

# The Legal Basis for Homeschooling in a Pandemic and Beyond

by  
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## Abstract

Homeschooling provided parents with another educational option as the COVID-19 pandemic shut down classrooms, with the number of homeschooling parents doubling in 2020. This Article examines the legal status of homeschooling, particularly in the context of the constitutional parental right.

## I. Introduction

Parents have homeschooled their children for various reasons, among the most significant being parental concerns about the academics and environment of local schools, as well as a desire to provide religious or moral instruction.<sup>1</sup> Other reasons for homeschooling children may include medical reasons.<sup>2</sup> Now, a pandemic has joined the list of reasons for homeschooling.

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<sup>1</sup> U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, *The Condition of Education* 2005, at 32 (2005), <https://nces.ed.gov/pubs2005/2005094.pdf> [<https://perma.cc/8K4P-48AL>]. Concerns about the school environment drove the choice to homeschool (a reason cited by 34% of families), followed by dissatisfaction with instruction (17%) and a desire for religious instruction (16%). Ke Wang, Amy Rathbun, & Lauren Musu, *School Choice in the United States: 2019*, 2 [hereinafter *School Choice*], available at [https://nces.ed.gov/pubs2019/2019106.pdf?campaign\\_id=0&emc=edit\\_ptg\\_20200818&instance\\_id=0&nl=nyt-parenting&regi\\_id=0&segment\\_id=0&te=1&user\\_id=07c84e6008fc833fc81b9d28e136ff32](https://nces.ed.gov/pubs2019/2019106.pdf?campaign_id=0&emc=edit_ptg_20200818&instance_id=0&nl=nyt-parenting&regi_id=0&segment_id=0&te=1&user_id=07c84e6008fc833fc81b9d28e136ff32) [<https://perma.cc/P5XD-V5YQ>].

<sup>2</sup> For example, parents may want to avoid required vaccinations for children. “With the passage of [a recent] law, New York became only the fifth state to ban all nonmedical exemptions to its vaccination requirements and now has among the strictest policies in the nation.” Kelly Cousoulis, *21st Century Medicine Versus Anti-Vaccination Myths: Analyzing the World-Wide Resurrection of Measles and Why the United States Should End Religious and Philosophical Vaccination Exemptions*, 12 *GEORGE MASON INT'L L.J.* 89, 102-03 (2021).

COVID-19 complicated life for nearly everyone, including school-aged children and their parents. Not wanting to deal with their children’s schools pivoting between online and traditional instruction, or the online school curriculum, many parents turned to homeschooling for the first time. According to a Gallup poll, the percentage of parents homeschooling in 2020 doubled to 10%.<sup>3</sup>

Parents have been able to homeschool their children during the pandemic because of a history of homeschooling in the United States, as well as recent legislative authority in all states. However, this falls short of the constitutional protection afforded to parents to make decisions concerning the care, custody, and control of their children (hereinafter “parental right”), which is deeply rooted and has been described by the U.S. Supreme Court as a fundamental right.<sup>4</sup>

While there is no consistently used definition of the parental right,<sup>5</sup> it does not necessarily include homeschooling.<sup>6</sup> Further-

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Unvaccinated children should either be homeschooled or moved to a different state. *Id.*

<sup>3</sup> Megan Brennan, *K-12 Parents’ Satisfaction with Child’s Education Slips*, GALLUP (Aug. 25, 2020), <https://news.gallup.com/poll/317852/parents-satisfaction-child-education-slips.aspx> [<https://perma.cc/5RQF-658Y>].

<sup>4</sup> See, e.g., *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997) (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one’s children.”); *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.”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (“The liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.’”).

<sup>5</sup> The U.S. Supreme Court language regarding it is broad. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (“The liberty interest at issue in this case—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. More than 75 years ago, in *Meyer v. Nebraska*, we held that the ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and ‘to control the education of their

more, even if the parental right did include homeschooling, the U.S. Supreme Court has not articulated a consistent level of scrutiny for judicial review of restrictions on the parental right.<sup>7</sup> It is unclear whether strict scrutiny would apply to such state interferences,<sup>8</sup> and various levels of scrutiny have been applied, depend-

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own.”). See also John M. Lewis, *Re-Evaluating Grandparental Visitation in North Carolina in Light of Troxel v. Granville*, 23 CAMPBELL L. REV. 249, 254 n.39 (2001) (noting two state supreme courts’ interpretations of the parental right). “Consequently, federal circuits have split regarding the boundaries of parental rights, with some circuits adopting the traditional view of the *Meyer-Pierce* right and others finding that parental rights terminate upon the choice to send a child to a public school rather than a private school.” Lauren Vanga, Comment, *Ending Bullying At A Price?: Why Social Conservatives Fear Legislatively Mandated LGBT Indoctrination in Schools*, 17 CHAP. L. REV. 659, 669 (2014).

<sup>6</sup> See *infra* Part III.

<sup>7</sup> Daniel E. Witte, Note, *People v. Bennett: Analytic Approaches to Recognizing A Fundamental Parental Right Under the Ninth Amendment*, 1996 B.Y.U. L. REV. 183, 187 (“highlight[ing] the disparity that some perceive between the expansive language higher courts have used to characterize constitutionally protected parental rights and the lack of deference many lower courts actually show when applying parental rights within specific fact settings.”). Normally, “[w]hen the right infringed is ‘fundamental,’ the governmental regulation must be ‘narrowly tailored to serve a compelling state interest.’ Rights are fundamental when they are ‘implicit in the concept of ordered liberty,’ or ‘deeply rooted in this Nation’s history and tradition.’ Where the claimed right is not fundamental, the governmental regulation need only be reasonably related to a legitimate state objective.” *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460-61 (2d Cir. 1996) (citations omitted).

