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FUNDAMENTALIST CHALLENGES TO CORE DEMOCRATIC VALUES: EXIT AND HOMESCHOOLING

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This Essay explores the choice many traditionalist Christian parents (both fundamentalist and evangelical) make to leave public schools in order to teach their children at home, thus in most instances escaping meaningful oversight. I am not primarily concerned here with the quality of academic achievement in the core curricular areas among homeschoolers, which has been the subject of much heated debate.¹ Instead, my comments focus on civic education in the broadest sense, which I define primarily as exposure to the constitutional norm of tolerance. I shall argue that the growing reliance on homeschooling comes into direct conflict with assuring that children are exposed to such constitutional values.

I begin with a brief social and legal history of homeschooling in the United States during the twentieth century and then discuss the dominance of religiously motivated parents among homeschoolers in contemporary America. Section II shows that homeschoolers make broad claims for exemption from state oversight that are not warranted by the constitutional doctrine on which they rely. In Section III, I argue that the state's interest in educating children for life in a pluralist democracy trumps any asserted parental liberty interest in controlling their children's education. Finally, in Section IV, I argue that where parents do not live together and share legal custody of their children, the state should articulate a preference for formal schooling over

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¹ Much controversy surrounds the educational attainments of homeschooled children. See, e.g., Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 134 & nn.47–50, 180 (2008) (arguing, among other things, that all children should be required to attend organized public or private schools until they have mastered the educational basics at the level required under each state's constitution). The authors of one recent article argue that parents have a constitutional right to homeschool regardless of their own educational credentials, and maintain that homeschooled children score well on academic achievement tests, and that additional state regulation does not improve the quality of education as measured by traditional tests. Tanya K. Dumas et al., *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, WIDENER L. REV. (forthcoming) (manuscript at 3, available at <http://ssrn.com/abstract=1317439>) (citing numerous studies); see also Brief for Home Sch. Legal Def. Ass'n et al. as Amici Curiae Supporting Petitioners, *Jonathan L. v. Super. Ct.*, 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008) (No. B192878) (reviewing homeschooling academic successes). This Article does not respond to their claims.

homeschooling when the parents disagree. I urge states to engage in far more stringent oversight and regulation of homeschooling than exists in any state at present, arguing that there is no constitutional bar to doing so and a compelling state interest in additional oversight tools, especially in the arena of civic education concerning normative democratic values about tolerance and diversity.

I. HOMESCHOOLING

A. A Brief Legal History

The rise of formal schools and the adoption of compulsory school laws transformed schooling in nineteenth-century America. Beginning in the second quarter of the nineteenth century, the common school movement led by Horace Mann and other reformers resulted in the widespread availability of free public schools.² Homeschooling virtually disappeared in the United States by the early twentieth century as states (beginning with Massachusetts in 1852³ and ending with Texas in 1915)⁴ adopted and enforced laws requiring parents to make their children literate and, later, to send their children to a formal school for at least part of every academic year.⁵

The constitutionality of one brand of compulsory school law reached the United States Supreme Court in 1925. In *Pierce v. Society of Sisters*, the Court overturned a compulsory school law that parents could only satisfy by enrolling their children in public schools, barring the use of sectarian or other private schools.⁶ The Court held that parents must have the right to choose among approved ways of satisfying the compulsory education law, but in doing so it underscored that the case did not challenge “the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”⁷

The Court has never fleshed out the extent of the state’s power to regulate independent schools. Today, the vast majority of states impose curricular requirements on private schools, and these requirements appear to be largely unchallenged.⁸ Similarly,

² See Carl F. Kaestle, *Victory of the Common School Movement: A Turning Point in American Educational History*, in HISTORIANS ON AMERICA 23, 26–27 (U.S. Dep’t of State 2007), available at <http://www.america.gov/media/pdf/books/historians-on-america.pdf>.

³ Act of May 18, 1852, ch. 240, 1852 Mass. Acts 170–71.

⁴ Act of Mar. 13, 1915, ch. 49, 1915 Tex. Gen. Laws 92.

⁵ See, e.g., *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 529 (Mass. 1993) (describing the Massachusetts Colony requiring towns to open public schools beginning in 1647).

⁶ 268 U.S. 510, 535 (1925).

⁷ *Id.* at 534.

⁸ Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 393.

the Court has never had an occasion to consider the reach of the state's authority to regulate homeschooling, which is completely unregulated in states such as Alaska, and in other states subject to minimal requirements, ranging from mandatory notice to the state that the parents intend to homeschool to reporting and testing requirements regarding mastery of core curricular subjects such as reading and math.⁹ It stands to reason, however, that if states can regulate licensed private schools, the educational needs of children make it even more important for the state to provide minimum educational standards for children whose schooling takes place completely immune from the view of strangers.

Homeschoolers nonetheless frequently rely on the language in *Pierce* regarding parental rights for authority not only to teach their children at home, but also to do so without any government oversight at all.¹⁰ These arguments almost always fail. State courts and lower federal courts have repeatedly rebuffed assertions by sectarian schools and homeschoolers that they are constitutionally entitled to complete freedom from state oversight.¹¹

During the first half of the twentieth century, some state courts accepted defenses to charges of violating the compulsory school laws that would not be credible today. When many people still lived in rural communities where transportation was limited, some courts excused parents who taught their children at home when the distances were too far and the town did not provide transportation or the travel conditions were too dangerous due to isolated country roads.¹² Even then, however, school authorities were often unwilling to grant parents permission to teach their children at home where statutes provided discretion to do so.¹³

⁹ See, e.g., ALASKA STAT. § 14.30.010 (2006); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (2010) (describing a comprehensive regulatory scheme including filing of home instruction plans, quarterly reports and annual testing); see also Home School Legal Defense Association State Laws, <http://www.hsllda.org/laws/> (last visited Apr. 13, 2010). HSLDA is a Christian advocacy group that opposes state regulation of homeschooling, which provides a guide to the law in each state. The guide, however, as shown below, does not always summarize applicable law accurately.

¹⁰ *Pierce*, 268 U.S. at 535 (“[T]he State [may not] standardize its children.”); see also *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) (rejecting parents’ reliance on *Pierce* and related cases *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)), *cert. denied*, 129 S. Ct. 1013 (2009).

¹¹ E.g., *Combs*, 540 F.3d at 247; *People v. Turner*, 263 P.2d 685, 686–87 (Cal. App. Dep’t Super. Ct. 1953), *appeal dismissed*, 347 U.S. 972 (1954). *But see* *Brunelle v. Lynn Pub. Sch.*, 702 N.E.2d 1182, 1186 (1998) (holding that mandatory home visits by state officials violate parents’ rights, but other regulations are allowed).

¹² See, e.g., *In re Richards*, 7 N.Y.S.2d 722, 723 (N.Y. App. Div. 1938) (noting that the road to school was “lonely, poorly cared for, [and] unfenced”). *But see* *People v. Himmanen*, 178 N.Y.S. 282, 283 (N.Y. Co. Ct. 1919) (holding that the only defense to compulsory attendance is the physical or mental condition of the child and that bad roads and the lack of a school bus are immaterial).

¹³ See, e.g., *Care and Prot. of Charles*, 504 N.E.2d 592, 594–95 (Mass. 1987).

