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RELIGIOUS HOME-SCHOOLS: THAT'S NOT A MONKEY ON YOUR BACK, IT'S A COMPELLING STATE INTEREST

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I. INTRODUCTION

Home-schooling and religious beliefs are a familiar combination. While religious beliefs are not the only reason for home-schooling, it appears that religion plays a significant role in home-schooling programs.[2] At the very least, the topic of home-schooling for religious reasons receives a lot of attention. A primary focus for home schooled children is religious values.[3] Parents of home schooled children more and more are challenging the monitoring of their programs by the government, claiming that their religious values are being compromised.[4] For example, there are current lawsuits in Pennsylvania that are challenging whether government has the ability to monitor the progress of home schooled children.[5]

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[2] For example, statistics show that 75% of home schooled students attend religious services. *See,* Homeschool Students Score Better Academically and Socially, Homeschool Information, http://homeschoolinformation.com/homeschooling/homeschool_statistics1.htm (last visited March 5, 2005); Homeschooling Statistics, Christian Home Educators of Colorado, *available at* http://www.chec.org/Legislative/News/HomeschoolingStatistics/Index.html (last visited March 5, 2005).

[3] Lawrence M. Rudner, *Scholastic Achievement and Demographic Characteristics of Home School Students in 1998*, EDUCATION POLICY ANALYSIS ARCHIVES, Mar. 23, 1999, vol. 7, no. 8 at discussion section, *available at* http://epaa.asu.edu/epaa/v7n8. [Hereinafter Rudner] (this study analyzes how home schooled students have fared on achievement tests; it also reports that "[t]he primary focus of many home schools is on religious and moral values.").

[4] G. Jeffrey MacDonald, *Does the State Have a Right to Monitor?*, CHRISTIAN SCIENCE MONITOR, August 31, 2004, *available at* http://www.christiansciencemonitor.com/2004/0831/p14s02-legn.html.

[5] *Id.* There are at least two pending lawsuits in Pennsylvania challenging government monitoring of home schooled children. The complaint for one of these cases, *Newborn v. Franklin Reg. Sch. Dist., et al*, will be discussed later in this paper. It can be viewed at

This debate regarding what regulations over home-schooling should be in place, if any, has viewpoints located at two completely opposite ends of the spectrum.[6] At one end, there are those who view education as a compelling interest of the state; perhaps its most compelling interest and primary function.[7] Those with this view would most likely favor more government regulation of home-schooling. On the other end of the spectrum are those who see education as inherently religious in nature.[8] This end of the spectrum would likely, in part, consist of those who home school their children for religious purposes and object to government monitoring of their home-schooling programs. I will address the merits of each end of the spectrum and find some middle ground with this note.

This note will address whether parents who home school their children for religious purposes should be required to report to the government about the progress of their children by way of methods such as teacher certification requirements, progress reports, and standardized testing. I will first address the legal background of home-schooling and why parents choose to home school their children, particularly the religious reasons. I will then address some of the current regulations in place for home-schooling and what objections parents who home school have to these regulations. Most of these objections will relate to the Free Exercise Clause of the United States Constitution.[9] Finally, I will weigh the factors for and against these regulations and conclude that a government should employ at least three requirements for monitoring both religious and non-secular home-schooling programs.

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http://www.pahomeschoolers.com/newsletter/issue87a2.htm (last visited October 11, 2007) (*abstract available at* http://www.hslda.org/Legal/state/pa/20040205NewbornvFRSD/default.asp (last visited October 11, 2007)).

[6] *See* Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 368 (2003).

[7] *Id.* at 368-9 (citing City of Louisville v. Commonwealth, 121 S.W. 411, 411-12 (Ky. App. 1909) (noting that "[public education] is regarded as essential to the preservation of liberty—as forming one of the first duties of a democratic government.")).

[8] *Id.* at 369. DeGroff characterizes this group as "those who view the family as part of a divinely created order, and who see the educational process as unavoidably religious in nature." Degroff, *supra* note 6, at 369.

[9] U.S. CONST. amend. I.

II. BACKGROUND

A. Legal Background (Case History)

There are a few significant cases from which the right to home school children in the United States has derived over the course of the last century.[10] The first of these cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923), was brought to the United States Supreme Court when a teacher in a parochial school taught a lesson in how to read German to a 10-year-old, in violation of state law.[11] While the Court recognized that the state had the power to compel public school attendance and impose reasonable regulations,[12] it found that such a restriction was both unreasonable and "not injurious to the health, morals or understanding of the ordinary child."[13]

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[10] Mike Smith, A Word from Mike Smith: President's Page, Home School Court Report (May/June 2003), http://www.hslda.org/courtreport/V19N3/V19N310.asp. This article briefly describes two foundation cases upon which home-schooling rests: *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See also*, Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C.L. REV. 1913, 1917-1920, (Sept. 1996) (offering a detailed history of home-schooling in America). In early America, there were laws that put the responsibility of educating children on parents. After the American Revolution, states slowly began to take on the burden of educating children by enacting compulsory public school attendance laws. This transition began a series of lawsuits that continue today, challenging these compulsory education statutes. *Id.*

[11] Meyer v. Nebraska, 262 U.S. 390, 396-97 (1923). The Nebraska statute at issue in *Meyer* reads:

> Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.
>
> Section 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade.