<sup>8</sup> “The Supreme Court, however, has never expressly indicated whether this ‘parental right,’ when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review.” *Immediato*, 73 F.3d at 461. “One thing is clear: the majority of Justices past and present agree emphatically that the Due Process Clause of the Fourteenth Amendment guarantees parents a right to the care, custody, and control of their children. The clarity ends there. The Court has left open for debate the nature of the right, the appropriate level of scrutiny, and which state interests allow for a decision against a parent’s wishes for his or her child.” Kristen H. Fowler, *Constitutional Challenges to Indiana’s Third-Party Custody Statutes*, 82 IND. L.J. 499, 507 (2007). See also Nicole Thieneman Maddox, *Silencing Students’ Cell Phones Beyond the Schoolhouse Gate: Do Public Schools’ Cell Phone Confiscation and Retention Policies Violate Parents’ Due Process Rights?*, 41 J.L. & EDUC. 261, 267 (2012) (“Thus, courts have not consistently applied strict scrutiny analysis to cases involving parental rights throughout the history of due process jurisprudence. Even after the Supreme Court’s announcement of par-

ing on the specific parental issue at stake.<sup>9</sup> As a result, the strength and contours of the parental right have been uncertain for decades.<sup>10</sup>

This Article examines the place of homeschooling in constitutional law, particularly in the context of the parental right. Accordingly, Part II introduces the concept of homeschooling and its legal basis, while Part III looks at potential constitutional protections. Part III analyzes the standard of review of state laws restricting the parental right, examining the limitations of such a right.

## II. Homeschooling and Its Legal Basis

The value of an education cannot be overstated, particularly given that education has long been viewed as a key to success in society, especially in today's knowledge-based society and economy.<sup>11</sup> Every state constitution has an education clause requir-

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ents' rights to manage their children as fundamental, the question of the appropriate level of scrutiny for a state's justified intrusion remains unclear. The Supreme Court has not announced a consistent standard to be applied in cases addressing this issue.”).

<sup>9</sup> Commonly, either strict scrutiny or rational basis review is applied in substantive due process cases. Kelly A. Spencer, Note, *Sex Offenders and the City: Ban Orders, Freedom of Movement, and Doe v. City of Lafayette*, 36 U.C. DAVIS L. REV. 297, 302 (2002). However, the U.S. Supreme Court has also used other levels of scrutiny in such cases. 2. *Substantive Due Process — Intermediate Level Scrutiny.*, 106 HARV. L. REV. 210, 211 (1992). See *infra* Part III.B.

<sup>10</sup> “American common law gives parents the primary right to govern their children’s activity, but specific issues of statewide importance are resolved by statute.” Sy Moskowitz, *American Youth in the Workplace: Legal Aberration, Failed Social Policy*, 67 ALB. L. REV. 1071, 1081 (2004).

<sup>11</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”); Judith M. Gerber & Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York’s Foster Children*, 69 ALB. L. REV. 1, 74 (2005) (“Adults who speak out about the rocky path they have traveled from foster care to successful adulthood often attribute their life success to their education and a caring teacher.”); Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 668 (1987) (“Our tradition asserts that this compulsion is in the best interest of children, because education ultimately develops their capacity to enjoy the full and meaningful exercise of their adult liberties.”).

ing a system of free public education.<sup>12</sup> States also have compulsory attendance laws,<sup>13</sup> but some families fulfill these legal duties through homeschooling, which is legal in all states.<sup>14</sup>

### A. Homeschooling

Homeschooling occurs when students receive their formal education at home. According to the National Center for Education statistics,

students are considered to be homeschooled if their parents reported them being schooled at home instead of at a public or private school, if their enrollment in public or private schools did not exceed 25 hours a week, and if they were not being homeschooled only due to a temporary illness.<sup>15</sup>

There is no uniform or prescribed curriculum for homeschooling.<sup>16</sup> In recent years, homeschooling students in more than half of U.S. states have been allowed access to participate in their local public schools' athletic programs.<sup>17</sup> Some states do not require parents wishing to homeschool their children to give notice, but others do.<sup>18</sup>

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<sup>12</sup> Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 6 (2002).

<sup>13</sup> Randall Curren & J. C. Blokhuis, *The Prima Facie Case Against Homeschooling*, 25 PUB. AFFAIRS Q. 1, 1 (2011).

<sup>14</sup> Tanya K. Dumas, Sean Gates, & Deborah R. Schwarzer, *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, 16 WIDENER L. REV. 63, 68 (2010). See also Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 43 (2020).

<sup>15</sup> *School Choice*, *supra* note 1, at 2.

<sup>16</sup> Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 80 (2002).

<sup>17</sup> Home Education, *Homeschool Sports Access by State*, Coalition for Responsible Home Schooling, <https://responsiblehomeschooling.org/research/current-policy/homeschool-sports-access-by-state/> [<https://perma.cc/5EY6-82KT>]. For commentary, see Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. LEGAL ASPECTS SPORT 213 (2005). See also Tayler G. Hansford, Recent Development, *Education Law—The Traveler's Guide to Homeschool Regulation in the United States*, 43 AM. J. TRIAL ADVOC. 513, 517 (2020).

<sup>18</sup> Hansford, *supra* note 17, at 514.

Historically, children in the United States were commonly homeschooled from the Colonial era until the Industrial Revolution, when the prominence of the home as a social institution decreased.<sup>19</sup> By the mid-nineteenth century, there was also significant immigration to the United States, and the public schools disseminated American values to all.<sup>20</sup> Around this time, states started to enact compulsory schooling laws under *parens patriae* authority.<sup>21</sup> These laws evolved over the years to “mandate that children of a certain age receive education by either attending a public or private primary and secondary school, or a homeschool.”<sup>22</sup>

The modern era of homeschooling originated in the 1970s, prompted by an increasingly bureaucratic public school system and the proliferation of values in the public schools that did not necessarily align with all parents’ beliefs.<sup>23</sup> Homeschooling became countercultural for both conservatives and liberals.<sup>24</sup> Increased suburbanization and privatization also contributed to homeschooling.<sup>25</sup>

Homeschooling grew with the advent of the twenty-first century. There was a 74% increase of homeschooling between 1999 and 2007, for a total of 1.5 million homeschooled children in 2007.<sup>26</sup> National homeschooling rates grew again until 2012, after which they remained steady for a few years at around

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<sup>19</sup> MILTON GAITHER, *HOMESCHOOL: AN AMERICAN HISTORY*, 1-51 (2017).

<sup>20</sup> *Id.* at 38-39.

<sup>21</sup> Ronald Kreager Jr., Note, *Homeschooling: The Future of Education’s Most Basic Institution*, 42 U. TOL. L. REV. 227, 228 (2010).

<sup>22</sup> Anjaleck Flowers, *The Implied Promise of a Guaranteed Education in the United States and How the Failure to Deliver It Equitably Perpetuates Generational Poverty*, 45 MITCHELL HAMLIN L. REV. 1, 6 (2019).

