

## NOTE

### AVOIDING IMPLICIT ACCEPTANCE OF BIGOTRY: AN ARGUMENT FOR STANDARDIZED TESTING OF HOME-SCHOOLED CHILDREN

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INTRODUCTION .....	1177
I. BACKGROUND .....	1180
A. Case History .....	1180
B. Justifications for Home Schooling .....	1183
C. Concerns Regarding Home Schooling .....	1185
D. Home-Schooling Legislation .....	1186
E. Vagueness .....	1188
II. ANALYSIS .....	1188
A. The Advocates' "Fundamental" Right .....	1193
B. The States' "Compelling" Interest .....	1194
C. Narrowly Tailored? .....	1196
D. Proposed Home-Schooling Legislation .....	1197
CONCLUSION .....	1199

#### INTRODUCTION

Lynx and Lamb Gaede are fourteen-year-old identical twins from Bakersfield, California,<sup>1</sup> folk singers with a strong fan base, who have already produced an album.<sup>2</sup> They are also neo-Nazi white supremacists.<sup>3</sup> Their music is an expression of their white supremacist ideology, which their mother, April Gaede, taught them.<sup>4</sup> Mrs. Gaede

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<sup>1</sup> See ABC News, Youth Singers Spread Racist Hate (Oct. 20, 2005), <http://abcnews.go.com/Primetime/story?id=1231684&page=1>.

<sup>2</sup> See *id.* Lynx and Lamb perform under the moniker "Prussian Blue," named for "their German heritage and bright blue eyes." *Id.* Prussian blue is also the color of Zyklon B pesticide residue, which Lynx and Lamb allege was absent in the "so-called gas chambers in the concentration camps." See Jesse Pearson, *Hello, White People!: Prussian Blue Look to the Future*, VICE MAGAZINE, Jan 7, 2007, <http://www.viceland.com/issues/v11n10/htdocs/hello.php>.

<sup>3</sup> ABC News, *supra* note 1.

<sup>4</sup> See *id.*

home schools the two girls and infuses these ideas into the curricula<sup>5</sup> because she believes that her children “need to have the background to understand why certain things are happening.”<sup>6</sup> For example, among the lessons that Mrs. Gaede teaches is that the Roman Empire fell due to the overmixing of races<sup>7</sup> and that Lynx and Lamb should be skeptical about the Holocaust and that they should doubt that six million Jews even existed at that time.<sup>8</sup> Mrs. Gaede, in professing these beliefs, recognizes that “all children pretty much espouse their parents’ attitudes” and swears that she will continue to share “that part of [her] life with [her] children.”<sup>9</sup> Lynx summarizes her views: “We’re proud of being white, we want to keep being white . . . . We want our people to stay white[,] we don’t want to just be . . . a big muddle.”<sup>10</sup> She concludes, “We just want to preserve our race.”<sup>11</sup>

The Supreme Court has observed that “[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”<sup>12</sup> However, the Court has also recognized the parental right to “direct the upbringing and education of children.”<sup>13</sup> Home schooling, therefore, places the state’s interest in education at odds with the parents’ interest in the upbringing of their child.<sup>14</sup>

Although every state provides for home schooling,<sup>15</sup> tension generally arises when the state seeks to regulate aspects of home school-

<sup>5</sup> See *id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Aaron Gell, *Minor Threat*, GQ, [men.style.com/gq/features/landing?id=content\\_4207](http://men.style.com/gq/features/landing?id=content_4207) (last visited Apr. 1, 2007).

<sup>8</sup> See Tracy Connor, *Pop Twerps from Heil Can't Carry Tune*, N.Y. DAILY NEWS, Oct. 30, 2005, available at WL at 2005 WLNR 25300869.

<sup>9</sup> ABC News, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

<sup>13</sup> *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (holding that the right of Amish parents to refuse to send their children to public schools after the eighth grade outweighed the considerations behind Oregon’s compulsory attendance statute).

<sup>14</sup> See CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS’ RIGHTS IN EDUCATION* 1–27 (3d ed. 2002). Klicka explains,

Home schooling is exactly what the name implies: a school in the home. The Illinois Supreme Court defined a school as “a place where instruction is imparted to the young.” The teachers in a home school are usually the parents, and it is estimated that at least 50% of the parents have only a high school diploma.

*Id.* at 1 (citations omitted).

<sup>15</sup> See Bruce D. Page, *Changing Our Perspective: How Presumptive Invalidity of Home School Regulations Will Further the State’s Interest in an Educated Citizenry*, 14 REGENT U. L. REV. 181, 189 (2002).

ing that the parents believe are within their own province.<sup>16</sup> This is particularly so if the parent chooses to home school specifically to avoid state interference. Regulations may require that the home-schooling parent have achieved a certain level of education,<sup>17</sup> that the child learns particular subjects, or that the students participate in standardized testing.<sup>18</sup> The state often justifies such regulations as necessary to further its interest in universal education.<sup>19</sup>

Nonetheless, the state cannot create “regulations so severe as to eradicate the distinction between home and public education [so as to] destroy the alternative of private education guaranteed by *Pierce*.”<sup>20</sup> Such regulations would infringe on “the historical and fundamental right of parents to have their children free from standardization of their education.”<sup>21</sup> Nevertheless, the state possesses an interest in regulating home-schooling curricula for the same reasons it possesses an interest in regulating the curricula of public schools.<sup>22</sup> Neither public nor private schools would satisfy state education requirements if they taught neo-Nazi revisionist history to Lynx and Lamb, and therefore the state should have the authority to reject such teachings regardless of the forum in which the child learns them.<sup>23</sup>

This Note queries whether the state’s interest in the content of home-schooling curricula can justify universal standardized testing of all subjects. Part I provides background pertaining to home schooling’s history, benefits, and concerns. It explores the state’s interest in this area, the degree to which competing parental interests have clashed with those of the state, and the related legislative trends. Part II of this Note examines whether parents have a fundamental right to direct the education of their children and, if so, what compelling state interest may justify home-schooling regulation. The Note concludes that universal standardized testing will resolve the negative consequences of implicit state approval of home-schooling curricula without unnecessarily infringing on the parental right to direct the upbringing of one’s child.

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16 *See id.*

17 *See* KLIČKA, *supra* note 14, at 141 (discussing the various teaching qualification statutes from the nine states that had such statutes as of May 1997).

18 *See id.* at 161, 163.

19 *Id.* at 22–27.

20 *Id.* at 46.

21 *Id.*

22 *See* *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925).

23 This Note does not argue that states should deny parents the right to teach their children such beliefs but contends that the teaching of such beliefs should not satisfy state education requirements. For example, Mrs. Gaede may teach her children white supremacist beliefs but not with the implicit approval of the state of California.