In *Meyer*, the student in question was not in eighth grade. Interestingly, the statute only banned the teaching of modern foreign languages (German, Spanish, French, etc.) and not the "dead" languages (ex: Hebrew, Latin, Greek, etc.) due to a rather antiquated rationale behind the statue, "[i]t is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals." *Id.* at 401.

[12] *Id.* at 402.

[13] *Id.* at 403.

The main significance of this case is that the Supreme Court began to place general limitations on the government's power over education.[14] The Supreme Court spoke on the issue again in 1925, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).[15]

In *Pierce*, two private schools sought an injunction against the enforcement of the Oregon Compulsory Education Act, which required the students currently enrolled in the private schools to attend public schools.[16] The United States Supreme Court ruled that the Act was a violation of the Fourteenth Amendment and that parents have a right to choose to enroll their children in private schools.[17] *Pierce* furthered the movement away from a system that only allowed public schooling approved by the government.

In 1972 a third case came before the Untied States Supreme Court when three parents violated Wisconsin law.[18] In *Wisconsin v. Yoder*, the three Amish parents violated Wisconsin law by refusing to send their children to public school for religious reasons.[19] The Amish parents claimed that compulsory high school attendance would have an adverse impact on the very survival of the Amish Community.[20] The Court sided with the Respondents and ruled that

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[14] *See* Donald D. Dorman, *Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REFORM 733, 738 (Summer 1990). (Dorman notes that *Meyer, Pierce*, and *Farrington v. Tokushige,* 273 U.S. 284 (1927) (court struck down statutes that unreasonably restricted the curriculum of private schools, recognizing that a parent has a Constitutional right "to direct the education of his own child without unreasonable restrictions") establish that both the state and the parents have a strong interest in the upbringing and education of the children, but the state cannot unreasonably regulate their education).

[15] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[16] *Id.* at 530-534. The Oregon Compulsory Education Act [hereinafter OCEA] required every child between eight and sixteen attend public school, which caused the withdrawal of students from two private schools which caused the schools great economic hardship. Specifically, the schools claimed that the Act violated 1) the right of parents to choose where their children should be educated; 2) "the right of schools and teachers therein to engage in a useful business;" and 3) the right "against the deprivation of their property without due process of law;" all rights that are secured by the Fourteenth Amendment.

[17] *Id.* at 530, 534-35. The Court in *Pierce* held that the OCEA "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" and therefore violated the Fourteenth Amendment. The Court also suggested that enforcement of the Act had the potential to destroy all private schools in the state of Oregon.

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

[19] *Id.* at 208-10. The Wisconsin statute required all children between the ages of seven and sixteen attend a public or private school.

[20] *Id.* at 209-12. The Amish community was formed as a rejection of institutionalized churches during the sixteenth century and as a return to "the simple life of the early Christian era." Community life typically involves hard labor via farming or farming-related occupations

public schools did not adequately suit the needs of Amish children and the Respondents should be allowed to home school their children.[21] In so holding, *Yoder* ruled that the Wisconsin law being challenged violated the Free Exercise Clause of the First Amendment.[22] One of the major impacts of *Yoder* is essentially the showing that home-schooling is valid. However, as will be shown, home-schooling is not without its restrictions.

The United States Supreme Court's test to analyze claims of Free Exercise Clause violation was first established in *Sherbert v. Verner*.[23] In *Sherbert,* the Appellant was discharged from her job because she refused to work on the day of the Sabbath.[24] Upon her discharge, Appellant sought unemployment benefits from the Employment Security Commission [hereinafter ESC].[25] Since Appellant could not work on Saturdays, the ESC rejected Appellant's application for benefits.[26] The Court found that the disqualification for benefits imposed a significant burden on the Appellant's free exercise of religion.[27]

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with an emphasis on "learning through doing." Amish formal education ceases at the eighth grade level (i.e. there is no higher education) because such education tends to emphasize values that are in conflict with their beliefs (such as conformity with the outside world) and takes the children away from the Amish community.

[21] *Id.* at 210, 217. In fact, the court went so far as to say that "the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion." The court ruled that the statute should survive a challenge of the Free Exercise Clause because the statute was the least restrictive means to enforce a compelling state interest. *Id.* at 214. For a synopsis of *Yoder*, see Wisconsin v. Yoder abstract, Oyez, *at* http://www.oyez.org/oyez/resource/case/449/ (last visited October 12, 2007).