<sup>23</sup> GAITHER, *supra* note 19, at 91.

<sup>24</sup> Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children’s Interests*, 46 U. BALT. L. REV. 57, 64 (2016).

<sup>25</sup> GAITHER, *supra* note 19, at 91.

<sup>26</sup> Stacey Bielick, *Issue Brief: 1.5 Million Homeschooled Students in the United States in 2007*, NAT’L CTR. FOR EDUC. STAT. 2-3 (Dec. 2008).

3.3%<sup>27</sup>—this amounted to nearly 2 million homeschooled students.<sup>28</sup>

In 2020, the COVID-19 pandemic doubled the number of children being homeschooled in the United States. Approximately 5.4% of U.S. households with school-aged children reported homeschooling in Spring of that year, but 11.1% of households with school-age children reported homeschooling by the Fall.<sup>29</sup> Homeschooling rates increased particularly in households where respondents identified as Black or African American—from 3.3% in Spring 2020 to 16.1% in Fall 2020.<sup>30</sup> This may be because of the ways that the COVID-19 pandemic affected this demographic group.<sup>31</sup>

The significant increase of homeschooling during the COVID-19 pandemic is often attributed to either safety concerns regarding in-person learning or concerns with remote learning.<sup>32</sup> The physical shutdown of many schools in 2020 to prevent the spread of the virus required an emergency shift to remote learn-

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<sup>27</sup> Casey Eggleston & Jason Fields, *Census Bureau's Household Pulse Survey Shows Significant Increase in Homeschooling Rates in Fall 2020*, UNITED STATES CENSUS BUREAU (Mar. 22, 2021), <https://www.census.gov/library/stories/2021/03/homeschooling-on-the-rise-during-covid-19-pandemic.html> [<https://perma.cc/9BK7-65EQ>].

<sup>28</sup> Hansford, *supra* note 17, at 513.

<sup>29</sup> Eggleston & Fields, *supra* note 27.

<sup>30</sup> *Id.*

<sup>31</sup> Susannah J. Gleason & William J. Keegan, *Bioethics*, 37 GA. ST. U. L. REV. 173, 193-94 (2020). See also Chaz Rotenberg, Note, *The Path Less Traveled: Afrocentric Schools and Their Potential for Improving Black Student Achievement While Upholding Brown*, 47 FORDHAM URB. L.J. 1173, 1183-84 (2020) (“Even in integrated, high-performing schools, Black parents worry about how majority-white environments and curricula could harm their children. These concerns can include microaggressions, hate speech, disproportionate school discipline, and over-diagnosed learning and social disabilities. As a result, many Black parents remove their children from public schools and opt for other educational options, such as homeschooling and Black-immersion programs.”).

<sup>32</sup> See, e.g., Brenan, *supra* note 3 (“As COVID-19 continues to disrupt schools in the U.S., parents of school-age children are significantly less satisfied than they were a year ago with the education their oldest child is receiving. . . . While parents’ satisfaction with their child’s education has fallen, there has been a five-point uptick (to 10%) in the percentage of parents who say their child will be home-schooled this year.”).

ing.<sup>33</sup> For many schools, responding to the sudden emergence of COVID-19 meant delivering classes synchronously online during the school day through videoconference on Zoom or a similar video communications platform. While teachers exerted significant effort to learn how to teach remotely during the onset of a global pandemic, the lack of previous investment in online learning technology by schools meant many students had to do “their coursework in video chat rooms . . . instead of having the opportunity to take advantage of high quality interactive and pedagogically sound online options.”<sup>34</sup> Many parents considered emergency remote teaching substandard, worrying that their children would not learn as well online.<sup>35</sup>

As a result, some parents found it easier to take control of their children’s education entirely during the pandemic, leading to a significant expansion of homeschooled children. “From the much-discussed ‘pandemic pods,’ (small groups of students gathering outside a formal school setting for in-person instruction) to a reported influx of parent inquiries about stand-alone virtual schools, private schools and homeschooling organizations, American parents are increasingly open to options beyond the neighborhood school.”<sup>36</sup> It is possible that parental interest in homeschooling will continue beyond the pandemic.<sup>37</sup>

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<sup>33</sup> David Lopez, Foreword, *The Great Pandemic and the Great Reckoning: Law and Society in an Emerging World*, 72 RUTGERS U. L. REV. 1265, 1268 (2021).

<sup>34</sup> Richard Arum & Mitchell L. Stevens, *What Is a College Education in the Time of Coronavirus?*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/opinion/college-education-coronavirus.html> [<https://perma.cc/AL5A-THEE>].

<sup>35</sup> Motivating students to learn online posed challenges to parents. Jeffrey M. Jones, *Social Factors Most Challenging in COVID-19 Distance Learning* (June 12, 2020), <https://news.gallup.com/poll/312566/social-factors-challenging-covid-distance-learning.aspx> [<https://perma.cc/TT6P-BDZR>]. Indeed, “[m]otivating students in a live classroom has been the focus of scholarly attention for decades. As online courses and distance learning become more common, attention must shift to ensuring that students are also motivated in their online courses.” Margaret Ryznar & Yvonne M. Dutton, *Lighting a Fire: The Power of Intrinsic Motivation in Online Teaching*, 70 SYRACUSE L. REV. 73, 74 (2020).

<sup>36</sup> Eggleston & Fields, *supra* note 27.

<sup>37</sup> See Arianna Prothero & Christina A. Samuels, *Home Schooling Is Way Up With COVID-19. Will It Last?*, EDUC. WK. (Nov. 11, 2020), <https://>



Criticisms of the current homeschooling regime include “the absence of any significant regulation, the inability of most homeschooling parents to teach the variety of courses appropriate, the extreme ideological views many hold, the limited socialization most provide, and the risks of abuse and neglect.”<sup>38</sup> There also have been concerns that homeschooling may facilitate the under-education of some girls,<sup>39</sup> and that abuse or neglect of homeschooled children may escape the notice of authorities.<sup>40</sup> In addition, well-resourced families leaving the public schools is a missed opportunity to improve them.<sup>41</sup> Finally, “education has a fundamental role in maintaining the fabric of our society,”<sup>42</sup> but it omits homeschooled children. Accordingly, homeschooling “may pose a risk to children as future citizens.”<sup>43</sup> Regulations on homeschooling have been suggested.<sup>44</sup> For example, some commentators have suggested that homeschooled children should be required to take regular standardized tests.<sup>45</sup>

Advocates for homeschooling, meanwhile, point to success along several measures. These include good testing scores by many homeschooled children and their later engagement in productive lives.<sup>46</sup> Furthermore, homeschooling allows parents to

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[www.edweek.org/policy-politics/home-schooling-is-way-up-with-covid-19-will-it-last/2020/11](http://www.edweek.org/policy-politics/home-schooling-is-way-up-with-covid-19-will-it-last/2020/11) [https://perma.cc/6WAJ-CJL5].