I  
BACKGROUND

A. Case History

Our national educational traditions originated in home schooling.<sup>24</sup> The idea that parents are responsible for educating their children is “rooted in Anglo-American common law.”<sup>25</sup> In the fledgling days of the colonies, parents retained control over whether their children would attend the schools that the state provided.<sup>26</sup> In 1642, Massachusetts Bay Colony passed the first compulsory education law.<sup>27</sup> However, it was not until Massachusetts passed a compulsory attendance statute in 1852 that the state established its compelling interest in education.<sup>28</sup> This shift to compulsory attendance laws occurred for at least two reasons. First, as the nation became more industrialized, the geographic concentration of people made mass education more economical.<sup>29</sup> Second, as immigration increased, the state came to view education as a viable means of assimilating new Americans into society.<sup>30</sup>

The new compulsory attendance laws created tension between parental rights and state interest. Prior to the introduction of such laws, public schools were merely an option that a parent could choose to utilize.<sup>31</sup> Indeed, “state involvement with education during this period was based on a concern over easing parental duties rather than an interest in an educated society.”<sup>32</sup> After states passed and courts upheld compulsory attendance laws, parents had fewer options, and the state interest in education strengthened.<sup>33</sup> To this day, it remains an open question whether the state’s power to educate children is grounded in a delegation from the parents or whether it is independent of any other interest<sup>34</sup>: “[T]he inception of public education as a tool for easing the burden of parents’ historically recognized obligation to educate their children[ ] evolved [into] legislative and judicial theories that ‘[t]he state has the right to educate its youth in order to

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<sup>24</sup> See Kara T. Burgess, Comment, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69, 69–70 (1986).

<sup>25</sup> *Id.* at 69.

<sup>26</sup> *Id.* at 69–70.

<sup>27</sup> *Id.* at 70.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See KLICKA, *supra* note 14, at 32.

<sup>34</sup> See Burgess, *supra* note 24, at 72–75 (discussing the Supreme Court’s jurisprudence recognizing both the parental right to educate their children and the governmental interest in controlling education).

insure its survival.’”<sup>35</sup> Nevertheless, “[e]ach of these two contenders for power—the public state and the private family—claims a stake in regulating and shaping children’s development.”<sup>36</sup>

Regardless of the tensions between parental rights and the state’s interest, the First and Fourteenth Amendments to the United States Constitution protect home schooling, and it is both legal and practiced in every state.<sup>37</sup> *Meyer v. Nebraska*<sup>38</sup> was the first case to explicitly recognize the parental interest in a child’s education as deriving from the Fourteenth Amendment.<sup>39</sup> In *Meyer*, a Nebraska statute forbade the teaching of any foreign language, except for ancient and dead languages, to children who had not yet passed the eighth grade.<sup>40</sup> The State claimed an interest in promoting civic development by ensuring that all children born and reared in the United States spoke English proficiently.<sup>41</sup> The Court held that the statute violated the due process rights of the parents,<sup>42</sup> noting that state action that is either arbitrary or lacks reasonable relation to some state interest infringes on the Fourteenth Amendment.<sup>43</sup> Because “the Legislature ha[d] attempted materially to interfere with the . . . power of parents to control the education of their own,”<sup>44</sup> the Court held the statute to be arbitrary and without reasonable constraint.<sup>45</sup>

*Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*<sup>46</sup> relied on the *Meyer* rationale to strike down an Oregon statute<sup>47</sup> that required all parents or guardians of children between the ages of eight and sixteen to send their children to public school in the district where the child resided.<sup>48</sup> The respondents were the Society of the Sisters of the Holy Names of Jesus and Mary, a corporation “with the power to care for orphans, educate and instruct the youth, [and] establish and maintain schools,”<sup>49</sup> as well as Hill Military Academy, a

<sup>35</sup> *Id.* at 70–71 (quoting Herbert W. Titus, *Education, Caesar’s or God’s: A Constitutional Question of Jurisdiction*, 3 J. CHRISTIAN JURIS. 101, 114 (1982)).

<sup>36</sup> Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 86 (2004).

<sup>37</sup> See KLUCKA, *supra* note 14, at 27, 159.

<sup>38</sup> 262 U.S. 390 (1923).

<sup>39</sup> As the Court stated in *Meyer*, “[t]he problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment.” *Id.* at 399.

<sup>40</sup> *Id.* at 397.

<sup>41</sup> See *id.* at 397–98.

<sup>42</sup> See *id.* at 402–03.

<sup>43</sup> See *id.* at 400.

<sup>44</sup> *Id.* at 401.

<sup>45</sup> See *id.* at 403.

<sup>46</sup> 268 U.S. 510 (1925).

<sup>47</sup> See *id.* 534–35.

<sup>48</sup> See *id.* at 530–31 (explaining that failure to comply with the statute was punishable by misdemeanor).

<sup>49</sup> *Id.* at 531.

private corporation that runs “for profit an elementary, college preparatory, and military training school for boys.”<sup>50</sup> The respondents alleged that the statute violated their Fourteenth Amendment rights.<sup>51</sup> The Court did not agree with the respondents’ assertion that their own Fourteenth Amendment rights were being infringed upon but held instead that the statute “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>52</sup> The Court acknowledged also that a “child is not the mere creature of the state [and that] those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>53</sup>

*Wisconsin v. Yoder*<sup>54</sup> analyzed the parental rights issue via the First Amendment.<sup>55</sup> In *Yoder*, the respondents challenged the validity of a Wisconsin compulsory school-attendance law under the Free Exercise Clause of the First Amendment.<sup>56</sup> The respondents belonged to the Old Order Amish religion and objected to the compulsory attendance laws as detrimental to their religion and way of life.<sup>57</sup> They believed that “by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children.”<sup>58</sup> The respondents objected to sending their children to public school after the eighth grade, but the state law required attendance until the child reached sixteen years of age.<sup>59</sup> Amish beliefs emphasize farm work or a similar profession, learning by doing, and wisdom as opposed to intellect and technical knowledge.<sup>60</sup> The Amish believe that the values taught in high school and higher education are generally contrary to the Amish way of life.<sup>61</sup> Amish parents objected to the worldly influences present in high school and other higher education institutions that foster competition and were concerned that if their children could not grow up among the Amish, they would be ill-equipped to handle the religious obligations accom-

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<sup>50</sup> *Id.* at 533.

<sup>51</sup> *See id.* at 532–33. Specifically, the respondents argued that the statute violated their rights as corporations not to be deprived of their property without due process of law because it would effectively prevent their schools from having any students. *See id.*

<sup>52</sup> *Id.* at 534–35.

<sup>53</sup> *Id.* at 535.

<sup>54</sup> 406 U.S. 205 (1972).

<sup>55</sup> *See id.*

<sup>56</sup> *Id.* at 209.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 207.

<sup>60</sup> *See id.* at 211–12.