By the middle of the twentieth century homeschooling had virtually disappeared, and its legal status was uncertain at best. It is estimated that by mid-century no more than 10,000 children satisfied the compulsory school laws by studying at home.¹⁴ Homeschooling without authorization left parents vulnerable to charges of child neglect because the state did not recognize homeschooling as a legitimate alternative to public schools or organized private schools.¹⁵

Homeschooling experienced a gradual resurgence beginning in the 1960s, initially as part of a progressive movement influenced by educational theorists who favored unstructured learning.¹⁶ Starting in the late 1970s some state courts began to interpret the compulsory education statutes to allow parents to homeschool if they provided their children with an education equivalent to the training offered in the public schools.¹⁷ But as public schools adopted more progressive approaches to learning, “conservative and religious families were surprised to find themselves in a counter-cultural position” as they began to homeschool.¹⁸ Homeschooling remained illegal in the majority of states in 1981.¹⁹ Court decisions, combined with effective lobbying by Christian homeschoolers that prompted statutory reforms, led to a legal revolution so that by 2000, homeschooling was legal under some circumstances in all fifty states, whether by judicial decree or statute.²⁰

The question of whether homeschooling parents have violated the compulsory education laws often turns on whether the statutory language in the state’s compulsory education law provides a mechanism for an alternative to an organized, licensed school. Where it does not, some courts have allowed parents to claim that they run a private school in the sense contemplated by the statute, even though the enrollment of the school is limited to one or more family members and the school is located in

¹⁴ Patricia M. Lines, *Homeschooling Comes of Age*, 140 PUB. INT. 74, 75–76 (2000).

¹⁵ *Id.* at 77 (noting that early pioneers of contemporary homeschooling faced the risk of fines or even jail); *see, e.g., Turner*, 263 P.2d at 689 (holding attendance at public or private school or lessons at home from a licensed teacher are the only ways to satisfy compulsory school laws); *State v. Bowman*, 653 P.2d 254, 258–59 (Or. Ct. App. 1982) (holding that teaching by a parent or private tutor is not a private school under the compulsory education law, but parents can homeschool at the state’s discretion); *Grigg v. Commonwealth*, 297 S.E.2d 799, 803 (Va. 1982) (declaring that unapproved homeschooling does not constitute a private school). *But see* *People v. Levisen*, 90 N.E.2d 213, 215 (Ill. 1950) (holding that where a statute does not provide an exemption from compulsory school requirement for lessons from parent or tutor, the court will recognize quality homeschooling as a “private school”).

¹⁶ Lines, *supra* note 14, at 75–76.

¹⁷ *Brunelle v. Lynn. Pub. Sch.*, 702 N.E.2d 1182, 1184–85 (Mass. 1998); *Perchemlides v. Frizzle*, No. 16641 (Mass. Super. Ct. Nov. 13, 1978) (mem.), *available at* <http://www.mhla.org/information/massdocuments/perchemlidesdecision.pdf>.

¹⁸ Lines, *supra* note 14, at 76.

¹⁹ Yuracko, *supra* note 1, at 124 & n.2 (citing *Home-Schooling: George Bush’s Secret Army*, ECONOMIST, Feb. 28, 2004, at 52).

²⁰ *See* Lines, *supra* note 14, at 77.

their home.²¹ But even today, homeschooling as generally defined—parents teaching their own children at home—exposes parents to legal liability, shocking parents and home school proponents.

For example, in September 2009 the Superintendent of Education for the State of Alabama reiterated, “the only legal means of ‘homeschooling’ is by a private tutor who is certified to teach in the public schools.”²² Apparently he circulated this formal reminder because of widespread abuses of another option under state law—“enrollment and attendance” at a church school operated under the oversight of a local church, group of churches or denomination.²³ According to the Home School Legal Defense Association, the “vast majority” of Alabama homeschoolers enroll in church schools, but do not attend any organized school.²⁴ Instead, the church school treats each family as a classroom.²⁵ Alabama’s Superintendent made clear that going forward the state would require attendance at an actual school run by a church before a child would be deemed to be receiving the education the law requires.²⁶

B. Who Homeschools and Why

It is hardly surprising that Alabama allows church schools that are not licensed through the normal process applicable to independent schools to fulfill the compulsory school requirement, at least if the children actually attend, because religious groups have been the prime advocates for both homeschooling and independent schools.

Although many deeply religious, conservative Protestant families remain in public schools, and frequently fight to reform them, “a significant minority of conservative and evangelical Protestants have chosen some form of an exit strategy in favor of religious schools.”²⁷ Religious belief has long motivated the vast majority of parents who decline to enroll their children in public schools. In the nineteenth century, Roman Catholics set up a vast system of religious schools in response to rampant Protestant proselytization in public schools.²⁸ Some of the earliest court decisions

²¹ See, e.g., *Jonathan L. v. Super. Ct.*, 81 Cal. Rptr. 3d 571, 590 (2008) (holding, among other things, that the applicable statute treats home schools as private full-time day schools thus exempting their students from the compulsory public education law); *People v. Levisen*, 90 N.E.2d 213, 215 (Ill. 1950) (quoting *State v. Peterman*, 70 N.E. 550, 551 (Ind. App. 1904)).

²² Home School Legal Defense Association, *Controversy Over “Attendance” at Church Schools*, Oct. 28, 2009, <http://www.hslda.org/hs/state/al/200910280.asp> [hereinafter HSLDA, *Controversy*]; see also ALA. CODE § 16-28-5 (2009).

²³ HSLDA, *Controversy*, *supra* note 22; see also ALA. CODE § 16-28-1.

²⁴ HSLDA, *Controversy*, *supra* note 22; see also ALA. CODE § 16-28-3.

²⁵ HSLDA, *Controversy*, *supra* note 22.

²⁶ See *id.*; ALA. CODE §§ 16-28-5, -1, -3.

²⁷ David Sikkink, *Conservative Protestants, Schooling, and Democracy*, in 1 *EVANGELICALS AND DEMOCRACY IN AMERICA* 276, 278 (Steven Brint & Jean Reith Schroedel eds., 2009).

²⁸ See STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 74–75 (2000).

about homeschooling involved parents who asserted that the public school's practices undermined their own religious beliefs.²⁹ Many religious homeschoolers keep their children out of public schools expressly to shelter them from what the parents see as a secular bias that undermines fundamentalist teachings.³⁰

When parents choose not to enroll their children in public schools, the children almost always end up receiving a sectarian education, whether in an organized, licensed independent school or at home. In 2005, nearly forty percent of all children enrolled in non-public schools attended a Roman Catholic school, and that was a significant decline from the 1960s.³¹ Another thirty-eight percent of children in private school in 2005 attended "other religious" schools.³² Some of the "other religious" schools expressly describe themselves as "evangelical."³³ Although it is hard to measure the number of homeschooled children with any precision, most estimates indicate that twice as many children are homeschooled as are enrolled in conservative Christian schools.³⁴

While it remains a sliver of the educational landscape, homeschooling is growing rapidly. In 2007, the most recent year for which data are available, about 1.5 million children (or roughly 2.9% of school-aged children) were being homeschooled in the United States.³⁵ Some experts predict that homeschooling will grow at a rate as fast as fifteen to twenty percent annually in some parts of the country.³⁶

Proponents of homeschooling emphasize that parents from all walks of life homeschool and that they do so for many different reasons. That is true as far as it goes. Homeschoolers live in every part of the country, include every race and religion, and fall at various points along the socioeconomic spectrum.³⁷ The vast majority of

²⁹ See, e.g., *Commonwealth v. Renfrew*, 126 N.E.2d 109, 111 (Mass. 1955) (affirming conviction of Buddhists who kept their children from attending school because, among other things, they objected to reading from the Bible, reciting the Lord's prayer and similar materials).

³⁰ Rob Reich, *The Civic Perils of Homeschooling*, EDUC. LEADERSHIP, Apr. 2002, 56, 57.

³¹ THOMAS D. SNYDER ET AL., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUC. STATISTICS 2008, 91 tbl. 58 (U.S. Dep't of Educ. 2009).

³² *Id.*

³³ *Id.* at 287 tbl. 197.