<sup>38</sup> Barholet, *supra* note 14, at 46. See also Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1429 (2020).

<sup>39</sup> Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALI. L. REV. 123, 132 (2008).

<sup>40</sup> Robin L. West, *The Harms of Homeschooling*, 29 PHILOSOPHY & PUB. POL'Y Q. 7, 9 (Summer/Fall 2009).

<sup>41</sup> “The families who abandon the public schools tend to be the families with the greatest resources for improving the schools.” George Shepherd, *Homeschooling's Harms: Lessons from Economics*, 49 AKRON L. REV. 339, 356 (2016).

<sup>42</sup> *Plyer v. Doe*, 457 U.S. 202 (1982).

<sup>43</sup> Huntington & Scott, *supra* note 38, at 1430.

<sup>44</sup> See, e.g., 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, 4 (2007) (noting the debate regarding regulations on homeschooling).

<sup>45</sup> West, *supra* note 40, at 12.

<sup>46</sup> Sonia M. Muscatine, *Homeschooling and the Right to Education: Are States Fulfilling Their Constitutional Obligations to Homeschooled Students?*, 49 J.L. & EDUC. 67, 84 (2020).

avoid underperforming schools and to provide a religious education.<sup>47</sup> Finally, homeschooling can be tailored to each student to maximize performance and results.<sup>48</sup>

### B. *Legal Basis for Homeschooling*

“[T]he right to homeschool is based on state legislation, which can be changed at any time.”<sup>49</sup> The legal status of homeschooling was initially unclear because compulsory school attendance laws did not necessarily exempt parents who educated their children at home.<sup>50</sup> Even in 1981, the majority of states still prohibited homeschooling.<sup>51</sup> However, “[c]ourt decisions, combined with effective lobbying by Christian homeschoolers that prompted statutory reforms, led to a legal revolution so that by 2000, homeschooling was legal under some circumstances in all fifty states, whether by judicial decree or statute.”<sup>52</sup> Often, homeschooling is permitted as an exemption to state compulsory school attendance laws.<sup>53</sup>

Homeschooling has often been linked to religious justifications, which strengthened constitutional arguments for homeschooling. “The Court’s *Yoder* decision is regularly relied on by the homeschooling movement as providing special protection for religious parents.”<sup>54</sup> Indeed, there is a particular emphasis on re-

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<sup>47</sup> See *supra* Part I.

<sup>48</sup> Dumas et al., *supra* note 14, at 70.

<sup>49</sup> Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 B.Y.U. EDUC. & L.J. 59, 59-60.

<sup>50</sup> *Id.* at 59.

<sup>51</sup> Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991, 994 (2010).

<sup>52</sup> *Id.* at 994.

<sup>53</sup> See ALASKA STAT. ANN. § 14.30.010(b)(12) (West 2019) (Children are not compelled to attend school if they are being homeschooled by their parents or legal guardians.); CONN. GEN. STAT. § 10-184 (West 2018) (“Subject to the provisions of this section and section 10-15c, each parent . . . shall cause such child to attend a public school . . . unless . . . the parent or person having control of such child is able to show that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools.”). For the text of additional homeschool laws, see Hansford, *supra* note 17.

<sup>54</sup> See Barthelet, *supra* note 14, at 30.

ligion in that case.<sup>55</sup> However, “[b]y the early 1990’s . . . homeschooling had expanded and divided into two distinct movements: one secular and the other conservative Christian.”<sup>56</sup> The homeschooling movement grew a strong secular base, only strengthened by the COVID-19 pandemic. Thus, constitutional protection for homeschool cannot simply be founded in religious freedom, and can benefit from the protection from other constitutional rights as well.<sup>57</sup>

However, some scholars and courts have questioned the constitutionality of homeschooling.<sup>58</sup> In 2008, a California Court of Appeals case not only denied that parents had a constitutional right to home school their children, but held that non-credentialed parents may not homeschool their children.<sup>59</sup> According to the court, “It is clear that the education of the children at their home, whatever the quality of that education, does not qualify for the private full-time day school or credentialed tutor exemptions from compulsory education in a public full-time day school.”<sup>60</sup> The California court granted a petition for a rehearing,<sup>61</sup> however, and determined that parents did have a right to direct their children’s education and that California statutes permitted home schools as a type of private schools.<sup>62</sup>

Other courts across the United States have upheld state restrictions on homeschooling. These restrictions included requiring homeschooling parents to comply with notice, reporting, and

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<sup>55</sup> Yet, “make no mistake—secular homeschoolers need this protection.” Jennifer Karinen, Note, *Finding a Free Speech Right to Homeschool: An Emersonian Approach*, 105 GEO. L.J. 191, 214 (2016).

<sup>56</sup> Yuracko, *supra* note 39, at 126.

<sup>57</sup> For example, the First Amendment. Karinen, *supra* note 55.

<sup>58</sup> See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1453 (2018) (“We reject the classic defense of parental rights [when it comes to homeschooling]—that they are necessary to limit state intervention in the family—by emphasizing the state’s existing presence in the lives of all children and the role parental rights may play in suppressing children’s diverse values and experiences.”).

<sup>59</sup> *In re Rachel L.*, 73 Cal. Rptr. 3d 77 (Cal. Ct. App. 2008).

<sup>60</sup> *Id.* at 84.

<sup>61</sup> *Jonathan L. v. Superior Ct.*, 81 Cal. Rptr. 3d 571, 576-77 (Cal. Ct. App. 2008).