<sup>61</sup> *See id.* at 211.

panying baptism.<sup>62</sup> Because public education is inimical to the Amish religion, the Supreme Court affirmed the Wisconsin Supreme Court's holding that the statute violated the free exercise clause of the First Amendment.<sup>63</sup>

The *Yoder* Court premised its holdings on several considerations. First, the Court determined that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."<sup>64</sup> The Court conceded that this power is by no means absolute, but rather "yield[s] to the right of parents to provide an equivalent education in a privately operated system."<sup>65</sup> More specifically, the power yields to the Free Exercise Clause and parents' interest in controlling the religious upbringing of their children.<sup>66</sup> The Court's rationale stressed that the compulsory attendance statute affected the respondents' *religion* as opposed to their way of life.<sup>67</sup> Conversely, state regulation that infringes on parents' right to direct their children's secular upbringing does not rise to the level of requiring strict scrutiny.<sup>68</sup> As the Court observed, "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations."<sup>69</sup>

## B. Justifications for Home Schooling

There are various reasons why a parent might opt for home schooling, of which religion is particularly notable.<sup>70</sup> Still, religion is not the only reason to home school as "both religious and non-religious parents express pedagogical concerns, having concluded that home schooling will better serve their children's academic or social needs."<sup>71</sup> Some parents may believe that the social experience that public schools offer today is "inappropriate and detrimental to the learning process."<sup>72</sup> Other parents may remove their children from public schools and begin home schooling because they disapprove of

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<sup>62</sup> *Id.* at 211–12. The Amish conduct adult baptisms to symbolize a young adult's acceptance of the Amish way of life. *See id.* at 211.

<sup>63</sup> *See id.* at 207, 216.

<sup>64</sup> *Id.* at 213 (citing *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925)).

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 214.

<sup>67</sup> *See id.* at 215–16.

<sup>68</sup> *See People v. Bennett*, 501 N.W.2d 106, 111–12 (Mich. 1993).

<sup>69</sup> *Yoder*, 406 U.S. at 215.

<sup>70</sup> *See KLIČKA, supra* note 14, at 49.

<sup>71</sup> *Page, supra* note 15, at 186.

<sup>72</sup> *Id.* at 197.

sex and drug education or believe that teachers are no longer effective.<sup>73</sup>

The benefits of home schooling are manifold.<sup>74</sup> Standardized tests are generally administered to home-school students as well as public school students.<sup>75</sup> A 1994 study found that almost 55% of home-schooled students scored in the top quarter of all students taking standardized tests.<sup>76</sup> Home schoolers also frequently surpass their publicly educated counterparts in college.<sup>77</sup> Furthermore, home-schooled children apparently have a higher acceptance rate at some colleges than other students.<sup>78</sup> Recent application data indicates that “Stanford University received 35 applications from home schoolers for the 2000–2001 academic year, accepting nine students. This acceptance rate, 26%, is nearly twice that of the university’s non-home-schooled applicants.”<sup>79</sup>

This is not necessarily surprising given that parents perform the work of professional educators not for compensation, but for the welfare of their children.<sup>80</sup> As a result, they demonstrate heightened dedication to the child’s progress.<sup>81</sup> Furthermore, home-schooled children are educated in smaller groups, which facilitates a more hands-on approach to teaching and allows the parent to mold the material to fit the unique characteristics of the child.<sup>82</sup> A child who struggles to grasp a particular subject will receive additional help if necessary, while a child who excels in a particular area will be able to further refine that area.<sup>83</sup> Indeed, “[t]he advantages to home schooling are systemic and fundamental.”<sup>84</sup>

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<sup>73</sup> See KLICKA, *supra* note 14, at 3–7; see also Brad J. Davidson, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States’ School-Choice Legislation*, 33 TEX. TECH L. REV. 435, 437–38 (2002); Page, *supra* note 15, at 197.

<sup>74</sup> See KLICKA, *supra* note 14, at 8–20 (“Many studies over the last two decades have established the academic excellence of home-schooled children. Not only can home-schooled students compete with children in public school, they excel, generally performing much better than the average student.”).

<sup>75</sup> See Page, *supra* note 15, at 193. Home-schooled children often take examinations such as the SAT and ACT, but compulsory standardized testing for home-schooled children is not universal. See *id.*

<sup>76</sup> See *id.* at 191.

<sup>77</sup> See KLICKA, *supra* note 14, at 171–79.

<sup>78</sup> See Page, *supra* note 15, at 190–91.

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

<sup>80</sup> See *id.* at 193.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 194.

<sup>83</sup> See *id.*

<sup>84</sup> *Id.* at 194.

### C. Concerns Regarding Home Schooling

Despite the ostensible advantages to home schooling, concerns remain about the institution as a whole.<sup>85</sup> First, home schooling compromises the state's interest in financing public education.<sup>86</sup> For every student that is home schooled, a school district loses between three and four thousand dollars in tax funding from the state and federal authorities.<sup>87</sup> Despite the financial burden on the state, the current trend has been toward deregulating home schooling.<sup>88</sup> Christopher Klicka, Senior Counsel for the Home School Legal Defense Association,<sup>89</sup> however, contends that home schooling may threaten school officials' jobs, suggesting that officials cannot remain objective in evaluating the merits of home schooling.<sup>90</sup>

Another state concern is that home-schooled children do not receive the same quality education as their publicly or privately schooled counterparts.<sup>91</sup> One common argument asserts that public school officials and teachers tend to have a higher education than home-schooling parents<sup>92</sup>:

Many public school officials actually believe they are the "guardians of the children," and as such they need sufficient controls over *all* the children within the boundaries of their school districts. They sincerely believe that since they often have seven years of higher education, they know what type of education is best for all children.<sup>93</sup>

These officials cannot comprehend how a parent with only a high school education can properly educate children.<sup>94</sup> Further, states remain concerned that some children are "slipping through the cracks"<sup>95</sup> and "fail to meet minimum standards set for all students."<sup>96</sup> However, the striking educational success of home-schooled children tends to overshadow these concerns.<sup>97</sup>

Finally, states worry that home-schooled children do not experience proper social and interpersonal development.<sup>98</sup> Parents address

<sup>85</sup> See KLICKA, *supra* note 14, at 21–27.

<sup>86</sup> See Page, *supra* note 15, at 203.

<sup>87</sup> See KLICKA, *supra* note 14, at 21–22.

<sup>88</sup> See *id.* at 20.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.* at 22.

<sup>91</sup> See *id.* at 22–26.

<sup>92</sup> See *id.*

<sup>93</sup> *Id.* at 22.

<sup>94</sup> See *id.*

<sup>95</sup> Page, *supra* note 15, at 201–03 (emphasis omitted).

<sup>96</sup> *Id.* at 201.