³⁴ ROB REICH, BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION 145 (2002). It is hard to measure the numbers of homeschooled children accurately because some states, like Alaska, do not require homeschoolers to report the existence of their children, while in states that do require reporting, some homeschoolers refuse to comply. *Id.*; see also Home School Legal Defense Association, *Home Schooling in the United States: A Legal Analysis-Alaska*, available at <http://www.hslda.org/laws/analysis/Alaska.pdf>.

³⁵ NAT'L CTR. FOR EDUC. STATISTICS, ISSUE BRIEF: 1.5 MILLION HOMESCHOOLED STUDENTS IN THE UNITED STATES IN 2007, NCES 2009-030, 1 (U.S. Dep't of Educ. 2008), available at <http://nces.ed.gov/pubs2009/2009030.pdf> [hereinafter NCES, ISSUE BRIEF].

³⁶ Lines, *supra* note 14, at 75.

³⁷ Dumas et al., *supra* note 1, at 7-8; Lines, *supra* note 14, at 78.

homeschoolers, however, are white and Christian,³⁸ and they choose to homeschool because of their religious beliefs and their desire to protect their children from conflicting messages.

Federal surveys taken in 2003 and 2008 by the National Center for Education Statistics in the U.S. Department of Education clarify the depth of religious conviction among homeschoolers. In 2003, seventy-two percent of homeschooling parents reported that one reason they teach their children at home is to provide “religious instruction.”³⁹ By 2007, eighty-three percent of homeschoolers reported that they chose to keep their children at home to “provide religious or moral instruction.”⁴⁰ Although in 2003 only thirty percent of homeschoolers called religious instruction their “primary” reason for teaching their children themselves,⁴¹ some other reasons offered as “primary” may reduce to religion. For example, homeschooling parents cite their desire to protect their children from “negative peer pressure,” much as the Amish parents in *Yoder* worried about the goings-on in high school.⁴² Muslims are also increasingly turning to homeschooling to protect their children from drugs and their daughters from “dressing like hoochies, cursing and swearing and showing disrespect toward their elders,” as well as to protect children from prejudice.⁴³

Homeschoolers also voice “dissatisfaction with academic instruction” offered in the public schools.⁴⁴ We should interpret “dissatisfaction with academic instruction” in light of other things that we know about the attitudes of conservative Christian homeschoolers. Michael Farris, a founder of the Home School Legal Defense Association, has warned of the dangers of public education, which according to him include “promoting values that are questionable or clearly wrong: the acceptability of homosexuality as an alternative lifestyle; the acceptability of premarital sex as long as it is ‘safe’; the acceptability of relativistic moral standards.”⁴⁵ We can infer that many homeschoolers’ concerns about instruction in the public schools likely include objections to sex education, evolution, gender equality, and the choice of secular curricular

³⁸ SNYDER ET AL., *supra* note 31, at 71 tbl. 38; Lines, *supra* note 14, at 78. *But see* Dumas et al., *supra* note 1, at 8 (“[T]he homeschooling community is not a monolithic bloc.”).

³⁹ DANIEL PRINCIOTTA ET AL., HOMESCHOOLING IN THE UNITED STATES: 2003, 13 tbl. 4 (U.S. Dep’t of Educ. 2006).

⁴⁰ NCES, ISSUE BRIEF, *supra* note 35, at 2 fig.2.

⁴¹ PRINCIOTTA ET AL., *supra* note 39, at 13 tbl. 4.

⁴² *Id.* at 13–14 & n.2 (“including safety, drugs, [and] negative peer pressure”); *see* Wisconsin v. Yoder, 406 U.S. 205, 211 (1972) (describing the Amish objection to “social life with other students,” with its attendant pressures to “conform to the styles, manners, and ways of the peer group”).

⁴³ Neil MacFarquhar, *Resolute or Fearful, Many Muslims Turn to Home Schooling*, N.Y. TIMES, Mar. 26, 2008, at A14 (reporting that in Lodi, California, thirty-eight of the ninety school-age girls of Southeast Asian origin are homeschooled).

⁴⁴ NCES, ISSUE BRIEF, *supra* note 35, at 2; *see* PRINCIOTTA ET AL., *supra* note 39, at 13–14 & tbl. 4.

⁴⁵ Yuracko, *supra* note 1, at 127 (quoting MICHAEL FARRIS, HOMESCHOOLING AND THE LAW 59 (1990)).

materials.⁴⁶ As Rob Reich has pointed out, religious homeschoolers seek to give their children “a proper religious education free from the damning influences of secularism and pop culture” and they make no secret of that fact.⁴⁷

All of these primary reasons for homeschooling—both those that are expressly religious and those that resonate in a family’s conservative religious beliefs—indicate that almost ninety percent of parents who homeschool do so for reasons stemming from their religious beliefs.⁴⁸ The survey data clearly confirm the anecdotal evidence suggesting that homeschooling is dominated by conservative Christians.⁴⁹

II. THE AUTONOMY CLAIMS OF HOMESCHOOLERS

A. Freedom from Oversight

Some homeschooling parents insist that education is none of the state’s business, seeking freedom from the classical balance of powers between the state and the family. The Pennsylvania families that challenged the state’s authority to keep track of homeschooled children in *Combs v. Homer-Center School District*,⁵⁰ for example, maintained that God gave the family “exclusive jurisdiction” over the education of children.⁵¹ The parents asserted that the state’s requirement that they keep a log of their homeschooling activities and turn that log over to the state for periodic review was a form of compelled conduct and expression that violated their religious beliefs.⁵² They believed it would be “sinful for them to . . . grant control over their children’s education to the civil government.”⁵³

⁴⁶ These concerns echo those of litigants who have sought to protect their children from exposure to ideas and language they found offensive, the most studied being Vicki Frost, who lost her battle to protect her children from the Holt reading series. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060, 1070 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); STEPHEN BATES, *BATTLEGROUND* 11 (1993); *see also* *Duro v. Dist. Attorney*, 712 F.2d 96, 97 (4th Cir. 1983) (“Duro [a Pentacostalist homeschooler] . . . is opposed to what he terms the ‘unisex movement where you can’t tell the difference between boys and girls . . .’”), *cert. denied*, 465 U.S. 1006 (1984); MACEDO, *supra* note 28, at 159–60.

⁴⁷ Reich, *supra* note 30, at 57.

⁴⁸ NCES, *ISSUE BRIEF*, *supra* note 35, at 2, 3 & fig.2 (finding that eighty-eight percent report “concern about the school environment” and eighty-three percent “desire to provide religious or moral instruction”; only seven percent reported a desire to use a “nontraditional approach to education”).

⁴⁹ Deeply religious parents from other religious traditions, however, are increasingly exploring homeschooling. MacFarquhar, *supra* note 43.

⁵⁰ 540 F.3d 231 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1013 (2009).

⁵¹ *Id.* at 234.

⁵² Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Summary Judgment at 6–7, *Combs v. Homer-Center Sch. Dist.*, No. 04-CV-1599 LEAD (Apr. 13, 2006).

⁵³ *Combs v. Homer-Center Sch. Dist.*, 468 F. Supp. 2d 738, 754 (W.D. Pa. 2006), *aff’d in part and vacated in part*, 540 F.3d 231 (2008).