<sup>62</sup> *Id.* at 576.

superintendent review requirements;<sup>63</sup> requiring homeschooled children to take annual standardized tests;<sup>64</sup> requiring certain testing scores in order to continue homeschooling;<sup>65</sup> requiring home visits, plans of instruction, and descriptions of instructor qualifications;<sup>66</sup> and establishing an approval process for homeschooling.<sup>67</sup>

### III. Constitutional Law

Previous legal challenges to homeschooling prompted its advocates to look to constitutional protection for homeschooling, even though family law typically is a matter of state domain.<sup>68</sup> “Parents who wish to homeschool their children often turn to the Fourteenth Amendment’s Due Process Clause for constitutional authority.”<sup>69</sup> Professor Billy Gage Raley has also argued for establishing that homeschooling is a fundamental right under the U.S. Constitution. According to him, there are two methods to doing so:

Under *Washington v. Glucksberg*, the right to homeschool could be established as fundamental in its own right if it can be shown that the practice is ‘deeply rooted in this Nation’s history and tradition.’ Alternatively, under the Court’s recent ruling in the landmark case *Obergefell v. Hodges*, homeschooling could fall under the already-established fundamental right of parents to ‘direct’ the education of children if it can be shown that the Court’s rationales for recognizing this right ‘apply with equal force’ to homeschooling.<sup>70</sup>

When it comes to homeschooling as a parental right, the language of the U.S. Supreme Court is clear on protecting a parent’s right to the care, custody, and control of a child, but it has not

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<sup>63</sup> *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 231 (3d Cir. 2008), *cert. denied*, 555 U.S. 1138 (2009).

<sup>64</sup> *Murphy v. Arkansas*, 852 F.2d 1039, 1039-40 (8th Cir. 1988).

<sup>65</sup> *Null v. Bd. of Educ.*, 815 F. Supp. 937, 937 (S.D. W. Va. 1993).

<sup>66</sup> *Blackwelder v. Safnauer*, 689 F. Supp. 106, 106, 113 (N.D.N.Y. 1988).

<sup>67</sup> *In re Charles*, 504 N.E.2d 592, 592 (Mass. 1987).

<sup>68</sup> *See, e.g., Moore v. Sims*, 442 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern.”).

<sup>69</sup> Jessica Archer, *Leandro’s Limit: Do North Carolina’s Homeschoolers Have a Right to a Sound Basic Education Protected by the State?*, 36 CAMPBELL L. REV. 253, 267 (2014).

<sup>70</sup> Raley, *supra* note 49, at 63.

been extended to include homeschooling.<sup>71</sup> Furthermore, although the law on the parental right has developed over a century,<sup>72</sup> there has been no clear and consistent standard of review for this parental right, and there is no guarantee it would receive strict scrutiny.<sup>73</sup> This has resulted in uneven protection of the right in the lower courts.

### A. Homeschooling as a Parental Right

The parental right has not been defined by the U.S. Supreme Court as including homeschooling.<sup>74</sup> Indeed, “[n]o Supreme Court case and very few lower court cases squarely address the

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<sup>71</sup> See *infra* Part III.A.

<sup>72</sup> See *infra* Part III. “Parental autonomy is protected under the Constitution as a fundamental right.” Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. RES. L. REV. 293, 307 (2012). See also Kristin Henning, *The Fourth Amendment Rights of Children At Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 73 (2011) (“The notion of parental autonomy is so deeply embedded in American society that courts have recognized a constitutionally protected interest in parents’ right to raise children as they deem appropriate with minimal government interference.”).

<sup>73</sup> See *infra* Part III.B.

<sup>74</sup> Raley, *supra* note 49, at 59-60. Compare John Witte, Jr. & Andrea Pin, *Faith in Strasbourg and Luxembourg? The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts*, 70 EMORY L.J. 587, 613-14 (2021) (“In *Konrad and Others v. Germany* (2006), the [European Court of Human Rights] rejected the rights claim of parents to homeschool their primary-school-aged children . . . . The Protocol to Article 9, the Court pointed out, begins by saying that ‘[n]o person shall be denied the right of education.’ ‘It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions.’ The child’s right to education came first, and the Romeike children were too young to waive that right or to understand the implications of that waiver for their later democratic capacities. Germany’s interest and duty was in protecting each child’s right to education and ‘safeguarding pluralism in education, which is essential for the preservation of the ‘democratic society’ . . . . In view of the power of the modern State, it is above all through State teaching that this aim must be realized.’ Germany has determined that in a democratic society ‘not only the acquisition of knowledge but also integration into and first experiences of society are important goals in primary-school education . . . . [T]hose objectives could not be met to the same extent by home education, even if it allowed children to acquire the same standard of knowledge.’”).

constitutional status of homeschooling as it exists today.”<sup>75</sup> According to the U.S. Supreme Court in one case, “the state’s prohibition of homeschooling substantially implicated no constitutionally protected parental right.”<sup>76</sup>

Excluding certain parental actions from the parental right is not new. For example, when parents challenged a psychological assessment questionnaire in the school, the Ninth Circuit held that although the Fourteenth Amendment Due Process Clause protects their rights to control their children’s upbringing, it does not include the right to direct how a public school teaches their child.<sup>77</sup> In another case, the father argued that the public school should excuse his minor son from attending health education classes because of his parental right, and that strict scrutiny was the proper level of scrutiny.<sup>78</sup> The Second Circuit rejected his argument and applied rational basis review to uphold the school’s curriculum: “*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught.”<sup>79</sup> In another example, parents challenged the validity of a school policy requiring students to wear uniforms.<sup>80</sup> The federal district court held that the parents did not have a fundamental right to direct the dress code or uniform policy at the school and that rational basis review was appropriate. Finally, when a group of parents sought to enjoin enforcement of a juvenile curfew law, the court explained that the fundamental parental right focuses on the parents’ control of the home and formal education of their children, but does not include a parent’s ability to unilaterally determine when and if children will be on the streets, especially at night.<sup>81</sup> In all these cases, the courts nar-

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<sup>75</sup> Timothy Brandon Waddell, *Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541, 545 (2010).

<sup>76</sup> Vivian E. Hamilton, *Home, Schooling, and State: Education in, and for, a Diverse Democracy*, 98 N.C. L. REV. 1347, 1366 (2020) (citing *Turner v. California*, 74 S. Ct. 785 (1954)).

<sup>77</sup> *Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006).

<sup>78</sup> *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

<sup>79</sup> *Id.* at 141.

<sup>80</sup> *Derry v. Marion Cmty. Sch.*, 790 F. Supp. 2d 839 (N.D. Ind. 2008).