<sup>97</sup> See *supra* notes 76–79 and accompanying text (discussing the comparatively high performance and success of home-schooled children).

<sup>98</sup> See Page, *supra* note 15, at 194–98.

this concern in various ways.<sup>99</sup> Some parents may deliberately expose their children to social activities, such as little league or church groups.<sup>100</sup> Other parents actually feel relief that their children avoid exposure to the detrimental social environment of public schools.<sup>101</sup>

#### D. Home-Schooling Legislation

Whatever the underlying rationale, states often seek to regulate home schooling. State regulation falls into two categories: ends focused and process focused.<sup>102</sup> Ends-focused legislation merely requires that children demonstrate certain skills at specific points in time.<sup>103</sup> Generally, standardized testing would fall under this category. Pennsylvania provides an example of one such statute:

The department shall establish a list, with a minimum of five tests, of nationally normed standardized tests from which the supervisor of the home education program shall select a test to be administered if the supervisor does not choose the Statewide tests. At the discretion of the supervisor, the portfolio may include the results of nationally normed standardized achievement tests for other subject areas or grade levels. The supervisor shall ensure that the nationally normed standardized tests or the Statewide tests shall not be administered by the child's parent or guardian.<sup>104</sup>

Such ends-focused legislation signifies a hands-off approach to home schooling in which the state intervenes only if a child falls below a preset standard of acceptability.<sup>105</sup> The same Pennsylvania statute provides that if the superintendent of the public school district determines that a child is not receiving an adequate education at home, that child "shall be promptly enrolled in the public school district of residence or a nonpublic school or a licensed private academic school."<sup>106</sup>

Such statutes often provide various procedural safeguards before the child is placed in public schools, however.<sup>107</sup> If a superintendent suspects deficiencies in educational quality, the superintendent must

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<sup>99</sup> See *id.* at 196–97.

<sup>100</sup> See *id.* at 196.

<sup>101</sup> See *id.* at 197.

<sup>102</sup> See *id.* at 209.

<sup>103</sup> See *id.*

<sup>104</sup> 24 PA. STAT. ANN. § 13-1327.1(e)(1) (West 2006).

<sup>105</sup> See, e.g., VA. CODE ANN. § 22.1-254.1(C) (2006) ("The parent who elects to provide home instruction shall provide the division superintendent . . . evidence that the child has attained a composite score in or above the fourth stanine" on a battery of achievement tests which have been approved by the Board of Education for use in the public schools.).

<sup>106</sup> § 13-1327.1(l).

<sup>107</sup> See, e.g., § 22.1-254.1(C) ("In the event that evidence of progress as required . . . is not provided by the parent, the home instruction program for that child may be placed on probation for one year. . . . If the remediation plan and evidence are not accepted or the required evidence of progress is not provided . . . following the probationary year, home

provide a guardian with notice and an opportunity to present more information demonstrating that the lessons are adequate.<sup>108</sup> Then, the school board of directors must arrange a hearing before a qualified and impartial hearing examiner.<sup>109</sup> Ultimately, the guardian may appeal the examiner's decision to the secretary of education or in state court.<sup>110</sup>

Proponents of home schooling prefer ends-focused legislation to process-focused legislation because the former tends to be less intrusive than the latter.<sup>111</sup> Most litigation over home schooling involves process-focused legislation, which seeks to "control the way in which a parent teaches."<sup>112</sup> Process-focused legislation tends to regulate home schooling to the same extent it regulates public schooling; for example, Missouri's home-schooling statute contains several specific provisions.<sup>113</sup> To prove that the child is receiving regular instruction, the parent must maintain "[a] plan book, diary, or other written record indicating subjects taught and activities engaged in,"<sup>114</sup> "[a] portfolio of samples of the child's academic work,"<sup>115</sup> "[a] record of evaluations of the child's academic progress,"<sup>116</sup> or "[o]ther written[ ] or credible evidence"<sup>117</sup> that would demonstrate the same. Furthermore, the statute requires that home schooling "[o]ffer at least one thousand hours of instruction, at least six hundred hours of which will be in reading, language arts, mathematics, social studies and science."<sup>118</sup>

The type of legislation that this Note recommends is ends focused. However, to ensure constitutionality, this particular legislation should be narrowly tailored to avoid crediting curricula that could not be taught in public schools. The legislation would not mandate that particular texts or subjects be taught, but that certain texts or subjects not receive state approval, implied or otherwise.

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instruction shall cease and the parent shall make other arrangements for the education of the child.").

<sup>108</sup> § 13-1327.1(h).

<sup>109</sup> *Id.* § 13-1327.1(k).

<sup>110</sup> *Id.*

<sup>111</sup> See Page, *supra* note 15, at 210 ("The distinction between ends-focused and process-focused regulation is the first way to distinguish between regulations meriting serious consideration, based on their potential for benefit to the educational level of the public, and those which serve no legitimate public end."). Page is a proponent of home schooling and contends that states should permit home schools to operate freely. See *id.* at 213.

<sup>112</sup> *Id.* at 209.

<sup>113</sup> See MO. ANN. STAT. § 167.031 (West 2006).

<sup>114</sup> *Id.* § 167.031.2(2)(a)a.

<sup>115</sup> *Id.* § 167.031.2(2)(a)b.

<sup>116</sup> *Id.* § 167.031.2(2)(a)c.

<sup>117</sup> *Id.* § 167.031.2(2)(a)d.

<sup>118</sup> *Id.* § 167.031.2(2)(b).

### E. Vagueness

Most home-schooling legislation that fails to satisfy constitutional requirements is struck down as unconstitutionally vague.<sup>119</sup> The Supreme Court set out the standard for vagueness in *Grayned v. City of Rockford*<sup>120</sup>: “[A]n enactment is void for vagueness if its prohibitions are not clearly defined. . . . A vague law impermissibly delegates basic policy matters to [police officers], judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”<sup>121</sup>

A statute is vague if it fails to put the average citizen on notice of the boundaries and extent of the law.<sup>122</sup> For example, the Supreme Court of Wisconsin once struck down a statute requiring attendance in either public or private school because it failed to define “private school.”<sup>123</sup> Similarly, in 1985 Minnesota’s highest court struck down for vagueness a statute requiring that home-schooling teachers have “essentially equivalent” qualifications to public school teachers.<sup>124</sup> Some process-focused legislation is struck down because it promotes standardization that would render home schooling indistinguishable from public schooling. Regulations cannot be so severe as to eradicate the difference between the two.<sup>125</sup>

## II

### ANALYSIS

What is ignored in the debate over home-schooling regulation is what the concept of home schooling implies and whether those implications justify the type of restrictive ends-focused regulation that this Note supports. The level of state and parental interest in a child’s education is in constant flux. Before the state’s interest in universal education earned recognition, education was solely the province of the parents. Since that point, there has been a tenuous balance between the state interests and parental rights, under the First and Fourteenth Amendments. Nevertheless, so long as it is within the state’s power to provide for the primary education of children within its districts, state-approved subjects will be taught in public schools. Furthermore, even in states with the loosest restrictions on home

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119 See KLICKA, *supra* note 14, at 84 (“A vague compulsory attendance law is one where the local school district or school official is given virtually unlimited discretion to define key terms in the law, or generally has the freedom to ‘legislate’ his own home school policy.” (emphasis omitted)).