[22] *Yoder*, 406 U.S. at 219.

[23] Sherbert v. Verner, 374 U.S. 398 (1963).

[24] *Id.* at 399. Appellant, a member of the Seventh-day Adventist Church, celebrated her Sabbath was on Saturday. Her employer initially permitted her to work a five-day week; however, two years after joining the Church, Appellant's work week was extended to a six-day week, including Saturdays, which covered every work shift at Appellant's workplace. Appellant, after being discharged, sought employment at other places of the same industry, but would not be hired due to her inability to work on Saturdays.

[25] *Id.* at 399-401.

[26] *Id.* Appellant brought a claim under the South Carolina Unemployment Compensation Act [hereinafter SCUCA], under which a claimant is ineligible for benefits if "he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer." *Id.* at 401 (quoting S.C. Code Tit. 68, §§ 68-114 (1962)). The ESC found that Appellant's restriction from working on Saturdays disqualified her from benefits because the refusal to accept suitable work was without good cause.

[27] *Id.* at 403.

In evaluating whether the denial of benefits was a violation of the Free Exercise Clause, the Court established a four-part test. This test is frequently used in home education challenges.[28] As relevant to this note, this test is best explained in *Blount v. Department of Education and Cultural Services,* 551 A. 2d 1377 (Me. 1988).[29] In *Blount*, the Plaintiffs refused to allow the state to monitor their home-schooling program, claiming such monitoring was in conflict with their religious beliefs.[30] The Blount court ruled that the Statute in question which mandated monitoring home-schooling programs[30] did not violate the Free Exercise Clause because it was the least restrictive means to enforce the state's compelling right to monitor the home-schooling program.[31]

The use of the four-part test as explained in *Blount*[32] was modified in 1990 by *Employment Division, Department of Human Resources of Oregon v. Smith*.[33] In *Smith*, the United States Supreme Court held that the Oregon Statute prohibiting the use of peyote was not repugnant to the Free Establishment Clause because the Oregon statute only "incidentally infringe[d] upon [the respondents'] free exercise of religion."[34] Therefore, if a statute only

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[28] *See* DeGroff, *supra* note 6. This test is described in detail *infra* note 28.

[29] Blount v. Dept. of Educ. & Cultural Services, 551 A.2d 1377, 1379-80 (Me. 1988). (the Court laid out the test requiring a challenger to show that (1) there is a sincere religious belief and (2) the regulation restrains the belief. If the petitioner proves (1) and (2), the State can still prevail if it shows that the regulation is (3) the least restrictive means of (4) enforcing a compelling state interest).

[30] The statute required state monitoring of the home-schooling, but allowed for different methods of assessment. The available methods of assessment that a parent could choose from included, "annual standardized testing . . . annual examination by a certified teacher, or by review under the auspices of an official state or local home-schooling advisory board, or by 'a locally developed test appropriate to the educational plan.'" *Id.* at 1383.

[31] *Id.* at 1381-82.

[32] *See* DeGroff, *supra* note 6. This test is described in detail *infra* note 30.

[33] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 880 (1990) (the respondents, former employees of a drug rehabilitation center, were fired as a result of ingesting peyote for religious reasons, then were denied unemployment benefits because Oregon Law made it a crime to consume peyote; the United States Supreme Court held that the prohibition of peyote use in this case was not prevented by the First Amendment).

[34] *Id.* at 878. Specifically, the court held, "[i]t is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *See also,* Jack Macmullan, Comment*, The Constitutionality of State Home-schooling Statutes*, 39 VILL. L. REV. 1309, 1326 (1994).

incidentally places an undue burden on one's religious beliefs, it is not a violation of one's First Amendment rights under *Smith*.[35] This test established in *Blount* and modified in *Smith* provides a basis on how to judge the validity of a home school monitoring statute.

As home-schooling became accepted by the courts as a legitimate means of education, home-schooling parents shifted their attention to challenging regulations that monitor these home-schooling programs.[36] Some were successful and some were not.[37] While it is evident that many of these home-schooling parents want the government completely out of the education of their children, I believe that they will most likely not get their way since the state has a duty to enforce a compelling interest in ensuring their citizens are adequately educated.

A landmark case where statutory testing requirements were challenged and upheld was heard by the Eighth Circuit Court of Appeals in *Murphy v. Arkansas*.[38] In *Murphy*, Appellants alleged that the Arkansas Home-schooling Act[39] "deprived them of the right to free exercise of religion" by requiring home schooled children to take an achievement test in order to monitor the progress of the home schooled children.[40] The court found that the state had a compelling interest in educating the children, and the State's Home-Schooling Act was the least restrictive means of enforcing that interest.[41] As a result, the court upheld the Arkansas statute.[42]

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[35] *See* Macmullan, *supra* note 34 at 1326 (citing *Smith*, 494 U.S. at 876-82) ("Therefore, any generally applicable neutral state law will survive a free exercise claim, unless the claim is offered 'in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children.'").