<sup>81</sup> *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999). *See also Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998), another

rowly interpreted the parental right to exclude the parental issues at stake.

Lower courts have been willing to interpret the parental right to include homeschooling, but not always. The Michigan Supreme Court held that there is a constitutional right to homeschool, but for religious reasons based on the free exercise clause.<sup>82</sup> In the Ninth Circuit, the court held that a school district's adverse employment action based on a public school principal's decision to homeschool his children violated the principal's constitutional rights.<sup>83</sup> The concurrence reiterated the principal's right to free exercise of his religion and his right to control the education of his children, subject to reasonable regulation.<sup>84</sup>

Finally, there was a relevant case from the Court of Appeals of Georgia. On procedural grounds, the court's opinion overturned the trial court's order in a child custody dispute case for the mother to enroll a child in school instead of homeschooling.<sup>85</sup> Chief Judge Dillard also added: "Suffice it to say, a parent's right to the care, custody, and control of one's child includes a constitutionally protected right to make decisions regarding the child's education—including the choice to homeschool."<sup>86</sup>

Even if homeschooling were included in the parental right, however, the lack of a standard of review for the parental right is a major weakness in its protection. This is considered next.

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curfew case in which the court rejected the parents' fundamental right argument under *Yoder*, *Stanley*, and *Meyer*, but settled on intermediate scrutiny.

<sup>82</sup> *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993) (striking down a state teacher certification requirement for homeschooling).

<sup>83</sup> *Peterson v. Minidoka Cnty. Sch. Dist.*, 118 F.3d 1351, 1358 (9th Cir. 1997).

<sup>84</sup> *Id.* at 1360 (Fletcher, J., concurring).

<sup>85</sup> *Borgers v. Borgers*, 820 S.E. 2d 474 (2018). Similar litigation occurred in *In Re: Martin F. Kurowski and Brenda A. Kurowski*, No. 2009-751 (N.H. Mar. 16, 2011), <https://caselaw.findlaw.com/nh-supreme-court/1560265.html> [<https://perma.cc/3JSU-ND2L>], but the New Hampshire Supreme Court ultimately sidestepped the homeschooling issue: "While [the case] involves home schooling, it is not about the merits of home versus public schooling. This case is only about resolving a dispute between two parents, with equal constitutional parenting rights and joint decision-making responsibility, who have been unable to agree how to best educate daughter."

<sup>86</sup> *Borgers*, 820 S.E. 2d at 478 (Dillard, J., concurring).

### B. *Standard of Review for the Parental Right*

Even if the parental right did include homeschooling, the U.S. Supreme Court has declined to select a level of scrutiny.<sup>87</sup> As a result, laws curtailing this parental constitutional right are not necessarily afforded strict scrutiny.<sup>88</sup> In contrast, there is no consistent level of scrutiny or a consistent approach to selecting the level of scrutiny when it comes to the parental right.

Some of the relevant U.S. Supreme Court jurisprudence predates the current constitutional analytic framework of the various levels of scrutiny.<sup>89</sup> However, even a modern U.S. Supreme Court case did not clarify the level of scrutiny for this parental right, despite noting its importance.<sup>90</sup> Instead, the concurring and dissenting opinions in *Troxel* suggested different approaches to the appropriate level of scrutiny in cases on the parent's care, custody, and control of children. Justice Thomas wrote a concurrence in favor of not only articulating a level of scrutiny, but also

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<sup>87</sup> This is so even though “normally, the Supreme Court must provide an applicable level of scrutiny that governs its disposition of the case.” Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087 (2002).

<sup>88</sup> “[I]f strict scrutiny is applicable, the government action is unconstitutional unless: (1) it furthers an actual, compelling government interest and (2) the means chosen are necessary (narrowly tailored, the least restrictive alternative) for advancing that interest.” Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 453 (1988).

<sup>89</sup> Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 J.L. & EDUC. 83, 100-01 (2009).

<sup>90</sup> *Id.* “The Court [in *Troxel*] also acknowledged the fundamental liberty interest that parents have in the care, custody, and control of their children as ‘perhaps the oldest of the fundamental liberty interests recognized by this Court.’ Although the Court’s foregoing discussion clearly suggested that it would apply strict scrutiny to the Washington statute, the Court failed to articulate the level of scrutiny. Rather than specifying a level of scrutiny, the Court used oblique references to ‘heightened protection’ without ever defining that standard.” Kristina Thomas Whiteaker, Student Work, *West Virginia Takes Refuge in Troxel’s Safe Harbor: State ex rel. Brandon L. v. Moats*, 105 VA. L. REV. 547, 556 (2003). There was not even a majority opinion to clarify the approach to the parental right, only a plurality. “[A] plurality, rather than a majority opinion would be another measure of the strength of reasoning.” Lee Epstein, William M. Landes, & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1139 n.122 (2015).



suggested strict scrutiny: “I agree with the plurality that this Court’s recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. . . I would apply strict scrutiny to infringements of fundamental rights.”<sup>91</sup>

Meanwhile, in his *Troxel* dissent, Justice Scalia noted that “[o]nly three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated.”<sup>92</sup> He concluded that “the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection.”<sup>93</sup> These three cases are *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder*.<sup>94</sup>

These U.S. Supreme Court cases apply the Due Process Clause of the Fourteenth Amendment to protect parents in mak-

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<sup>91</sup> *Troxel*, 530 U.S. at 57 (Thomas, J., concurring). “Although Justice Thomas would apply a strict scrutiny level of scrutiny to infringements of a parent’s fundamental right, the rest of the Court was notably silent on this issue.” Daniel R. Victor & Keri Lynn Middleditch, *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. AM. ACAD. MATRIM. LAW. 391, 401 n.33 (2009). See also *Troxel*, 530 U.S. at 65 (plurality opinion) (explaining “heightened protection [for] certain fundamental rights and liberty interests” before describing the parental interest in the care, custody, and control of children as a “fundamental liberty interest.”).

<sup>92</sup> *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting).

<sup>93</sup> *Id.* (“A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.”). *Id.* Nonetheless, the *Troxel* plurality notes, “[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children,” citing *Stanley v. Illinois*, 405 U.S. 645 (1972) (noting the interest of a parent in the companionship, care, custody, and management of his or her children); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.”); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); *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.”). *Id.* at 66.