120 408 U.S. 104 (1972).

121 *Id.* at 108–09.

122 See KLICKA, *supra* note 14, at 85.

123 *State v. Popanz*, 332 N.W.2d 750 (Wis. 1983).

124 *State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985).

125 See KLICKA, *supra* note 14, at 46.

schooling, the curricula in home schools must satisfy state requirements. It necessarily follows that the curricula taught by parents or other home-schooling teachers in satisfaction of state requirements implicitly has state approval.

Parents have asserted a fundamental right to direct the educational upbringing of their children.<sup>126</sup> In *Ellis*,<sup>127</sup> the parents chose to home school because they believed that public education promoted teachings, values, and ideas contrary to their religious convictions.<sup>128</sup> The parents questioned the validity of the state's authority to investigate the instruction and curriculum that they offered.<sup>129</sup> The plaintiffs claimed that the statute was overbroad and infringed on their First Amendment rights.<sup>130</sup> The court's analysis centered on whether "the statute unnecessarily impinges upon plaintiffs' first amendment right to direct the *religious* upbringing of their children."<sup>131</sup> The court rephrased the plaintiffs' claim, recognizing the difference between the right to direct the religious upbringing of one's children, which falls under the freedom of religion provision of the First Amendment, and the claimed right to direct the *educational* upbringing of one's children.

The state, not parents, determines the curriculum in public schools.<sup>132</sup> School boards determine most of the particulars of the curriculum.<sup>133</sup> State school boards select required and optional courses for students attending public schools and prescribe what topics they will study.<sup>134</sup> States even regulate the curricula in private schools.<sup>135</sup> This leads to incongruity. Parents, who have little say as to the curricula in public schools, have almost sole discretion over what to teach their children in a home-school setting, even though they are

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<sup>126</sup> See *Ellis v. O'Hara*, 612 F. Supp. 379, 380 (E.D. Mo. 1985) ("Plaintiffs complain that the statute unnecessarily impinges upon their first amendment rights to direct the educational upbringing of their children . . .").

<sup>127</sup> *Id.*

<sup>128</sup> See *id.* at 379.

<sup>129</sup> See *id.* at 380.

<sup>130</sup> See *id.* at 382.

<sup>131</sup> *Id.* (emphasis added).

<sup>132</sup> See, e.g., ALA. CODE § 16-6B-2(a)(1), (b) (LexisNexis 2001) (defining required courses as "courses which are required to be taken by every student enrolled in public schools in the State of Alabama," including mathematics, science, and social studies); ARIZ. REV. STAT. ANN. § 15-701.01(A)(1) (2002) (endowing the relevant school board with the power to prescribe the curricula and set the academic standards).

<sup>133</sup> See § 15-701.01(B) .

<sup>134</sup> See, e.g., § 16-6B-2 (mandating the "teaching of important historical documents including the Constitution of the United States, The Declaration of Independence, The Emancipation Proclamation, The Federalist Papers, and other such documents important to the history and heritage of the United States").

<sup>135</sup> See *id.* § 16-28-1(1) (providing that private schools shall offer instruction "in the several branches of study required to be taught in the public schools of this state").

required to satisfy the same state education requirements.<sup>136</sup> This incongruity cannot be explained by the nonpublic nature of home schooling because the state also regulates private school curricula to some extent.<sup>137</sup>

If Lynx and Lamb Gaede were enrolled in public school, a historically revisionist white supremacy theory of history would not have been taught. This is not to say that their mother could not have imparted her racist views to her children, but she would have done so without implicit state approval. Is her taking advantage of home schooling to teach her children this view of history—a view of history that could not be taught in public school (or perhaps even private school)—tolerable? States should be able to regulate the nature of the core topics taught in a home school to the same extent they regulate those taught in a public school. However, regulating the actual curriculum raises difficult issues.

Home-schooling advocates contend that any statute restricting curricula in home schools would face strict scrutiny in the courts.<sup>138</sup> The strict scrutiny analysis is the most stringent test that a court can apply. The court must first determine that the state action impacts a fundamental right, triggering strict scrutiny.<sup>139</sup> Then the court determines whether the state interest is sufficiently compelling.<sup>140</sup> Finally, the court analyzes the state's means in achieving the compelling interest to see if they are narrowly tailored to achieve the goal.<sup>141</sup> However, despite home-schooling advocates' contentions to the contrary, a statute that restricts the curricula in home schools should not necessarily face strict scrutiny because such a statute would not infringe on a fundamental right unless it impinged on First Amendment interests. Parents have an interest in the upbringing of their children, but that interest alone is not fundamental and therefore should not trigger

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<sup>136</sup> Compare *supra* Part I.D. with *supra* notes 134–35 and accompanying text. Although it is true that parents who choose to home school their children to prevent their exposure to various aspects of public schooling are within their rights to do so, it does not follow that these same parents may design curricula to substitute for subjects that could never be taught in public school in the first place.

<sup>137</sup> See, e.g., ALA. CODE § 16-28-1(1) (LexisNexis 2001).

<sup>138</sup> See KLICKA, *supra* note 14, at 46 (“Regulations conforming all schools, including home schools, to the teaching standards, curriculum content, and social levels of public schools destroys diversity and creates a danger of ‘despotism over the mind.’”). Klicka uses Hitler’s rise to power as a warning against totally state-controlled educational systems. See *id.* at 47. During Hitler’s rise to power, he gained control of the educational system and used it to indoctrinate the youth of the German nation in fascism. *Id.*

<sup>139</sup> See *Reno v. Flores*, 557 U.S. 292, 302 (1993) (observing that substantive due process analysis “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 state interest”) (citations omitted).

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*

strict scrutiny.<sup>142</sup> Although current precedent vests a fundamental right only in the religious upbringing of one's children, restricting particular books or topics presents a delicate problem.