[36] For further discussion, see *infra* pages 7-9.

[37] *See id.* (the discussed cases exemplify those that worked and those that did not).

[38] Murphy v. Arkansas, 852 F. 2d 1039 (8th Cir. 1988).

[39] Arkansas Home-schooling Act, ARK. CODE ANN. § 6-15-504 (2003). This law required all Arkansas home schooled students to take an achievement test selected by the state board of education, presumably as a means of monitoring the progress of home schooled children. This standardized test is used for a number of different reasons. Most significant to this discussion, if the home schooled student fails to achieve a minimum score within eight months of their grade level in designated subjects, "the student must be placed in a public, private, or parochial school." *Murphy*, 852 F. 2d at 1040-41. Interestingly, public, private, and parochial students are not required to take such annual tests and, if they do, those not achieving minimum scores are not placed into remedial programs.

[40] *Murphy*, 852 F. 2d at 1041. The Appellants also alleged that the statute deprived them of equal protection, due process, and "the right of privacy and parental liberty in violation of the United States Constitution."

[41] *Id*. at 1041-43. The *Murphy* court followed the test for the Free Exercise Clause set forth in *Yoder* and *Blount*, later modified in *Smith*. *See supra* pages 5-7. In *Murphy,* the Court stated that the State has "'beyond dispute. . . a compelling interest in ensuring that all its citizens are being adequately educated.'" *Id*. at 1042 (quoting district court's unpublished decision). The

In a 1993 case challenging the validity of state monitoring of home-schooling programs, *People v. DeJonge,* 501 N.W.2d 127 (Mich. Sup. Ct. 1993),[43] the Appellants, two home-schooling parents, appealed their conviction for violating Michigan's compulsory education law because they taught their children without the aid of a state certified teacher.[44] Appellants claimed that a certification requirement is a violation of their First Amendment right to free exercise of religion and such a requirement was not the least restrictive means to satisfying the state's compelling interest.[45] The Michigan Supreme Court ruled that parents who home school their children for religious reasons are not required to obtain any specific certification.[46] In

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testing procedure imposed by the Home-schooling Statute allowed the parent to choose the test "from a list of nationally recognized standard achievement tests and allowed the parent to be present while the test [was] administered." The Court held that this procedure "allow[ed] parents vast responsibility and accountability in terms of their children's education--control far in excess of limitations on religious rights that have been previously upheld", and held that, unlike *Yoder*, Appellants made no showing that the state's interest would be satisfied if their religious beliefs were accommodated.

[42] *Id.* The Court rejected Appellant's Equal Protection claim, ruling that the Appellants were part of the category of home schooled children, the category at which the Home-schooling Statute was aimed, thereby failing to qualify for the strict scrutiny analysis that may be provided under the Equal Protection Clause. *See* Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 644 (2003) In general, cases challenging statutes under the Equal Protection Clause will be subject to strict scrutiny when they involve "distinctions based on classifications such as race, alienage or national origin." *Id.* (citing *Cleburne v. City of Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). These statutes are "upheld only if they are narrowly tailored to serve a compelling state interest", however, cases where the Equal Protection Clause is employed to challenge statutes via classifications based on other characteristics, such as home schooled children (as previously mentioned) or gender are "entitled to an intermediate level of scrutiny." *Id.* This level of scrutiny requires the law to be "substantially related to an important governmental interest." *Id.* The Court "decline[d] to extend the right of privacy to this situation." *Murphy*, 852 F.2d at 1044. *See also*, Lukasik, *supra* note 10 at 1937-38.

[43] People v. DeJonge, 501 N.W. 2d 127 (Mich. Sup. Ct. 1993).

[44] *Id.* at 129-130, n.2 ("[t]his act requires parents of children from the age of six to sixteen to send their children to public schools or to state-approved nonpublic schools. . . students must be instructed by certified teachers"; in order to receive state approval, the instructors must be certified to teach in a public school of a comparable grade level). This certification requirement appears to be a means of state monitoring. *See also,* MICH. COMP. LAWS § 380.1561 (2004).

[45] *DeJonge*, 501 N.W. 2d at 131.

[46] *Id.* at 141. (the court stated that even though the state may have possessed a compelling interest, "it has failed to prove that the certification requirement is essential to that interest.") For specific religious statements regarding the reasons why the DeJonges home schooled their children, *see*, *supra* notes 43, 44 and accompanying text.