Similarly, a father of homeschooled children in California, who relied on Christian curricular materials, referred to public schools as ““a world of snitches.””⁵⁴ He feared school attendance would expose the family (which had a long record with child welfare authorities) to inappropriate prying by neighbors and state officials.⁵⁵ It is a short step from this dismissal of the *parens patriae* function in education to hiding from child welfare workers as well as school officials (as indeed this family did).⁵⁶ This constellation of beliefs and resistance parallels, on a smaller scale, the interaction between child welfare workers and the residents of the fundamentalist Latter-Day Saints Yearning for Zion Ranch in Texas that may have helped to stoke the state’s inappropriate and disproportionate response to an allegation of sexual abuse—an incident I have discussed at length elsewhere.⁵⁷

Homeschoolers who take this hard line stance starkly challenge a bulwark of the modern state—that the state has an independent interest in the well-being of children who will be the next generation of citizens. Their position cannot be reconciled with the philosophy of the modern state as summarized by the California Supreme Court sitting *en banc* in 1984.⁵⁸ The court concluded that the free school guarantee in the state constitution “reflects the people’s judgment that a child’s public education is too important to be left to the budgetary circumstances and decisions of individual families.”⁵⁹ The court relied in part on a concededly paternalistic speech representing a different time and a different world view, in which one leader of California’s public school movement, arguing for a right to education to be included in the state’s constitution, opined in 1863 that ““if left to their own unaided efforts, a great majority of people will fail through want of means to properly educate their children; *another class, with means at command, will fail through want of interest.*””⁶⁰ And, one might add, in a more communal, and I hope less paternalistic, spirit through an agenda that expressly conflicts with the shared message of the public schools, to which we now turn.

⁵⁴ Jonathan L. v. Super. Ct., 81 Cal. Rptr. 3d 571, 594 n.33 (Cal. Ct. App. 2008).

⁵⁵ *Id.*

⁵⁶ *Id.* at 579 (finding that during a dependency proceeding, the family was “uncooperative,” the mother “attempted to hide the children,” and then coached them “not to talk with the social workers”).

⁵⁷ Catherine J. Ross, *Legal Constraints on Child-Saving: The Strange Case of the Fundamentalist Latter-Day Saints at Yearning for Zion Ranch*, 37 CAP. U. L. REV. 361 (2008) (arguing that the state violated the parents’ substantive and procedural rights when it removed nearly 470 children from the Ranch, and that following the law would have led to a result that would have been less traumatic for the children and more productive for achieving the state’s legitimate goals). Analyzing that situation, I recommended that the children—or at least the girls approaching physical maturity, the only ones about whom there appeared to be cause for concern—should have been required to attend local public schools where they would have contact with mandated child abuse reporters as well as the opportunity to learn about other ways of life. *Id.* at 408–09.

⁵⁸ Hartzell v. Connell, 679 P.2d 35 (Cal. 1984) (*en banc*).

⁵⁹ *Id.* at 43.

⁶⁰ *Id.* (emphasis in original) (quoting John Swett).

B. Freedom from Conflicting Ideas

The education provided by traditionalist religious families at home may come head to head with core values our educational system is designed to inculcate. The Court's assertion in *Pierce* that the state may demand that all students receive instruction "plainly essential to good citizenship"⁶¹ should not be read as limited to the three Rs. Homeschooling parents, and others who object to the curricular choices made by public school officials, often mistakenly believe that the parental rights recognized in the *Pierce* line of cases entitle them to protect their children from exposure to ideas that conflict with the messages parents are inculcating at home. But the circuit courts that have reached the question have uniformly held that once parents enroll their children in public school, their rights to restrict the curriculum to which their children are exposed are extremely limited.⁶²

Parents often object to the public school curriculum based on conflicts between the curriculum and the parents' religious beliefs, the most common cause of curricular disputes that reach the courts. In a widely-analyzed case—*Mozert v. Hawkins County Public Schools*⁶³—the Sixth Circuit held that mere "exposure" to ideas that self-described "born again Christian" parents asserted were undermining their religious beliefs did not violate the free exercise rights of the parents.⁶⁴

In particular, the parents objected to readings which taught religious tolerance and critical thinking, both of which the parents thought conflicted with the families' teachings in areas "where the Bible provides the answer."⁶⁵ One parent objected to curricular materials "about women who have been recognized for achievements outside their homes," as well as to readings that exposed his children to information about "other forms of religion" and "the feelings, attitudes and values of other students" when unaccompanied by "a statement that the other views are incorrect."⁶⁶ The parents' demands, the court held, conflict with the "civil tolerance" the Supreme Court has included among the fundamental values "essential to a democratic society," which requires that "in a pluralistic society we must 'live and let live.'"⁶⁷ This is precisely the concept the parents were unwilling to accept. Most of the children of the families that objected to the assigned readings withdrew from the Hawkins County schools to be homeschooled, attend religious schools, or enter a more congenial school system.⁶⁸

⁶¹ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

⁶² *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005), *modified*, 447 F.3d 1187, *cert. denied*, 549 U.S. 1089 (2006); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005).

⁶³ 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

⁶⁴ *Id.* at 1066.

⁶⁵ *Id.* at 1068–69.

⁶⁶ *Id.* at 1062.

⁶⁷ *Id.* at 1068–69 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

⁶⁸ *Id.* at 1060.

The Supreme Court subsequently restricted free exercise rights to accommodation in *Employment Division v. Smith*, making it even less likely that parents with similar claims might prevail.⁶⁹ *Smith* held “that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”⁷⁰ This emerging narrow view of how little the state must do to make the ultra-religious feel comfortable—combined with restrictions on school prayer—may help to account for the stunning growth in homeschooling that began in the 1990s. Parents who understand that their parental liberty is limited to the right to choose whether or not to send their children to public schools may well conclude that the only way to control the environment in which their children are educated is to remove them from public school, or to remove them from organized schools entirely.

In *obiter dicta* in *Smith*, Justice Scalia, writing for the Court, suggested that a “hybrid-rights” exception to the *Smith* doctrine may exist, in which a religious exercise claim combined with another constitutional claim, expressly including “the right of parents acknowledged in *Pierce v. Society of Sisters*, . . . to direct the education of their children” would require strict scrutiny of the state’s actions.⁷¹ Some religious parents, who enroll their children in public school and then try to bend the schools to their own value system, or who seek to exempt children from certain aspects of the curriculum (such as sex education or evolution), believe that they meet the requirements for a hybrid claim under *Smith*, as do many homeschoolers.

Predictably, homeschooling parents who seek complete immunity from state oversight seized on the hybrid rights exception to *Smith*.⁷² No court to date, however, has found for parents who made hybrid claims based on their liberty interests in parenting and the Free Exercise Clause. Indeed, a number of appellate courts reject the doctrine entirely.⁷³

⁶⁹ *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

⁷⁰ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. at 879).

⁷¹ *Smith*, 494 U.S. at 881–82 (citing and discussing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

⁷² *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 244 (2008), *cert. denied*, 129 S. Ct. 1013 (2009).

⁷³ Some courts reject the concept altogether. The Second, Third and Sixth Circuits treat the notion of hybrid claims as merely dicta. *Combs*, 540 F.3d at 247 (“Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta.”); *Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003) (holding there is no right to exemption from sex education class and “*Smith’s* ‘language relating to hybrid claims is dicta’”); *Watchtower Bible and Tract Soc’y of N.Y., Inc. v. Stratton*, 240 F.3d 553, 561–62 (6th Cir. 2001), *rev’d on other grounds*, 536 U.S. 150 (2002); *Kissinger v. Bd. of Trustees of the Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993) (stating that the hybrid rights exception is “completely illogical”).