Because they assume, unjustifiably, that strict scrutiny should apply to home-schooling regulations in all instances, home-schooling advocates make some erroneous legal criticisms. For example, advocates of home schooling often complain that "[t]he problem with many of [the home-schooling] cases is that they misapply the 'compelling interest test' in direct contradiction to United States Supreme Court precedents."<sup>143</sup> Klicka claims that "[t]hese cases against home schooling either apply the wrong constitutional test (a reasonableness test) or ignore the evidentiary requirements of the 'least restrictive' burden of the state."<sup>144</sup> However, in the section of his book dealing with "erroneous" application of the reasonableness standard, Klicka cites cases pertaining to regulation of religious schools.<sup>145</sup> One such case is *Sheridan Road Baptist Church v. Department of Education*,<sup>146</sup> in which a church objected to state-mandated teacher certification for religious reasons.<sup>147</sup> The court held that the compelling state interest was "the provision of an education to all children"<sup>148</sup> and that the teaching certification requirement was a *reasonable* means.<sup>149</sup> Klicka, however, sees the issue as concerning the compelling interest test as opposed to reasonableness.<sup>150</sup> This reflects a fundamental misunderstanding of the law. Klicka's concern should not be with the distinctions between the reasonableness test and the compelling interest test because they are two parts of the same test. If the court first determines that the right in question requires a compelling state interest to regulate, then the next requirement is that the regulation be *narrowly* tailored and use only the least restrictive means to achieve that interest.<sup>151</sup> The reasonableness inquiry is necessary only if the court determines that a fundamental right is not at issue.

There is a second misconception in Klicka's analysis. Klicka cites several cases in his section highlighting the misapplication of the rea-

<sup>142</sup> See *supra* notes 126–37 and accompanying text.

<sup>143</sup> KLICKA, *supra* note 14, at 73.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 75–80.

<sup>146</sup> 348 N.W.2d 263 (Mich. 1984).

<sup>147</sup> See *id.* at 267–68.

<sup>148</sup> *Id.* at 274.

<sup>149</sup> *Id.*

<sup>150</sup> See KLICKA, *supra* note 14, at 76.

<sup>151</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) ("When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by 'showing that it is the least restrictive means of achieving some compelling state interest.'" (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981))).

sonableness test.<sup>152</sup> In each of these cases, the plaintiffs claimed religious objections to the particular state regulation. Klicka, therefore, may be conflating the fundamental right that parents have to direct the *religious* upbringing of their children with a right to direct their *educational* upbringing. This confusion may be due to the Court's inconsistent description of the parental right to direct the upbringing of a child as a fundamental right.<sup>153</sup> Whether a fundamental right to direct the general upbringing of a child<sup>154</sup> exists, the right to direct a child's education is not itself fundamental. If it were, there would have been no need to ascertain whether the state was infringing on a First Amendment right. Instead, any case regarding regulation of home schooling would have to pass the strict scrutiny standard, which requires both a compelling state interest and the least restrictive means. However, as the law currently stands, only state action that affects religion in education is subject to strict scrutiny.

The courts reserve strict scrutiny analysis for cases in which the state infringes upon a fundamental right. In the realm of home schooling, the fundamental right usually at issue is the First Amendment right to free exercise of religion.<sup>155</sup> States have also recognized this concern and drafted their statutes accordingly.<sup>156</sup> Wyoming, for

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<sup>152</sup> See KLICKA, *supra* note 14, at 76–78. Among them are *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993); *State v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981); and *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980). These three cases each dealt with teacher certification requirements.

<sup>153</sup> See *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (plurality opinion) (affirming judgment of Washington Supreme Court that a state statute allowing grandparents to sue for visitation rights “unconstitutionally interferes with the *fundamental right* of parents to rear their children” (emphasis added)).

<sup>154</sup> I again emphasize the distinction between the right to direct the religious upbringing of a child and the right to direct the educational upbringing of a child or the right to direct the rearing of a child generally. The right to direct the religious upbringing of a child derives from the First Amendment right to freedom of religion. See U.S. CONST. amend. I. The right to direct the educational upbringing is the central concern of this Note and is distinct from the general concerns of child-rearing discussed in *Troxel*.

<sup>155</sup> See KLICKA, *supra* note 14, at 49–71 (discussing the judiciary's approach to cases involving home schooling for religious purposes).

<sup>156</sup> Laura J. Bach, Note, *For God or Grades? States Imposing Fewer Requirements on Religious Home Schoolers and the Religion Clauses of the First Amendment*, 38 VAL. U. L. REV. 1337 (2004). Bach gives a very illustrative example of the exceptions made for families home schooling for religious reasons. See *id.* at 1337. In a neighborhood of three home-schooling families in which two families consist of parents that have both attained only high school degrees and one consists of parents that have both completed bachelor's degrees, one of the high school educated families is home schooling for religious reasons. See *id.* If this occurred in Alabama, the family providing religious education would only have to fill out a one-time attendance form while the other two families would have “fewer choices and greater obstacles.” *Id.* If this occurred in Virginia, that family would have an exemption from compliance with the home-schooling statute while the other two families would have to comply. *Id.* Bach gives several more examples, but what remains clear is that states avoid regulating religious-home-schooling families for fear of infringing on a fundamental right and violating the Establishment Clause. That fear is not present when the regulations affect only

example, licenses the creators of home-schooling curricula to exclude “any concept, topic or practice in conflict with [their] religious doctrines.”<sup>157</sup> Similarly, Missouri provides that “[n]othing . . . shall require a . . . home school to include in its curriculum any concept, topic, or practice in conflict with the school’s religious doctrines.”<sup>158</sup> However, other than permitting religious freedom in curriculum design, states do not exempt home schools from general curriculum requirements.<sup>159</sup>

Consequently, a statute that excludes racist teachings from otherwise acceptable home-schooling curricula should not have to pass strict scrutiny because it seeks to curtail only secular teachings.<sup>160</sup> Although parents may impart their beliefs to their children, secular beliefs do not warrant the level of free speech protection given to religious beliefs in home-schooling situations, and therefore do not warrant the blanket blessing of the state. As the Supreme Court has observed, “A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . .”<sup>161</sup> However, despite this, home-schooling advocates contend that there is a fundamental right that home-schooling regulations would infringe. The Note now turns to an analysis of this claim and how a home-schooling regulation might survive strict scrutiny even if it impinges on a fundamental right.

#### A. The Advocates’ “Fundamental” Right

Advocates of home schooling that is free of state restrictions believe that parents confer authority upon schools to educate their chil-

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families that engage in secular home schooling because there is no fundamental right with which the states must concern themselves.

<sup>157</sup> WYO. STAT. ANN. § 21-4-101(a)(vi) (2006).

<sup>158</sup> MO. ANN. STAT. § 167.031.3 (West 2006).

<sup>159</sup> See, e.g., *id.* § 167.031; § 21-4-102(b) (“A home-based educational program shall meet the requirements of a basic academic educational program . . .”).

<sup>160</sup> To curb state-mandated standardization of home-school curricula, Missouri provides that “[a]ny other provision of the law to the contrary notwithstanding, all departments or agencies of the state of Missouri shall be prohibited from dictating through rule, regulation or other device any statewide curriculum for private, parochial, parish or home schools.” § 167.031(3). This type of bar, however, would not prevent a legislature from enacting the statute proposed in this Note, which limits the realm of acceptable curricula rather than mandating particular curricula.

