuals and the state. Though many religious parents are the most forceful opponents of extensive state regulation, drawing stark battle lines between “religious” citizens and the state is tendentious at best and disingenuous at worst.

427. Yuracko, *supra* note 23, at 127. The HSLDA represented the parents in the *Combs* case discussed above.

428. *Id.*; *see* CALLAN, *supra* note 401, at 147–57 (offering a similar argument concerning “ownership” of children, though not in reference to HSLDA).

429. MICHAEL W. AUSTIN, *CONCEPTIONS OF PARENTHOOD* 111 (2007).

430. *Id.*

something entrusted to them. Viewing parents merely as proprietors misses both the religious and public policy reasons to support strong parental rights.<sup>431</sup> The second belief, that parents should be able to shield their children from negative influences in society, is not unique to Christian parents or homeschoolers.<sup>432</sup> In fact, much has been written about the effects on children when parents abdicate their role as guardians and teachers and leave society or public schools to raise their children.<sup>433</sup>

The question remains whether parents guarding their children against what they perceive to be negative influences actually harms the interests of the state. As noted above, parents in the United States and Germany have sought to homeschool because they have disagreed with the moral values put forth in public schools.<sup>434</sup> The state wants to ensure that education of all types results in well-formed citizens and maintains the principles of liberalism on which a democracy is founded.<sup>435</sup> In that respect, the interests of the United States government are largely the same as the German government mentioned above. But it is unclear that state-run schools are the best environment in which to accomplish these goals. Some scholars note how homeschooling provides a viable option for parents seeking to instruct their children their own set of moral values or to avoid failing public school systems while still providing an education in good citizenship.<sup>436</sup> As a matter of educational choice, homeschooling is just one option among many—charter schools, private schools, public schools, magnet schools, and more.<sup>437</sup> Just as with other market-based systems, scholars contend that an education market would thrive most with as little regulation and interference as possible: “[t]he best arguments are on the side of a relatively laissez-faire approach” to regulating homeschooling because regulation by the state “implicitly presumes that the state does a good job educating kids and that parents are ignorant until proven otherwise—dubious propositions.”<sup>438</sup> In the end, “[t]he most sensible regulations

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431. As discussed herein, the policy argument for strong parental rights focuses on society’s expectation that parents will be the guardians and directors of their children. Indeed, public policy abhors the idea espoused by Plato in the *Republic* that children should be cared for in common, taken from their natural parents and raised by the city-at-large (REPUBLIC, Book V), though some seem to favor such a scenario, as in CALLAN, *supra* note 401. For an economic perspective of the need for strong parental rights as a support to society-at-large, see JENNIFER ROBACK MORSE, LOVE AND ECONOMICS 83–158 (2001).

432. Bandar Seri Begawan, *Islamic Values Shield Against Bad Influences*, THE BRUNEI TIMES, Jan. 7, 2009, [http://www.bt.com.bn/en/home\\_news/2009/01/07/islamic\\_values\\_shield\\_against\\_bad\\_influences](http://www.bt.com.bn/en/home_news/2009/01/07/islamic_values_shield_against_bad_influences) (“The role of parents has become very pertinent in these times of globalization [sic] to protect the younger generation from its negative effects.”).

433. See generally KAY HYMOWITZ, LIBERATION’S CHILDREN (2003).

434. See *supra* notes 144–45, 240.

435. Lubienski, *supra* note 391, at 170.

436. See Anderson, *supra* note 237.

437. Lubienski, *supra* note 391, at 172–74.

438. See Anderson, *supra* note 237.



would be minimal, requiring home-schooled kids only to demonstrate—through taking a state test or some agreed-upon alternative means—that they were learning how to read, write, and do math by a certain age.<sup>439</sup> For those especially concerned about educating for good citizenship, perhaps a further Civics requirement could be added as well.<sup>440</sup> Whatever the educational requirements imposed on homeschooling, it is at least an option that should be offered freely to parents consistent with a democratic ethic.

## VI. CONCLUSION: A QUANDARY AND A PREDICTION

This note has discussed the state of homeschooling in Germany and the United States as well as some of the challenges homeschoolers in each country will face in the coming years. The comparison between these two countries has shown that nascent and established democracies are both struggling with the basic division between state and private realms when it comes to education. Overall, Germany's decision to outlaw homeschooling seems to be less of a reasoned approach to educational policy and more of a return to a bygone German era.<sup>441</sup> In Germany, homeschooling is a rather recent phenomenon and the grassroots movement to make homeschooling a mainstream reality is growing in strength and organization.<sup>442</sup> Just as with the revolution of 1989, Germany's homeschooling revolution may require much time and a gradual conversion of public opinion, a "revolution of conscience."<sup>443</sup> The state itself seems unwilling to change on its own, but popular pressure has brought about one revolution already.