Other courts are willing to entertain heightened scrutiny for hybrid claims, but only where each claim is “tenable” on its own. *Parker v. Hurley*, 514 F.3d 87, 98 & n.9 (1st Cir.) (parental

III. THE NEEDS OF A PLURALIST DEMOCRACY TRUMP PARENTAL PREFERENCES

Two federal appellate courts have expressly rejected the hybrid rights claims offered by homeschooling parents. In *Swanson v. Guthrie*,⁷⁴ the Tenth Circuit dismissed as not even “colorable” a claim by homeschoolers that they should be able to supplement their religious homeschooling with selective use of public school facilities by cherry-picking the courses and activities their daughter wanted to use.⁷⁵ The parents asserted that the school board’s requirement that students attend the public schools full-time or not at all constituted an indirect burden on their free exercise rights combined with their liberty interest in educating their children, resulting in a hybrid claim under *Smith* that required strict scrutiny.⁷⁶ The court expressly repudiated the parents’ attempt to distinguish *Mozert*: “We see no difference of constitutional dimension between [opting-in to classes and opting-out of them]. The right to direct one’s child’s education does not protect either alternative.”⁷⁷

In *Combs v. Homer-Center School District*, a case that lies at the core of my argument here, the Third Circuit ruled against homeschooling parents who asserted that compliance with the state’s reporting and regulatory review requirements for home

rights claim of entitlement to advance notice and right to exemption from elementary school book readings is not even “colorable” much less “independently viable”), *cert. denied*, 129 S. Ct. 56 (2008); Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 18–19 (1st Cir.) (affirming rejection of a hybrid Parents’ Rights/Free Exercise claim as not independently viable), *cert. denied*, 543 U.S. 988 (2004); Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001) (finding no hybrid claim), *cert. denied sub nom.* Henderson v. Mainella, 535 U.S. 986 (2002); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (finding a hybrid claim where Free Exercise is combined with an Establishment Clause claim); Brown v. Hot, Sexy and Safer Prod., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (holding no independently viable parental rights claim controlled the public school curriculum), *cert. denied*, 516 U.S. 1159 (1996).

While the Ninth and Tenth Circuits have recognized hybrid rights, they require plaintiffs to raise “colorable” claims. *San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296–97 (10th Cir. 2004). The Tenth Circuit expressly repudiated enforceable parental rights in the context of hybrid claims made by homeschoolers: A plaintiff cannot “simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force a government to demonstrate the presence of a compelling state interest.” *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 700 (10th Cir. 1998) (rejecting a claim that homeschooled children should be able to opt-in to public schools for specific classes).

⁷⁴ *Swanson*, 135 F.3d 694.

⁷⁵ *Id.* at 696, 700 (discussing request to attend foreign language, music and certain science courses).

⁷⁶ *Id.* at 699.

⁷⁷ *Id.* at 700. One might argue that the school board’s interests would be better served by enticing homeschooled students to join their peers at least on a part-time basis, but that is left to the board’s discretion as a matter of constitutional law, as is the decision whether or not to accommodate parental requests for exemptions from the regular curriculum.

schools violated their religious beliefs.⁷⁸ The six families, all Christians of different denominations, shared the common belief that education of their children was more than a religious duty—according to them, education was religion itself.⁷⁹ This viewpoint is consistent with “the cultural strand within conservative Protestantism” that views “all aspects of life, including teaching and learning [as] inherently religious.”⁸⁰

Tackling the parents’ hybrid claim, the *Combs* court concluded that neither *Meyer*, nor *Pierce*, nor *Yoder* supported parental rights as framed in the case.⁸¹ The “particular right asserted in this case—the right to be free from all reporting requirements and ‘discretionary’ state oversight of a child’s home-school education—has never been recognized.”⁸² The state’s reporting requirements did not limit or interfere with the limited parental right to choose the means of complying with the compulsory education law by selecting a mode of schooling.⁸³ *Pierce* and *Meyer* and “‘a substantial body of case law’” recognized that if the state must allow parents to choose alternatives to public school “‘it has a proper interest in the manner in which those schools perform their secular education function.’”⁸⁴ Finding no colorable parental rights claim, the court expressly held that “[e]ven if we were to apply” the more generous pleading approach of other circuits to hybrid claims (which the Third Circuit does not recognize), the parents in *Combs* had failed to offer an independent parental rights claim.⁸⁵ In the absence of any allegations that the state regulation had directly interfered with the parents’ religious teachings, no viable claim existed.

Similarly, in *Jonathan L. v. Superior Court*⁸⁶ a California appellate court held that there is no constitutional right to homeschool, even when motivated by religious beliefs.⁸⁷ In short, the court held, “no such absolute right to home school exists.”⁸⁸ The parents’ preferences “must yield to state interests in certain circumstances.”⁸⁹ Without deciding whether it would consider the parents’ hybrid rights claim, or what standard of scrutiny was required, the court concluded that the state had a compelling

⁷⁸ *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 233 (3d Cir. 2008) (affirming summary judgment to the state officials below under federal law, but remanding claims based on the state’s Religious Freedom Restoration Act, later transferred to state court), *cert. denied*, 129 S. Ct. 1013 (2009).

⁷⁹ *Id.* at 234.

⁸⁰ Sikkink, *supra* note 27, at 280.

⁸¹ *Combs*, 540 F.3d at 247–49, 252.

⁸² *Id.* at 247.

⁸³ *Id.* at 251.

⁸⁴ *Id.* at 249 n.26 (quoting *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245–47 (1968) (upholding law providing public purchase and loan of textbooks to sectarian schools)).

⁸⁵ *Id.* at 247.

⁸⁶ 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008).

⁸⁷ *Id.* at 592.

⁸⁸ *Id.*

⁸⁹ *Id.*

interest in requiring the child, Rachel, to attend public school because of allegations of physical and sexual abuse that put her health and safety at risk.⁹⁰ In the context of a dependency proceeding, in which reports of abuse began in 1987, and another child in the family had already been adjudicated dependent and removed from the family, the court concluded, “[t]o pose the question is to answer it.”⁹¹ The state had a compelling interest, if one were required, in demanding that Rachel attend a public school where she would have regular contact with mandated child abuse reporters.⁹²

But the court did not limit its discussion to dependency proceedings. Seventeen-year-old Rachel L. told authorities she wanted to attend public school.⁹³ Social workers had concluded that keeping her at home where her mother, who lacked a high school diploma, taught eight children, and where Rachel was expected to help her younger siblings learn, exposed her to risk of “serious emotional damage.”⁹⁴ More broadly, the court noted the state’s responsibility for ensuring that all of the children in the state receive the “chance[] for economic and social success” that education offers, and recognized the “social dimension to the state’s interest in education.”⁹⁵ The “social dimension,” the court continued, involves schools bringing “together members of different racial and cultural groups and, hopefully, help them to live together in harmony and mutual respect . . . [t]hese results are directly linked to the constitutional role of education in preserving democracy”⁹⁶

What the California court called the “social dimension” is more commonly identified as the “shared experiences and common values” that provide societal cohesion.⁹⁷ Schools have long been charged with transmitting those shared values to the young, to say that schools transmit our values to the next generation of citizens is only to begin the conversation. What values are we—as a nation—committed to inculcating in our children? Because schools play a central role in democracy, it is incumbent upon us to agree at a minimum on some shared goals for education suitable to a modern democracy.

Aristotle posits the unnamed virtue of “acting well toward fellow citizens and strangers.”⁹⁸ This is not the norm of hospitality, but a more demanding notion of engagement—neither domineering nor obsequious that allows us to confront and resolve our differences. In modern democracies some ways of acting well toward

⁹⁰ *Id.* at 593–94.

⁹¹ *Id.* at 578, 593.

⁹² *Id.* at 593.

⁹³ *Id.* at 579. By the time the matter reached the appellate court, Rachel had run away and could not be located. *Id.* at 580 n.11.

⁹⁴ *Id.* at 579.

⁹⁵ *Id.* at 582 (quoting *Serrano v. Priest*, 5 Cal. 3d 584, 605 (1971)).

⁹⁶ *Id.* (quoting *Hartzell v. Connell*, 679 P.2d 35, 41 (Cal. 1984) (internal citations omitted)).

⁹⁷ Reich, *supra* note 30, at 58 (citing CASS SUNSTEIN, *REPUBLIC.COM* 2001).