<sup>161</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). In the news segment on Lynx and Lamb, their mother conceded that her teachings were not religious. See *Primetime* (ABC television broadcast Oct. 20, 2005) available at [http://mfile.akamai.com/16688/wmv/abcondemand.download.akamai.com/16688/prem/051020pt\\_hatemusic.wmv](http://mfile.akamai.com/16688/wmv/abcondemand.download.akamai.com/16688/prem/051020pt_hatemusic.wmv) (“[I]f we were Christians, they would be maybe singing Christian rock songs. But we’re not. We’re white nationalists and so, of course, that’s a part of our life and I share that part of my life with my children.”).

dren. In *School Board Dist. No. 18 v. Thompson*,<sup>162</sup> the Supreme Court of Oklahoma overturned the expulsion of a child for his parents' refusal to allow him to take required singing lessons.<sup>163</sup> The court reasoned that parents, as guardians of their children's well-being, are "free to a great extent to select the course of study" of their children.<sup>164</sup> Moreover, the court observed that the schools only attained authority over children by virtue of parental delegation.<sup>165</sup> According to Klicka, the court further observed that "the Oklahoma law modifies that absolute parental right very minimally. The parents' rights are still supreme since the public school's authority is *given by the parents and limited by the parents*."<sup>166</sup> This argument derives from the idea that parents have a fundamental right to direct the upbringing, and hence the education, of their children.<sup>167</sup> Also, based on the language employed in *Pierce*, one could contend that the Court acknowledged the state's interest in education as secondary to the right of parents to direct such education.<sup>168</sup>

## B. The States' "Compelling" Interest

After finding that parents have a fundamental right to direct their child's education, the State would need to articulate a compelling interest that justifies regulating education. The states have the authority to see "that nothing be taught which is manifestly inimical to

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<sup>162</sup> 103 P. 578 (Okla. 1909).

<sup>163</sup> *Id.* at 582.

<sup>164</sup> *Id.* at 581.

<sup>165</sup> *Id.* ("It is clear that neither the statute or common law gives to the teacher or school officers the exclusive authority they claim[,] . . . unless they get it upon the theory that the mere act of sending the children to school amounts to a delegation of the parental authority which the law of the land places in the hands of the parent . . .").

<sup>166</sup> KLICKA, *supra* note 14, at 42 (emphasis added). However, *Thompson* does not stand for the proposition that parents reign supreme in all educational matters. States generally do not regard singing, unlike history or social studies, as a core or required course. *See, e.g., WYO. STAT. ANN. § 21-4-101(a)(vi)* (2006) ("Basic academic educational program' is one that provides a sequentially progressive curriculum of fundamental instruction in reading, writing, mathematics, civics, history, literature and science."); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (establishing that although parents have a fundamental right to direct their children's education, the state may still intervene when it has a compelling interest it wishes to protect).

<sup>167</sup> *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Pierce*, 268 U.S. at 534-35).

<sup>168</sup> *See* 268 U.S. at 534-35. The Court first found it "entirely plain that the [state action at issue] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children." *Id.* Then the Court continued that the "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." *Id.* at 535. Together, these sentences could support the conclusion that parents have a fundamental right in overseeing their children's education.

the public welfare.”<sup>169</sup> Because governments generally have a compelling state interest in protecting the public welfare, states thus have a compelling interest in restricting teachings that deleteriously affect the public welfare.<sup>170</sup> Indeed, “[t]he capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government[ ]—certainly not, *unless such instruction is, in its nature, harmful to the public morals or imperils the public safety.*”<sup>171</sup> Implicitly approving the hateful revisionist history that some parents teach to their home-schooled children should qualify as harmful to the public morals or perilous to the public safety. Children carry the prejudices they learn during youth, prejudices that society seeks to eradicate when they embody ideologies of hate and intolerance, throughout their lives.<sup>172</sup> When the government is the source of prejudicial conduct, as it is when it allows parents to teach bigotry under the auspices of state-sanctioned home schooling, courts “subject [the conduct] to the most rigid scrutiny.”<sup>173</sup>

Practical problems are inherent in any state attempt to regulate home-school curricula. First, regulation governing teachers may overstep and infringe on the parental right to direct a child’s upbringing. However, the simple answer to this objection is that when parents create home-school curricula for their children, they assume the duties of teachers. This is the difference between regulating the upbringing of a child generally and regulating the educational upbringing of a child. The *Pierce* Court did not regulate parents as parents, but as administrators of education.<sup>174</sup> *Pierce* may have recognized the fundamental parental right to see to the upbringing of a child, but where education is concerned, the government’s authority to protect public welfare trumps this interest.

In addition, the strength of the parents’ interest may undermine the ability of the proposed legislation to prevent parents from imparting racist or prejudiced teachings. If a parent teaches a child prejudicial ideologies as part of the child’s upbringing, the parent has

<sup>169</sup> *Id.* at 534; *see also* Wisconsin v. Yoder, 406 U.S. 205, 240 n.2 (1972) (Stewart, J., concurring).

<sup>170</sup> *See* U.S. CONST. art. I, § 8 (“The Congress shall have power to . . . provide for the . . . general welfare of the United States.”).

<sup>171</sup> *Berea Coll. v. Kentucky*, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (emphasis added); *see also* *Farrington v. Tokushige*, 11 F.2d 710, 713 (9th Cir. 1926) (noting that Justice Harlan’s statement was not in conflict with the majority).

<sup>172</sup> *See* RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 120 (1995) (noting that children who are “brought up in a particularly strict family with dominant and moralistic parents [are] likely to be predisposed to develop into prejudiced adults in later life.”).

<sup>173</sup> *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

<sup>174</sup> *See* *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (noting that parents have authority to decline “instruction [of their children] from public teachers”).

effectively removed the state from the equation. Mrs. Gaede could still teach her children a racist, revisionist version of history,<sup>175</sup> but it would not satisfy a state educational requirement. If the state administers standardized tests of all subjects, it implicitly asserts that it only approves of the teachings covered by the exam. This type of statute does not seek to prevent a parent from teaching other subjects, but instead only credits the topics on the exam.

### C. Narrowly Tailored?

With the compelling state interest articulated above, the statute should be able to survive litigation, provided that it is narrowly tailored. There are two concerns here: first, the statutory provision must not uniformly standardize curricula between public, private, and home schools; and second, the provision must not be vague or overbroad. Courts may interpret a statute requiring standardized tests as effectively promoting standardization of education.