<sup>94</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Yoder*, 406 U.S. 205.

ing decisions regarding the care, custody, and control of their children.<sup>95</sup> While they offer some constitutional protection to the parental right, they do not encompass the right to homeschool, but “provide only a right to enroll a child in a private school that is ‘equivalent’ to a public school.”<sup>96</sup> These cases also do not provide a level of scrutiny for the parental right. While “*Meyer* and *Pierce* are viewed as seminal cases in parental rights jurisprudence[, they] do not guarantee much protection if they only prevent arbitrary and unreasonable regulations from infringing upon parental rights.”<sup>97</sup>

*Meyer v. Nebraska* is an early case that stood for the proposition that there is a substantive constitutional right of parents to direct the upbringing of their children.<sup>98</sup> In the case, the U.S. Supreme Court struck down a Nebraska law that prevented the teaching of any modern language other than English to any child who had not successfully passed the eighth grade. The Court determined that the liberty interest in the Fourteenth Amendment included the right of parents to control the education of their

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<sup>95</sup> There are additional U.S. Supreme Court cases that rely on such language as well. See, e.g., *Stanley*, 405 U.S. 645, 651 (“The rights to conceive and to raise one’s children have been deemed ‘essential,’ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), ‘basic civil rights of man,’ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and ‘(r)ights far more precious . . . than property rights,’ *May v. Anderson*, 345 U.S. 528, 533 (1953). ‘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.’ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, *supra*, 262 U.S. at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, 316 U.S., at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring.”); *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (“This insistence that the asserted liberty interest be rooted in history and tradition is evident, as elsewhere, in our cases according constitutional protection to certain parental rights.”).

<sup>96</sup> *Raley*, *supra* note 49, at 63. But see Louis A. Greenfield, *Religious Home-Schools: That’s Not a Monkey on Your Back, It’s a Compelling State Interest*, 9 RUTGERS J. L. & RELIGION 4 (2007) (naming *Meyer*, *Pierce*, and *Yoder* as among the “cases from which the right to home school children in the United States has derived over the course of the last century”).

<sup>97</sup> Mark Strasser, *Custody, Visitation, and Parental Rights Under Scrutiny*, 28 CORNELL J.L. & PUB. POL’Y 289, 291 (2018).

<sup>98</sup> *Meyer*, 262 U.S. 390.

children, concluding that the law did not rationally relate to the state's objectives.<sup>99</sup>

The Supreme Court in *Pierce v. Society of Sisters* also struck down, on substantive due process grounds, Oregon's state law that all students between 8 and 16 years of age attend public schools when the purpose of the law was only to promote a common American culture following World War I.<sup>100</sup> Although the decision protects the schools' economic rights as part of the property element in the due process clause, its language also provides a foundation for a rule that presumptively keeps the state out of family choices. The Court additionally emphasized the rights of parents to direct the upbringing and education of the children under their control, concluding that the law did not rationally relate to the state's objectives.<sup>101</sup> The Court interpreted the liberty protected by the Due Process Clause to encompass parental autonomy to rear a child as the parent sees fit.<sup>102</sup>

Finally, *Wisconsin v. Yoder* established a substantive right of parents, where several Amish parents prevailed on the basis of their religious beliefs after not sending their children to high school despite a Wisconsin law requiring all children to attend public schools until the age of 16.<sup>103</sup> In the case, the Supreme Court wrote that it was the fundamental interest of parents "to guide the religious future and education of their children."<sup>104</sup> According to the Court, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>105</sup> The Su-

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<sup>99</sup> *Id.*

<sup>100</sup> *Pierce*, 268 U.S. 510.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Yoder*, 406 U.S. 205. *See also supra* notes 54-55.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* The Court added, "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the

preme Court determined that “when balancing the free exercise claims of the parents against the state’s interest, courts must apply heightened scrutiny.”<sup>106</sup> As to the “fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. . .[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.”<sup>107</sup>

Due to the U.S. Supreme Court’s lack of an articulated level of scrutiny for the parental right, the lower courts have also been inconsistent when considering parental right cases.<sup>108</sup> The wide range of parental matters at stake also contributes to divergent

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right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.* (citations omitted). However, in his concurrence, Justice White writes, “*Pierce v. Society of Sisters* lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce*, both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not preempt the educational process by requiring children to attend public schools . . . . A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.” *Id.* at 239-40 (citations omitted).

<sup>106</sup> Jennifer Drobac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 *STAN. L. REV.* 1609 (1998).

<sup>107</sup> *Yoder*, 406 U.S. at 231.

<sup>108</sup> “In the absence of clear guidance from the Supreme Court, the lower federal and state courts inevitably have split on the matter. The Third and Sixth Circuit Courts of Appeals, as well as state courts in Washington, Ohio, Massachusetts and New York, have expressly classified parental interests as fundamental or have applied strict scrutiny in reviewing alleged violations. Other courts, including the Michigan Supreme Court, have explicitly stated that ‘parents do not have a constitutional right [to direct their children’s education] requiring strict scrutiny.’ Somewhere in the middle, perhaps, is the Fifth Circuit Court of Appeals, which recently affirmed parental rights as fundamental but applied a rational basis test to the question of mandatory school uniforms. Similarly, the United States District Court for the District of New Hampshire appears to have employed a type of relaxed strict scrutiny in denying plaintiffs’ right to have their children removed from activities in the public schools that offended their religion.” DeGroff, *supra* note 89, at 101.

approaches.<sup>109</sup> The result is that the lower courts use various levels of scrutiny when considering state interference.<sup>110</sup>

In *People v. DeJonge*, the Michigan Supreme Court reviewed a teaching certification requirement for homeschooling, but not in the context of the parental right.<sup>111</sup> The court subjected this state law to strict scrutiny under the state constitution and held that the requirement violated the Free Exercise Clause. A later decision by the Sixth Circuit, however, found that rational basis was the appropriate standard of review in such cases.<sup>112</sup>

There have been many instances of the courts using rational basis in parental right cases generally.<sup>113</sup> In one such case, a student and his parents alleged that a school's mandatory community service program violated their due process rights.<sup>114</sup> According to the Second Circuit, "The Supreme Court . . . has never expressly indicated whether this 'parental right,' when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review. Our reading of the appropriate caselaw convinces us that rational basis review is appropriate."<sup>115</sup> In so concluding, the Second Circuit relied on several decisions from other circuits applying rational basis review in cases involving parental control of a child.