⁹⁸ ARISTOTLE, *NICOMACHEAN ETHICS* 108 (Terence Irwin trans., 1985); Danielle S. Allen, *Further Reflections on Little Rock*, in 4 *SCHOOLS: STUDIES IN EDUCATION* 13, 14 (2007).

others are enshrined in law. The First Amendment requires, among other things and generally speaking, that the government shall not inhibit speech, shall leave individuals free to practice any religion or none, and shall not establish or prefer any set of religious beliefs.⁹⁹

Normative values are implicit in these civil liberties.¹⁰⁰ The First Amendment does not bind individuals (or any private actors), but it states a value preference. Respect for difference is at the heart of the First Amendment.¹⁰¹ We should both speak and listen. We should respect the choices others make about their beliefs and practices even if we disagree.

Political theorist Amy Gutmann proposes three basic principles that should form the core of “any morally defensible democracy”: civic equality, liberty, and opportunity.¹⁰² In the United States, the core value of tolerance serves all three goals.

Many liberal political theorists argue, however, that there are limits to tolerance.¹⁰³ In order for the norm of tolerance to survive across generations, society need not and should not tolerate the inculcation of absolutist views that undermine toleration of difference.¹⁰⁴ Respect for difference should not be confused with approval for approaches that would splinter us into countless warring groups. Hence an argument that tolerance for diverse views and values is a foundational principle does not conflict with the notion that the state can and should limit the ability of intolerant homeschoolers to inculcate hostility to difference in their children—at least during the portion of the day they claim to devote to satisfying the compulsory schooling requirement.

A. *What Should the State Do?*

The problem I have identified does not necessarily exist in all homeschooling environments. Just as conservative Christians are not monolithic—they choose different forms of schooling for their children—neither do all homeschoolers share the same agenda. Some homeschoolers may want their children to learn about all sorts of belief systems. But the evidence strongly indicates that many parents choose

⁹⁹ U.S. CONST. amend I.

¹⁰⁰ I examine this theme in greater depth, as well as the role of the First Amendment, in my forthcoming book. CATHERINE J. ROSS, *THE TROUBLED FIRST AMENDMENT IN OUR PUBLIC SCHOOLS* (Harvard University Press forthcoming) (on file with author).

¹⁰¹ Amy Gutmann, *Civic Education and Social Diversity*, 105 *ETHICS* 557, 562 (1993), discusses the divide between political liberals and comprehensive liberals over whether teaching ideals of individualism and autonomy ought to be part of the public agenda. But both, she argues, support teaching tolerance and mutual respect.

¹⁰² AMY GUTMANN, *IDENTITY IN DEMOCRACY* 5 (2003).

¹⁰³ Gutmann, *supra* note 101, at 562–63.

¹⁰⁴ *Id.*; see also MACEDO, *supra* note 28, at 85; Michael Walzer, Comment, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 99–101 (Amy Gutmann ed., 1994) (noting that immigrant societies like the U.S. are committed above all to individual rights and neutrality concerning culture and religion).

homeschooling precisely to avoid having their children exposed to other beliefs, or to what they disparagingly view as “relativism.”¹⁰⁵ Homeschooling parents who subscribe to an absolutist belief system are at the base of many legal disputes that arise in schools.¹⁰⁶ They often insist on a closed system of communication—objecting to their children’s hearing or reading about discordant ideas or beliefs. If a parent subscribes to an absolutist belief system premised on the notion that it was handed down by a creator, that it (like the Ten Commandments) is etched in stone and that all other systems are wrong, the essential lessons of a civic education (i.e., tolerance and mutual respect) often seem deeply challenging and suspect. If the core principle in a parent’s belief system is that there is only one immutable truth that cannot be questioned, many educational topics will be off limits.¹⁰⁷ Such “private truths” have no place in the public arena, including the public schools.¹⁰⁸

When the children of parents who hold absolutist beliefs of this sort attend public school, we hope that they will learn about the civic norms at the heart of the First Amendment. This is unfortunately one of the main reasons their parents remove them from public school. If children hear the message of tolerance in school, they may disagree with the teacher; they may have arguments about it in the cafeteria. Parents of public school students have ample time to counteract and undermine lessons the children have learned in school that conflict with family values. The children are free to accept or reject the views of their parents on the subject. This is part of the balance between family and state that distinguishes our republic from totalitarian regimes such as Plato’s Republic and ancient Sparta, as the Court put it in *Meyer*.¹⁰⁹

But when parents withdraw their children entirely from the public sphere, children are sheltered from any countervailing messages. Civic messages serve shared social goals and also allow children to choose their own identities as they mature,¹¹⁰ a step that many parents find threatening no matter what world view they subscribe to, but

¹⁰⁵ See Eric A. DeGroff, *Parental Rights and Public School Criteria: Revisiting Mozart After 20 Years*, 38 J.L. & EDUC. 83, 86–87 & n.32 (2009).

¹⁰⁶ See, e.g., *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir.) (describing parents’ challenges to school activities, arguing that they violated plaintiff children’s First Amendment rights), *cert. denied sub nom. Dibari v. Bedford Cent. Sch. Dist.*, 534 U.S. 827 (2001); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (allowing children of parents who objected to content of grade school readers on religious grounds to be taught at home while the parents’ suit against the school board was pending), *cert. denied*, 484 U.S. 1066 (1988).

¹⁰⁷ This may be true even of highly-educated, sophisticated parents, including law professors. See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 178–81 (1993).

¹⁰⁸ RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 36 (1984); see GUTMANN, *supra* note 102, at 156.

¹⁰⁹ *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923).

¹¹⁰ See Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 224 (1999).

which traditionalist religious parents are apt to find even more frightening because they sincerely believe that erring children will burn in hell.

Some of these concerns apply to organized schools as well. For example, some data indicate that students in evangelical schools demonstrate less comfort with freedom of speech than their peers in public schools.¹¹¹ Organized schools, however, all submit to state licensing procedures which include periodic oversight visits in most or all states.¹¹² Unlike home schools, sectarian schools offer some transparency, and I am unaware of any that have challenged the state's authority to impose minimum curricular requirements in recent years.¹¹³

Consistent with Gutmann's assertion that "[a] democratic government cannot possibly accommodate all conscientious beliefs, whatever they happen to be, and still remain democratic let alone committed to pursuing democratic justice,"¹¹⁴ state officials may revoke the accreditation of fundamentalist schools that offer an extreme curriculum.¹¹⁵ For example, if a radical madrassa taught its students to challenge the authority of the United States and urged students to grow up to be suicide bombers, the state could remove it from the list of institutions through which students could satisfy the compulsory schooling requirements.¹¹⁶ This decision would not, in my

¹¹¹ Sikkink, *supra* note 27, at 278.

¹¹² For a comprehensive guide to state regulations of private schools, see OFFICE OF NON-PUB. EDUC., U.S. DEP'T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009), available at <http://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf>.

¹¹³ In the 1980s, several lower courts rebuffed challenges to the states' regulatory authority over schools. See, e.g., *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) (upholding standardized testing requirement for homeschooled children); *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987) (upholding state oversight and regulation of sectarian schools).

An argument has been made that some state Religious Freedom Restoration Act statutes protect sectarian schools and home schools from state oversight. The plaintiffs in *Combs* made this claim about the Pennsylvania law, and that claim was recently remanded from federal to state court as a question of first impression under state law. *Combs v. Homer-Cent. Sch. Dist.*, No. 04cv1599 LEAD, slip op., 2009 WL 2849947, at *1 (W.D. Pa. Sept. 2, 2009) (dismissing all federal claims on remand from the Third Circuit and declining to exercise jurisdiction over the remaining state claim). I have not examined claims homeschoolers might make or have made under state RFRA's.

¹¹⁴ GUTMANN, *supra* note 102, at 170.

¹¹⁵ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (noting there is no question as to the rights of the state to supervise and inspect teachers and pupils and to ensure nothing taught "is manifestly inimical to the public welfare").