DeJonge, the Court noted that the State still has an effective means at its disposal to monitor home schooled children: standard individualized achievement testing.[47]

The Michigan Supreme Court handed down its decision in *People v. Bennett*,[48] on the same day as *DeJonge*[49]; both involved a challenge[50] to the same teacher certification requirement and had nearly identical factual circumstances involving home-schooling their children,[51] but with one exception: the Bennetts did not raise any challenge based on their religious convictions.[52] Without the religious argument, the Court ruled that the right to direct a child's education is not a fundamental right.[53] Since the Bennetts could not prove that the State's certification requirement was an unreasonable burden, the Court upheld the application of the statute.[54] These contrasting cases help to show that the reasons for home-schooling are significant in determining what state regulation and monitoring will be allowed.

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47 *Id.* at 131, n.6; 141, n.52 (Appellant stated that individualized standardized achievement testing was an adequate alternative means to the instructor certification requirement as a means of state monitoring, as the testing would comply with DeJonge's religious beliefs, and that "such testing is the core requirement utilized in most other states.").

48 People v. Bennett, 501 N.W. 2d 106 (Mich. 1993).

49 *See,* DeGroff, *supra* note 6, at 378.

50 *Bennett*, 501 N.W. 2d at 109.

51 *See,* DeGroff, *supra* note 6, at 379. The Bennetts withdrew their children from public school and home schooled the children because they believed that they could do a better job than the public system. *Bennett*, 501 N.W. 2d at 108-9.

52 *Id.* at 107, 112 (The Bennetts argued they had a "fundamental right, [derived from the Fourteenth Amendment,] to direct the education of their children" by educating them at home. The Bennetts further argued that since the state requires that children can only be educated by state-certified teachers, the same type of teacher will be educating their children, regardless of where the child is educated (public school, private school, or home school, for example). Finally, the Bennetts inferred from this certification requirement that the distinction between schools are blurred and their right to choose the education for their children is interfered with.); *see also,* DeGroff, *supra* note 6, at 379.

53 *Bennett*, 501 N.W. 2d at 115. The Court ruled that the right to direct a child's religious education is a fundamental right. Home-schooling, absent a claim of impinging on one's religious beliefs, "may be subject to reasonable government regulation."

54 *Id.* at 120 (the Michigan Supreme Court applied the statute in *Bennett* and not in *DeJonge* because it applied different standards of constitutional review). In *DeJonge*, the Court applied a more rigorous strict scrutiny standard due to the Free Exercise Clause challenge. DeJonge, 501 N.W. 2d at 134-35. In *Bennett*, however, the court only applied the rational basis test. *Bennett*, 501 N.W. 2d at 120. *See also,* DeGroff, *supra* note 6, at 379.

Further, it appears that religious reasons provoke higher standards of scrutiny. While this trend tends to make the restrictions for religious home-schools more lax than non-secular home-schools, religious home-schools will still be exposed to some regulation and monitoring due to the state's compelling interest in the education of its citizens. These methods of monitoring include standardized testing, teacher certification requirements, and the submission of portfolios used to monitor the progress of the home-schooled children. Each method will be analyzed later in this note.

B. Religious Reasons For Home-schooling

According to a 1999 survey that asked why parents home-school their children, the top three reasons provided were the following: (1) a better education could be offered at home, (2) religious reasons; and (3) there was a poor learning environment at public school.[55] While, according to this study, the leading reason why parents home-school their children is because the parents believe that they can do a better job than the public system,[56] and often do,[57] a more controversial discussion (and one more relevant to this paper) arises when one explores the religious reasons why children are home-schooled and the issues that arise from such home-schooling programs.

Some parents believe that it is a God-given right to home-school their children. These families tend to live and die by the word of the Bible and try to use this theory as a means of casting out state monitoring from their home-school program.[58] At most, this theory can show that one's religious beliefs are genuine; on its own, it cannot stymie government monitoring. A recent article in the *Pittsburgh Post Gazette* profiled the Combs, a family who currently home-schools their children for religious reasons.[59] The Combs believe that the Bible gives them the authority to educate their children.[60]

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[55] UNITED STATES DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, HOMESCHOOLING IN THE UNITED STATES: 1999 PARENT SURVEY OF THE NATIONAL HOUSEHOLD EDUCATION SURVEYS PROGRAM 9 (1999), *available at* http://nces.ed.gov/pubs2001/2001033.pdf (the exact breakdown of these 3 reasons is: Better Education (48.9%), Religious reasons (38.4%), and Poor Learning Environment (25.6%)).

[56] *Id.*

[57] *See* Rudner, *supra* note 3, (Figure 1 indicates (based on a standardized academic achievement tests) home schooled children scored better than both Catholic/Private school students and National students across grades 1-12.

[58] *See infra* notes 63, 65, 66.