The United States has accepted homeschooling in various forms and has a more established set of precedents in the courts surrounding educational policy. America is still a land of opportunity, including educational opportunity.<sup>444</sup> Yet even in the more established democracy of the United States, the debate continues between those who want stronger state control over education at the expense of parental involvement. Parents still want to guard children against what they see as negative influences in society,<sup>445</sup> while others want the state to usurp the parental role in its entirety.<sup>446</sup>

International challenges are coming to both countries. On the one hand,

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439. *Id.*

440. It does not appear that other schools have done any better in this regard. Michelle Healy, *Americans Don't Know Civics*, USA TODAY, Nov. 21, 2008, available at [http://www.usatoday.com/news/education/2008-11-19-civics\\_N.htm](http://www.usatoday.com/news/education/2008-11-19-civics_N.htm).

441. See Spiegler, *supra* note 49, at 180-81.

442. *Id.* at 189.

443. GEORGE WEIGEL, *THE FINAL REVOLUTION* 3 (2003).

444. Paul Johnson, *Ten Reasons for Identifying with America*, FORBES, May 13, 2002, at 43.

445. Richard John Neuhaus, *While We're at It*, FIRST THINGS, Oct. 1, 2000, at 89.

446. See generally Yuracko, *supra* note 23.

legislators in the United States are pleading with the German government to legalize homeschooling and respect parental rights. On the other hand, many in the international community are pushing the United States to adopt the UN Convention on the Rights of the Child,<sup>447</sup> an agreement that would (at least potentially) bring about the end of homeschooling in the United States.<sup>448</sup> In light of these international challenges, will Germany accept United States legislators' invitation, or will the United States sign on to the Convention and erase the legal framework for parental rights developed after centuries of struggle? This is the current quandary for these countries.

All across Germany, homeschooling families are under constant threat from the government.<sup>449</sup> Some parents have chosen to emigrate; others to capitulate, at least for a time;<sup>450</sup> and still others to fight against the government.<sup>451</sup> In the United States, parents are being ordered by courts to put their children into public schools for dubious reasons.<sup>452</sup> While the current situation is difficult and the future looks bleak to some, this author is hopeful that both Germany and the United States will see educational choice and parental rights not as a threat to democracy, but as a way for a pluralistic democracy to flourish.



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447. Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 UN GAOR Supp. (No. 49), at 167, U.N. Doc. A/44/49 (Nov. 20, 1989), available at <http://www2.ohchr.org/english/law/crc.htm>.

448. A full discussion of the Convention's impact on homeschooling is the subject of another entire Note. For our purposes, we may consider how the Convention has already been the basis used to attack homeschooling in England. See generally GRAHAM BADMAN, *Report to the Secretary of State on the Review of Elective Home Education in England* (2009), available at <http://www.freedomforchildrentogrow.org/8318-DCSF-HomeEdReviewBMK.PDF>.

449. See Belien, *supra* note 28; *Dudek Family Receives Formal Sentence*, HSLDA, Jul. 29, 2008, <http://www.hsllda.org/hs/international/Germany/200807290.asp>.

450. *Higs And Lows Of Two Families Illustrate Challenges For Homeschoolers*, *supra* note 180.

451. *Id.*; *Dudek Family Receives Formal Sentence*, HSLDA, Jul. 29, 2008, <http://www.hsllda.org/hs/international/Germany/200807290.asp>.

452. Julia Duin, *Home-Schooler Ordered to Attend Public School*, WASH. TIMES, Sep. 15, 2009, [http://www.washingtontimes.com/news/2009/sep/04/home-schooled-christian-girl-ordered-to-join-publi/?feat=home\\_headlines](http://www.washingtontimes.com/news/2009/sep/04/home-schooled-christian-girl-ordered-to-join-publi/?feat=home_headlines) (discussing, among other cases, a New Hampshire girl who is attending school under a court order because the judge considered that the girl's "vigorous defense of her religious beliefs . . . suggests strongly that she has not had the opportunity to seriously consider any other point of view"); James Tucker, *Judge Says She Knows What's Best for Homeschooled Christians*, AMERICAN FREE PRESS, Sept. 21, 2009, [http://www.americanfreepress.net/html/homeschooling\\_183.html](http://www.americanfreepress.net/html/homeschooling_183.html).