¹¹⁶ A private school operated by the Saudi government in Alexandria, Virginia, has been the subject of extended controversy concerning the messages contained in its Arabic textbooks. A review of seventeen books by the U.S. Commission on International Freedom recommended that the county government close the school after finding statements in the texts including an interpretation of the Quran indicating that it was permissible to kill adulterers and persons who convert from Islam to other religions, accusations that Jews caused the split between Sunni and Shiite Muslims, and that Muslims can seize the life and property of "polytheists," including those who believe in all of the world's other major religions. Matthew Barakat, *N. Va. School's*

view, compromise the rights of the teachers or the parents to continue to voice their opinions outside the temporal space reserved for compulsory schooling, as long as they did not violate any criminal statutes, including those governing incitement. States recognize that enrollment in licensed independent schools satisfies the compulsory education laws in part because they may conclude that “institutional private schools are under the direct supervision of . . . school authorities at all times.”¹¹⁷ In contrast, it is exceedingly difficult for the state to supervise numerous “widely scattered” parents who provide instruction at varying levels in their homes.¹¹⁸

Since states can impose minimum curricular requirements on home schools, and test students to be sure that they receive the mandated education, it should also be possible for states to require homeschoolers to meet broader curricular goals. Other commentators have urged states to engage in greater regulation of homeschooling to promote quality education¹¹⁹ and to protect the rights of homeschooled children, including the right of gender equality¹²⁰ and self-determination.¹²¹

I propose that we add to the civics education goals of the state, including lessons on mutual respect for diverse populations and viewpoints as a mandatory curricular requirements. As I observed above, some homeschoolers doubtless are committed to diversity, and this requirement would not conflict with their educational agenda, but this is not the group that concerns me. Imposing curricular requirements about respect for diverse viewpoints will be seen as undermining the most authoritarian conservative homeschoolers—those who believe in an absolute truth which forms the basis of the education they provide their children. Unfortunately, the unavoidable counterpart of a belief in absolute truth is that other belief systems are mistaken at best, and at worst, evil.

School integration provides an excellent analogy for the courts overriding parental educational choices, including those based on religious beliefs, when those choices conflict with constitutional imperatives. In 1973, a state court in Florida expressly

Texts Found to OK Killing, RICHMOND TIMES-DISPATCH, June 12, 2008, at B7. The Saudi government subsequently agreed to revise the readings, after alleging that the texts had been misinterpreted and mistranslated, and it has deleted some of the passages the Commission had flagged. The school’s status was under review by the Southern Association of Colleges and Schools, the applicable accreditation body, as of 2009. Matthew Barakat, *Saudi Academy in Va. Revises Islamic History Books*, SEATTLE TIMES, Mar. 12, 2009, available at http://seattletimes.nwsourc.com/html/nationworld/2008846126_apsaudiacademy.html.

¹¹⁷ *Scoma v. Chi. Bd. of Educ.*, 391 F. Supp. 452, 462 (N.D. Ill. 1974).

¹¹⁸ *Id.*

¹¹⁹ See Yuracko, *supra* note 1, at 133.

¹²⁰ *Id.* at 156–58 and *passim*. See generally Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 FORDHAM L. REV. 1617 (2001).

¹²¹ Emily Buss, *The Adolescent’s Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1286 (2000) (considering possibility of mandatory public school attendance during late adolescence); Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 54 (urging “developmental non-influence”).

considered and rejected assertions that one family's religiously-based belief in racial segregation entitled it to an exemption from the state's compulsory school law that would allow parents to teach their children at home in a school they called the Ida M. Craig Christian Day School, whose sole teacher was the mother and whose only students were the children in the family.¹²² According to the parents, "race mixing as practiced in the public schools was sinful and contrary to their religious beliefs."¹²³ In the face of the parents' assertion that they believed "blacks and Orientals were conceived through the copulation of Eve and Satan,"¹²⁴ the court ordered them to send their children to the integrated local public school.¹²⁵ If local authorities learned that these parents were homeschooling today, there should not be any legal bar to requiring their children to enroll in a licensed, organized school.

Parents with such racist beliefs could not expressly evade the national commitment to integration by using organized schools either. In *Runyon v. McCrary*, the Supreme Court dealt a major blow to the Christian academies that had been established to circumvent school integration, when it held that private schools could not deny admission on the basis of race.¹²⁶ The Court rejected the parents' claims that their right to direct their children's education included the right to send them to racially segregated schools, observing that even if one assumes that parents have the First Amendment right to "send their children to educational institutions that promote the *belief* that racial segregation is desirable," the contractual actions of the schools themselves are limited by law; they cannot refuse admission "to nonwhites."¹²⁷

As the Court explained in another case about parental racism, "[t]he Constitution cannot control such [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."¹²⁸

Whatever rights or privileges homeschoolers may have in the various states, nothing in federal law prevents closer regulation, including more detailed curricular demands. *Meyer* and *Pierce*, on which homeschoolers rely more heavily than the cases warrant, were premised on the uncontested principle that the state has the power to establish and enforce standard curricula that reach private schools. Neither *Combs* nor *Jonathan L.* suggests that the Federal Constitution limits the ability of states to regulate home schools more closely. Indeed, the *Jonathan L.* court expressly chastised the California legislature for failing to provide for any oversight of home schools other than requiring that parents filed an affidavit stating that they have made other arrangements and will not be enrolling their children in public school.¹²⁹ The court's

¹²² *T.A.F. v. Duval County*, 273 So. 2d 15, 17–18 (Fla. Dist. Ct. App. 1973).

¹²³ *Id.* at 16. At the time, Florida did not permit homeschooling.

¹²⁴ *Id.* at 18.

¹²⁵ *Id.*

¹²⁶ 427 U.S. 160, 173–74 (1976).

¹²⁷ *Id.* at 176 (emphasis added).

¹²⁸ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

¹²⁹ *Jonathan L. v. Super. Ct.*, 81 Cal. Rptr. 3d 571, 595–96 (Cal. Ct. App. 2008).

lengthy footnotes summarize methods used by other states to ensure that their home-schooled children are receiving an adequate education.¹³⁰

Public schools at their best offer alternative views of the world that are essential to our constitutional system. As Justice Brennan, speaking for the Court about our schools, explained: “The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”¹³¹ Those words are as true today as when he wrote them.

IV. A PRESUMPTION IN FAVOR OF FORMAL SCHOOLING WHEN PARENTS DISAGREE

So far I have directed my comments to the extent of the states’ power to mandate exposure to diverse views in homeschool curricula where both parents in a family are united in choosing to homeschool their children. Now I turn to the question of whether the state should be neutral about the choice between homeschooling and education in a public or private school licensed by the state when the parents cannot agree. Parental conflict over the choice of school is unlikely to come to public attention in an intact family, nor is there a mechanism for the state to intervene in such disputes absent harm to the child. But when parents do not live together and share legal custody of children, disputes over educational choice frequently end up in family court.

When parents share joint legal custody, each of them has a constitutional liberty interest in the “care, custody and control” of their children that entitles them to make educational decisions, including which school the child should attend.¹³² A judge may be forced to resolve the issue. When parents whose rights are equal cannot reach a consensus, the standard for the court is the “best interests of the child,” regardless of whether the dispute arises at an initial custody determination or at a later hearing to enforce or modify a custody decree.¹³³ This standard leaves the judge enormous discretion.

¹³⁰ *Id.* at 595–96 & nn.36–41 (summarizing regulations from other states including review of instruction plans, achievement tests, annual assessments, and minimum qualifications for teachers).

¹³¹ *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (internal citation omitted).

¹³² Each parent also has the right to inculcate his or her religion during their parenting time as well as to share their world views—no matter how controversial—more generally with the child. Eugene Volokh treats these parental rights as speech rights. Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 673 (2006) (“In practice, the law almost never restricts parental speech in intact families.”).