[59] Paula Reed Ward, *Home School Parents Sue State Over Religious Freedom*, PITTSBURGH POST-GAZETTE, Oct. 11, 2004, *available at* http://www.post-gazette.com/pg/04285/393756.stm. As the title of the article suggests, the Combs are challenging the state's monitoring requirements for their home-schooling program claiming that they are answerable only to God for their children's education. This article refers to three other

Case law provides further insight on religious reasons for home-schooling. For example, in *DeJonge*, the defendants chose to home-school their children because they wanted to provide "a Christ-centered education" for their children.[61] In addition, in *Yoder*, the parents removed their children from public school both in accordance with their religious beliefs and as a result of fear of being ostracized in the community.[62] Further evidence of their religious convictions is reflected in their belief that "the major purpose of education is to show a student how to face God, not just show him how to face the world."[63] A similar example can be seen in *Blount*.[64] While challenging the board of education's alleged responsibility to monitor their home-schooling programs, the Appellants in *Blount* (home-schooling parents) stated as part of their claim that a parent's right to educate their children is a God-given right.[65]

C. The Christian Fundamentalist View of Home-schooling

More extreme religious reasons also motivate parents to home-school their children. Christian Fundamentalists tend to use these more extreme religious reasons for home-schooling. "The main reason these Fundamentalist Christian parents opt out of public schools is their perception that the 'secularization of public schools . . . denies their right to oversee the upbringing of their children as they see fit.'"[66] Another reason Fundamentalist Christian

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Pennsylvania families who filed similar suits. *See also,* Newborn complaint, *supra* note 5; *see infra* notes 89-93.

[60] *See,* Ward, *supra* note 59. The parents rely on multiple passages from the Bible to support their stance on home-schooling their children and arguing against government monitoring. *See also* Christopher Klicka, *Biblical Reasons to Home School*, NATIONAL CENTER FOR HOME EDUCATION (May 17, 1999), *available at* http://www.hslda.org/docs/nche/000000/00000069.asp (citing Bible passages to back this and other home school-related rights); *see infra* notes 72-73.

[61] *DeJonge*, 501 N.W. 2d at 130 ("The DeJonges believe that 'the major purpose of education is to show a student how to face God, not just show him how to face the world.").

[62] *Yoder*, 406 U.S. at 209 (the parents in *Yoder* "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 [the parents] and that of their children.").

[63] *DeJonge, supra* note 43, at 130.

[64] *Blount,* 551 A. 2d 1377.

[65] *Id.* at 1380 ("[t]he Blounts . . . believe that parents' sovereignty over the spiritual development of their children is divinely ordained and that parents in this sphere are responsible immediately to God.").

[66] Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable* Comrpomise, 60 GWLR 818, 820 (1992). Examples used to show the "secularization of public schools"

educators home-school their children is to isolate their children from what they perceive to be a "breakdown" in the public education system.[67]

In addition to those reasons described above, these Christian Fundamentalists often home-school their children to maintain a "traditional" family structure.[68] The Fundamentalists often keep their children at home for educational purposes in order to insulate them from the secular world and its conflicting values and ways of life, which they view as deeply threatening to their way of life, submerged in the "traditional" family structure.[69]

Other parents explicitly adopt passages from the Bible or some other religious scripture as a model and expand upon the meaning of those passages or religious scriptures.[70] For example, many parents who home-school their children believe that God has delegated this right

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include the Supreme Court's prohibition of "school prayer, Bible reading, the teaching of Biblical creation, and the posting of the Ten Commandments in public schools." *Id.* at 821.

[67] *Id.* (citing James C. Carper, *The Christian Day School, in* RELIGIOUS SCHOOLING IN AMERICA 115-18 (James C. Carper & Thomas C. Hunt eds., 1984)). Fundamentalists relate this "breakdown" to problems such as lack of discipline, sexual permissiveness, and drug and alcohol abuse. *Id.* at 820-21.

[68] Symposium, *The Constitution and the Good Society: The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 FORDHAM L. REV. 1617, 1643-44 (2001) (the "traditional" family structure, rooted in a literal interpretation of the Bible, is one that has the husband as the head of household and the breadwinner with the wife as the homemaker, submissive to the authority of the husband (citing Harold G. Grasmick, et al., *The Effects of Religious Fundamentalism and Religiosity on Preference for Traditional Family Norms*, 60 SOC. INQUIRY 352, 353 (1990).)).

[69] *See* Symposium, *supra* note 72, at 1644 (McClain brings up an example relating to the hierarchy of the sexes that an education occurring exclusively at a religious institution, such as a church, mosque, or temple, may bring about. This hierarchy may place each sex in their "proper sphere;" the sons, or males, being raised as the authoritative, worldly, and favored gender, while the females are raised as opposites, likely to better prepare the children to the "traditional" family structure. *Id.* at 1644-45 (citing Susan Moller Okin, *Political Liberalism, Justice, and Gender*, 105 ETHICS 23, 29 (1994), *available at* http://www.jstor.org/view/00141704/di994956/99p0382s/0).