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<sup>109</sup> See *supra* Part III.B.

<sup>110</sup> See, e.g., *id.*

<sup>111</sup> 501 N.W.2d 127, 127, 144 (Mich. 1993).

<sup>112</sup> *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180-81 (6th Cir. 1993).

<sup>113</sup> For example, in the Fourth Circuit, students and parents brought an action challenging a school district's mandatory community service program. *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996). The Fourth Circuit held that although the *Meyer* and *Pierce* decisions used the language of rational basis review, the two decisions alone were not dispositive since they did not use the modern framework of scrutiny. However, the Fourth Circuit explained that the line of cases beginning with *Meyer* up to the Supreme Court's 1976 decision in *Runyon* consistently held that reasonable regulation by the state was permissible even when conflicting with the parental liberty interest. The court equated this language to rational basis review and held that the school district had a legitimate interest in teaching students the value of service. *Id.*

<sup>114</sup> *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996).

<sup>115</sup> *Id.* at 461.

The Fifth and Sixth Circuits also applied rational basis review in cases involving school dress codes.<sup>116</sup> The Fifth Circuit rejected the parents' argument that a school's mandatory uniform policy violated their fundamental parental right, instead applying rational basis review to uphold the statute.<sup>117</sup> Citing *Meyer* and *Pierce*, the Fifth Circuit further reasoned that its decision followed almost eighty years of precedent analyzing the parental right in the context of public education under a rational basis standard.<sup>118</sup> The Sixth Circuit also applied rational basis review when the father of a middle school student challenged the school's dress code as a violation of his Fourteenth Amendment due process right to control the education of his child.<sup>119</sup>

In the Seventh Circuit, a private religious school brought an action challenging a high school association's bylaw that made a transferring student eligible for athletics only if the transfer was from a private to a public school.<sup>120</sup> The Seventh Circuit rejected the school's argument that the transfer rule burdened the fundamental right of parents to direct the education of their children. The court explained that rational basis review, rather than strict scrutiny, was the appropriate level of scrutiny and upheld the transfer policy.<sup>121</sup>

Federal lower courts have also discussed applying intermediate scrutiny to infringements on the parental right. In one such case, parents challenged a local ordinance that required a license for door-to-door solicitation of donations and prohibited those under 16 years old from any such solicitation without being accompanied by a parent or legal guardian, arguing that it violated their Fourteenth Amendment right to the care, custody, and control of their children.<sup>122</sup> Citing *Troxel*, *Meyer*, and *Pierce*, the court recognized that parents have a fundamental right to the

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<sup>116</sup> *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001).

<sup>117</sup> *Id.* The Court reasoned that *Troxel* did not cover a school uniform policy because the parental right is not absolute in the public school context and can be subject to reasonable regulation. *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005).

<sup>120</sup> *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671 (7th Cir. 1987).

<sup>121</sup> *Id.*

<sup>122</sup> *New York Youth Club v. Town of Smithtown*, 867 F. Supp. 2d 328 (E.D.N.Y. 2012).

care, custody, and control of their children.<sup>123</sup> Given the ordinance's restriction on the parents' right to allow their children to move freely at night, the court reasoned that intermediate scrutiny was proper.<sup>124</sup>

In a few cases, federal courts have applied strict scrutiny in various contexts.<sup>125</sup> For example, in one case, parents challenged the state statute mandating that students recite the Pledge of Allegiance or the national anthem each morning.<sup>126</sup> The parents relied on *Meyer, Pierce, and Troxel* to argue for a fundamental liberty interest in directing the upbringing and care of their children.<sup>127</sup> However, the court applied strict scrutiny in holding that the statute was unconstitutional under the First Amendment.

Thus, the lower courts have differed in selecting a level of scrutiny in the absence of guidance from the U.S. Supreme Court. This has undermined the strength of the parental right.<sup>128</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> For example, the Ninth Circuit considered a curfew in *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997). The court addressed the parental right, stating that "the right to rear children without undue governmental interference is a fundamental component of due process. Substantive due process under the Fourteenth Amendment 'forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling government interest.'" *Id.* (quoting *Reno v. Flores*, 507 U.S. 292 (1993)).

<sup>126</sup> *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616 (E.D. Pa. 2003), *aff'd in part sub nom. Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004). However, the Third Circuit declined to address the Fourteenth Amendment issue in its decision in *Circle Sch. v. Pappert*, 381 F.3d 172.

<sup>127</sup> "Subsequently, courts around the country, including the courts of the states surveyed here, have cited *Troxel* for the proposition first set forth in *Meyer v. Nebraska* over eighty years ago: Parents have a fundamental right to control the care and custody of their children." Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL'Y 1, 9 (2006).

<sup>128</sup> Of course, "[e]ven where courts apply strict scrutiny, they might find the government has a compelling interest in the child's education. Antony Barone Kolenc, *When "I Do" Becomes "You Won't!"—Preserving the Right to Home School After Divorce*, 9 AVE MARIA L. REV. 263, 272 (2011). See, e.g., Dumas et al., *supra* note 14, at 87 ("A state has a compelling interest in the education of its children and may adopt regulations to advance this interest so long as it does not violate the fundamental constitutional rights of parents. The

#### **IV. Conclusion**

Many parents turned to homeschooling during the COVID-19 pandemic, a choice available to them after the evolution of the practice over centuries. While the legal authority for homeschooling has been legislative, some have sought constitutional protection for it, particularly as a parental right.

Even if constitutional protection is extended to homeschooling through the parental right, the U.S. Supreme Court case law on the parental right lacks a clear standard of review despite protecting certain parental actions. Given that homeschooling may stay for many families even after the pandemic ends,<sup>129</sup> it is worth further exploring in the context of constitutional law during the coronavirus pandemic and beyond.

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test of whether a regulation is permissible has two prongs: it must both be narrowly drawn to avoid undue restriction of fundamental rights and serve the State's compelling interest."); "The state's interests in education of its citizenry include ensuring that children are cared for, able to live self-determined lives, and able to develop into a citizenry that is capable of self-government and workforce participation." Hamilton, *supra* note 76, at 1394. *See also* Bartholet, *supra* note 14, at 27 "[Parental] rights are limited by the state's right to impose 'reasonable' regulations ensuring an adequate education."

<sup>129</sup> *See, e.g.*, Prothero & Samuels, *supra* note 37.