¹³³ The unilateral decision by one parent to begin homeschooling is a substantial change in circumstances warranting consideration of modification of a custody decree. *In re Marriage of Riess*, 632 N.E.2d 635, 640 (Ill. App. Ct. 1994).

State courts have not offered definitive guidance on whether the state should be neutral where one parent seeks to homeschool but another parent, who shares legal custody, disagrees. In the few private disputes that posed the issue, courts have retained the fact-specific best interests approach in which there is no way to factor in the state's interest in education.

In a case of first impression, an appellate court in Pennsylvania declined in 2008 to adopt a rule or presumption to govern such cases, rejecting the father's argument that the courts should favor public schooling when parents disagree.¹³⁴ Instead, applying the "well-established best interests standard, applied on a case by case basis," the court ruled that in the matter before it—where the homeschooled children were doing well academically, where the school district supervised the education, and where the father had agreed to the homeschooling plan before the parents divorced—the trial court had not abused its discretion in ordering continuation of the homeschooling regime.¹³⁵ Two other factors were crucial. Although the homeschooling mother had only a high school degree, the father had not shown that the children's best interest would be better served in public school.¹³⁶ Instead, his arguments focused on his own interests as the parent who objected to homeschooling.¹³⁷

Because the state is not a party to domestic custody proceedings, no argument was made that social policy or the state's interest in promoting exposure to diverse views and inculcating tolerance tilted toward a preference for public schooling. The court nonetheless considered and rejected the argument, based on the legislative history of the state's 1988 statute authorizing home education programs.¹³⁸ The court expressly reversed the trial court's conclusion that "absent extraordinary circumstances . . . it is usually in the child's best interests to attend public school."¹³⁹

Similarly, a family court in New Hampshire applied the best interests standard to an ongoing dispute between parents who had been divorced for ten years over whether their ten-year-old daughter, Amanda, should continue to be homeschooled by her mother or enrolled in public school as her father preferred.¹⁴⁰ The father did not object to the content of the homeschooling curriculum which included Bible lessons. He

¹³⁴ Staub v. Staub, 960 A.2d 848, 849 (Pa. Super. Ct. 2008).

¹³⁵ *Id.* at 849–50, 855–56.

¹³⁶ *Id.* at 855–56.

¹³⁷ *Id.* at 852.

¹³⁸ *Id.*

¹³⁹ *Id.* at 853; *see also* Jordan v. Rea, 212 P.3d 919, 922 (Ariz. Ct. App. 2009) (holding that best interests apply to parental disputes over private religious school); Donna G.R. v. James B.R., 877 So.2d 1164, 1167, 1170–71 (La. Ct. App. 2004) (reversing order continuing homeschooling as abuse of discretion where homeschooling mother left school at age 15 and children did poorly on standardized tests revealing "substandard" work); Taylor v. Taylor, 758 N.W.2d 243 (Mich. 2008) (denying application for leave to appeal trial court's order that child attend public school despite the appearance of bias against homeschooling).

¹⁴⁰ *In re* Kurowski & Voydatch, No. 2006-M-669, 2–3 (Laconia Fam. Div. N.H. July, 14, 2009), available at <http://www.telladf.org/UserDocs/KurowskiOrder.pdf>.

pitched in by teaching Amanda during his parenting time but worried about her lack of opportunities to be with her peers.¹⁴¹ The father argued that public schooling would expose Amanda to viewpoints other than her mother's "rigid" religion, and enable her "to function in a world which requires some element of independent thinking and tolerance for different points of view."¹⁴²

In a sign of how unsuited Amanda had become to entertaining other viewpoints, even those held by the people she loved most, the Guardian ad Litem reported that Amanda's adoption of her mother's religious belief system interfered with her relationship with her father.¹⁴³ Amanda was upset that her father did not share her religious beliefs and had chosen "to spend eternity away from her" a decision that, to her, proved that he did "not love her as much as he sa[id] he d[id]."¹⁴⁴ The court ordered that Amanda attend public school where, among other things, she would benefit from increased "exposure to a variety of points of view."¹⁴⁵

Asserting that she was not basing her decision on Amanda's religious beliefs, the judge "considered only the impact of those beliefs on her interactions with others."¹⁴⁶ Without acknowledging it, the judge appeared to show a preference for public school over homeschooling—at least over homeschooling with fundamentalist parents. Would not most children benefit from exposure to diverse views? Framed in this way, the judge may well be viewed as undermining the mother's religious exercise rights with respect to her daughter. On the other hand, the mother's views were undermining the father's relationship with Amanda who concluded that if her father really loved her, he would become born again.¹⁴⁷ There was no clear way to resolve this domestic conflict between two parents whose religious and parental rights were in equipoise.

A better—and perhaps more forthcoming—approach would be to adopt a rebuttable presumption that, all other things being equal, where the parents disagree, the state prefers public school to homeschooling because public schools serve the state's interest in exposure to diverse viewpoints and people. This would achieve the same result without necessitating any commentary on the religious views of Amanda or her mother. The preference could develop through common law or, perhaps preferably, through statutory language indicating the state's preference for public schooling, or at least for attendance at a formally licensed school, as compared to its tolerance for homeschooling. Such legislative language would be consistent with and promote the state's interest in providing all children with the lessons "essential to good citizenship."¹⁴⁸ A preference for public schools over homeschooling when parents cannot

¹⁴¹ *Id.* at 3.

¹⁴² *Id.* at 5.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *Id.* at 8.

¹⁴⁷ *Id.* at 5.

¹⁴⁸ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) ("[C]ertain studies plainly essential

agree would have the added advantage of precluding an “opening [of] the floodgates for uncountable and never-ending post-divorce challenges”¹⁴⁹ regarding this set of educational decisions.

CONCLUSION

As I have argued, democracy relies on citizens who share core values, including tolerance for diversity. When parents reject these values, the state’s best opportunity to introduce them lies in formal education. Setting aside all of the other issues surrounding homeschooling, the importance of inculcating democratic values is sufficient reason for more rigorous regulation of homeschooling than prevails at present. Whatever the precise parameters of parental liberty ultimately prove to be under the U.S. Constitution, they neither protect the right of parents to homeschool without oversight nor outweigh the state’s interest in the appropriate education of youth for citizenship.

I have argued here for two major reforms: stronger curricular requirements aimed at teaching constitutional values and statutes or common law favoring organized schooling where parents are unable to agree on homeschooling.

First, states should require homeschoolers to include curricular materials that promote tolerance for diversity. Concededly, many fundamentalist and evangelical homeschoolers may circumvent the requirement or undermine the materials even as they assign them—precisely because they may chose to homeschool in order to avoid messages of tolerance and to promote messages of truth. The state should engage in curricular oversight and testing, and should be prepared to withdraw consent to homeschooling where families flagrantly violate this requirement. I recognize, of course, that the goal of requiring homeschoolers to teach lessons about tolerance is largely hortatory, and may even be illusory. Perhaps the most we could hope for is lip service by homeschooled students on a standardized exam. But if states were to establish curricular requirements for teaching the meaning of the First Amendment, homeschooled students would at least gain passing exposure to mainstream norms of tolerance.

Second, where parents involved in custody disputes disagree about the choice of school for their children, states should adopt a rebuttable presumption favoring licensed schools (whether public or private) over homeschooling. Such a public policy would send a strong message even to intact families in which parents are divided over the choice of school environment, and would provide a layer of educational protection for children whose parents do not live together. This presumptive preference would serve additional aims such as gender equity, preparation to live and work in a non-insular world, and contact with mandated child abuse reporters and other social service

to good citizenship must be taught . . .”).

¹⁴⁹ *Stephen v. Stephen*, 937 P.2d 92, 100 (Okla. 1997) (Simms, J., concurring).

providers. Above all, favoring licensed schools over homeschooling promotes the state's normative goals in exposing children to constitutional values.