[70] *See,* Carolyn Nichols, *Families Find New Allies in Homeschooling*, FLORIDA BAPTIST WITNESS, June 3, 2004, *available at* http://www.floridabaptistwitness.com/2665.article. The home-schooling parents described in the article "adopted Deut. 11:19 as their model: 'Teach them [words of God] to your children, talking about them when you sit at home and when you walk along the road, when you lie down and when you get up.'" As previously mentioned, this type of reasoning is often used to show a family's sincere religious belief. *See,* DeGroff, supra note 6. This test is described in detail *infra* note 29.

to them in interpreting Bible passages.[71] Other reasons include imposing "conditions" that God has commanded them to meet when raising children[72] and teaching children the "content of true education."[73] Many of these religious reasons are representative of a Christian Fundamentalist view. These fundamentalists are, by and large, those who are objecting to State monitoring home-schooling programs.[74]

D. Methods of Attack

With statistics that support the academic success of home-schooled children,[75] one may think that parents would welcome some sort of monitoring to show off the success of their programs. However, many parents refuse to comply with statutory requirements that necessitate monitoring of home-schooling programs by the state-based on religious reasons.[76]

Parents that choose to challenge statutory requirements regarding the monitoring of their home-schooling programs have four methods of attack at their disposal: "(1) the Fourteenth Amendment's Due Process Clause, (2) the First Amendment, (3) the Fourth Amendment's

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[71] *See* Klicka, *supra* note 60, (citing Bible passage like Heb. 2:13 ("Children whom the Lord has given me") to back up home school-related rights). One must keep in mind that various writings by Klicka indicate that he is a staunch proponent of home-schooling and seems to believe that the less interference by the government, the better. *See, e.g., infra* notes 141-43 and accompanying text.

[72] *Id.* Passages supporting this proposition include Ephesians 6:4 ("Fathers, do not provoke your children to wrath, but bring them up in the nurture and admonition of the Lord.") and Psalm 1:1-2, which the Klicka paraphrases as "[m]editate on God's law day and night." A passage of particular interest that is used to prove this proposition is: "Jeremiah 10:12 ('Thus saith the Lord, learn not the way of heathen nations.') Isn't that what our children are learning in the public schools?" Klicka seems to be saying that this particular passage speaks directly to religious reasons in favor of home-schooling.

[73] *See,* Klicka*, supra* notes 60, 71-72. Passages used to support this "right" include Psalm 111:10; Proverbs 1:7 ("Fear of the Lord is the beginning of knowledge") and Psalm 119:97-101, which Klicka paraphrases as "The goal of education is to train children in God's law so they can govern themselves, be wiser than their enemies, have more insight than their teachers, understand more than the aged."

[74] Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 GEO. WASH. L. REV. at 820-21.

[75] *See*, *supra* notes 55-57.

[76] *See, e.g.,* Newborn, *supra* note 5. *See also*, FLA. STAT. ANN. § 1002.41. Often, these statutes require the home-schooling parents to submit portfolios to the superintendent of schools and/or have their children take standardized tests. Older statutes have mandated a teacher certification requirement for all home-schooling programs.

implied constitutional right to privacy, and (4) the Ninth Amendment."[77] Of particular relevance to this discussion is the First Amendment's Free Exercise Clause.

According to the Court's interpretation of the Free Exercise Clause, parents cannot be prevented from home-schooling their children if sending their children outside the home for schooling violates their religious beliefs.[78] This is illustrated in *Wisconsin v. Yoder* where the United States Supreme Court ruled that Amish parents have a right to home-school their children for religious purposes.[79]

Jack Macmullan presents a theory regarding challenges to home-schooling monitoring based on the Free Exercise Clause.[80] This theory states that a court's ruling on a state's monitoring of a home-schooling program depends upon how the court characterizes the state's interest.[81] If a "court characterizes the purpose of the state's interest [via monitoring] as ensuring that the children are receiving an adequate education," the monitoring is far more likely to be allowed.[82] On the contrary, when a regulation attempts to control the manner in which the children are educated, the court will characterize the State's interest as one that is not compelling enough to ensure that a child receives an adequate education.[83]

E. Meet the Newborns

The objections to state monitoring programs can be seen in a case pending in the Pennsylvania Court of Common Pleas.[84] Here, the Newborns are the plaintiffs challenging a

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77 *See* Lukasik, *supra* note 10, at 1921.

78 *Id.* at 1932. An in-depth discussion of the description of the case history of home-schooling can be found in earlier in this note beginning *infra* p.4.

79 *See supra* notes10, at 18-24.

80 *See* Macmullan, *supra* note 34, at 1328-29.