While standardization was once desirable,<sup>176</sup> its vitality has lessened in view of the fundamental right of parents to direct the education of their children.<sup>177</sup> The concern is that “[m]aking the regulation[ ] so severe as to eradicate the distinction between home and public education is to destroy the alternative of private education guaranteed by *Pierce*.”<sup>178</sup> The statute will avoid offending standardization concerns provided that the statutory provision is in negative terms, detailing subjects or views that shall *not* be covered on a standardized test.

The other concern is that the statute must not be overly vague. This has been a common, but largely unsuccessful, defense against home-school regulation statutes.<sup>179</sup> Courts are generally forgiving of arguably vague statutes aimed at promoting the educational advancement of children.<sup>180</sup> States should be able to mandate standardized

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<sup>175</sup> See *supra* text accompanying notes 4–11.

<sup>176</sup> See Burgess, *supra* note 24, at 71 (stating that “[u]niformity, conformity, and a homogeneous society [were] the justifications for compulsory public education”).

<sup>177</sup> See KLICKA, *supra* note 14, at 46; see also MO. ANN. STAT. § 167.031.3 (West 2006).

<sup>178</sup> KLICKA, *supra* note 14, at 46. Klicka continues,

The use of public schools to instill political and religious values uniformly throughout all schools poses a serious threat to the marketplace of ideas and the integrity of the democratic process. Regulations conforming all schools, including home schools, to the teaching standards, curriculum content, and social levels of public schools destroys diversity and creates a danger of “despotism over the mind.”

*Id.* (citation omitted).

<sup>179</sup> See, e.g., *State v. Buckner*, 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985) (holding that a compulsory education statute was not unconstitutionally vague).

<sup>180</sup> See Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of Statute, Regulation or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students*, 70 A.L.R. 5th 169 § 7 (1999).

testing with the same criteria they use to legislate public schools. There are currently standardized testing statutes applied to home-schooled children that pass constitutional muster.<sup>181</sup> These statutes exist to ensure that children receive adequate education at home.<sup>182</sup> Under the proposed legislation, the state would not use the standardized tests to ensure a certain caliber of education, but to signal the topics of which it approves. Granted, the state cannot presume to tell parents which beliefs to impart to their children when they are acting solely in their capacity as parents, but it can refuse to condone such teachings by not crediting them.

#### D. Proposed Home-Schooling Legislation<sup>183</sup>

This section proposes a home-schooling statute that incorporates the concerns explored in this Note. The proposed legislation borrows from sections of existing statutes. It reflects a desire to promote the benefits that home schooling offers, but to curtail the possibility that the state may accept prejudicial and improper education in satisfaction of its educational requirements and thereby condone those views. Notwithstanding the restriction of curricula, the proposed statute does not impose many mandatory duties.

##### § 1. Definitions

“Home instruction” shall mean a program conducted, in compliance with this section, by the parent or guardian or such person having legal custody of the child or children.

“Supervisor” shall mean the parent or guardian or such person having legal custody of the child or children who shall be responsible for the provision of instruction.

“Appropriate education” shall mean a program consisting of instruction in the required subjects for the time required in this Act and in which the student demonstrates sustained progress in the overall program.

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<sup>181</sup> See, e.g., *State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981).

<sup>182</sup> See, e.g., W. VA. CODE ANN. § 18-8-1(c)(2)(D)(i) (LexisNexis 2003).

<sup>183</sup> Bruce D. Page proposed legislation in his article that advocated in part that [t]he Legislature directs that courts of competent jurisdiction shall presume any law or regulation previously or hereinafter enacted by this State or its municipalities, which in any way burdens, either on its face or as applied, home schools in their ability to direct children’s education, to be invalid. This presumption shall be overcome only by the State’s or municipality’s showing that such a law or regulation is necessary to ensure a student’s or students’ basic literacy skills or basic concepts of civic responsibility, and that such a law or regulation represents the least restrictive means possible of achieving those ends.

### Commentary

This section defines the key terminology that will be utilized throughout the statute. The section draws strongly from Pennsylvania's home education statute.<sup>184</sup> There is one significant difference: the definition of "supervisor" in the proposed statute does not require that a parent or guardian have obtained a particular educational level.<sup>185</sup> This is because there is no correlation between the success of home-schooled children and their parents' level of education.<sup>186</sup>

### § 2. Supervisory Obligations

The supervisor who elects to provide home instruction shall provide the division superintendent by the Tuesday at least seven days prior to the commencement of the public school year written intention to provide home instruction to the child or children in said supervisor's care.

Appropriate education at the elementary school level is reading, writing, spelling, science, geography, history of the United States and of State X, civics, and safety education. At the high school level, the supervisor shall teach four years of English, one year of geometry, two years of algebra, one year of calculus, two years of humanities, and three years of social studies.

At the end of every term, the supervisor shall administer a standardized test provided by the state in all required subjects taught during the term.

### Commentary

The last part of this section is the crux of the proposed legislation. It requires testing in all subjects, enforcing this with mandatory standardized testing, but does not specifically say that the parents may not teach topics not required. Furthermore, it does not restrict the texts that the parents may use to teach the required subjects.

### § 3. Religious Exceptions

Nothing in this statute or the curriculum requirements is intended to require any private school or home education program to include in its curriculum any concept, material, or topic in conflict

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<sup>184</sup> See 24 PA. STAT. ANN. § 13-1327.1(a) (West 2006).

<sup>185</sup> *Id.* ("Supervisor" shall mean the parent or guardian . . . who shall be responsible for the provision of instruction, provided that such person has a high school diploma or its equivalent.").

<sup>186</sup> See KLICKA, *supra* note 14, at 169 (noting the breadth of study of home-schooled children and concluding that home-schooled children outperform the national average).

with its religious doctrines or to exclude from its curriculum any concept, material, or topic that is consistent with its religious doctrines.<sup>187</sup>

### Commentary

This final section cushions the statute from religious objection, while simultaneously protecting the religious freedom of parents.

### CONCLUSION

Although the current trend is toward deregulation of home schools, the analysis and statutory provision that this Note provides offers a compelling justification for increased regulation at little cost to the states. The proposed legislation would not negatively affect the benefits of home schooling.<sup>188</sup> Nor would it curtail parental rights. Parents cannot complain that the state is infringing on their right to direct their child's upbringing because the statute will not prevent them from disseminating these harmful ideas to their children. The statute will, however, separate the state from such deleterious ideals. Thus, Mrs. Gaede can preach her white supremacist doctrines to Lynx and Lamb as much as she pleases. The statute proposed here would simply establish that the state of California does not condone her beliefs. Standardized testing is already administered to some home-schooled children, this Note simply recommends that it be administered to all.

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<sup>187</sup> See WYO. STAT. ANN. § 21-4-101(a)(vi) (2006).

<sup>188</sup> See Page, *supra* note 15, at 192 ("Ray found that students educated at home in states whose home school laws are highly restrictive performed identically to those studying in the least restrictive states.").