81 *Id.* at 1328. This theory is based, in part, on *DeJonge*'s successful free exercise challenge on state monitoring. *See supra* notes 43-48.

82 *Id.* at 1328.

83 *Id.* at 1328-29 (illustrating non-compelling need in *DeJonge*, where the court held that the purpose of the state's regulation was to ensure that teachers were properly certified, not to ensure that children were receiving an adequate education). Macmullan also points out that the more significant the government interference is, the more likely a challenge based on the Free Exercise Clause will be successful. Macmullan, *supra* note 34, at 1328-1329. This appears to be an extension of the least restrictive means of a compelling government need test set forth in *Yoder* and modified in *Smith*. *See supra* notes 21 and 29. *See also supra* notes 32-35.

84 *See* Newborn, *supra* note 5.

Pennsylvania statutory requirement[85] that portfolios be submitted to the state.[86] The Newborns claim that the progress reports required by the home education statute[87] causes the school district "to become excessively entangled" with their religious education.[88] As such, the Newborns assert that they are protected from enforcement of the home education statute under the recently enacted Religious Freedom Protection Act.[89]

III. STATE REGULATION

A. Describing the Statutes

Home-schooling statutes have been categorized in several different ways. As a whole, they seem to break down into 2-3 different areas of focus. The first attempts to test how qualified the teacher is. Another tries to gauge how the home-schooling program is progressing during the academic year. The final category, which often overlaps with the second, aims to assure that the child is meeting the minimum requirements for someone at their age level. These categories are outlined below.

In one of many different law journal articles analyzing home-schooling regulations, Donald Dorman categorizes home-schooling statutes based on three features contained in such statutes.[90] The first of these features concerns "the competence of the teacher."[91] The second

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85 The statute being challenged is 24 PA. CONS. STAT. ANN. § 13-1327.1 (2004) (the "home education statute" or Act 169). *See* Newborn, *supra* note 5, at Complaint 2.

86 *Id.*

87 *Id.* at Complaint 18. Specifically, the portfolios the school district is requesting collectively refers to an affidavit and course objectives at the beginning of each school year, a log of reading material used, and samples of the children's work. This material would be reviewed by the superintendent under the authority of the home educational statute.

88 *Id.*

89 *Id.* at Complaint, Count I. The Religious Freedom Protection Act (RFPA) provides that "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability . . . [unless the burden is both] (1) In furtherance of a compelling interest of the agency [and] (2) The least restrictive means of furthering the compelling interest." 71 PA. CONS. STAT. ANN. § 2404 (2002). The Newborns believe that the Pennsylvania Homeschooling Act places an undue burden which would be a violation of section 2404 of the RFPA. *See,* Newborn, *supra* note 4, at Complaint 32. The Newborns are also challenging the validity of the home-schooling statute alleging that the statute violates the Free Exercise Clause of the First Amendment. *See*, Newborn, *supra* note 4, at Count VII.

90 *See* Dorman, *supra* note 14, at 749-54. Only the first and third categories will receive more specific treatment later in this note.

feature deals with "regulations concerning the content of the program."[92] The final category involves "regulations to measure and assure the student's academic progress."[93]

In addition to classifying statutes based on their features, home-schooling regulations can be classified based on their type of regulation. Bruce Page distinguished two different types of regulations affecting home-schooling programs.[94] The first is an ends-focused approach.[95] This approach is more of a hands-off approach by focusing on the end result of a child's education. Ends-focused regulations typically mandate that a home-schooled child be proficient in "certain skills at certain times."[96] The second is a process-focused approach.[97] This approach calls for

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[91] *Id.* at 749-50. The typical method of monitoring the competency of a teacher is via teacher certification. Other means include being judged qualified to teach, holding an educational degree such as a high school diploma or general educational development (GED) equivalency diploma or a baccalaureate degree, having a certified teacher supervise the home-schooling program, or "being the parent of a child enrolled in an approved correspondence program." This category will receive more detail later in this note at teacher certification.

[92] *See* Dorman, *supra* note 14, at 749-50. These regulations are carried out in a number of ways including requiring that certain subjects be taught, requiring "formal schooling take place a minimum number of days per year and a minimum number of hours per day," periodic outside inspections, and reporting requirements. For analysis of the Florida home-schooling statute, see *infra* notes 100-06 and accompanying text.

[93] *See* Dorman, *supra* note 14, at 749, 753-54. This last category is typically enforced by means of a standardized achievement test. While most home schooled children tend to score rather well, *see, supra* note 57, those who do not achieve a requisite score may have their home-schooling privileges revoked and be compelled to attend an institutional school. *Id.* at 754. (citing ARK. CODE ANN. § 6-15-505(a)(4) (1987)). This category receives more detail later in this note under the section on testing requirements. See *infra* pages 23-24.

[94] Bruce D. Page, Jr., Note, *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, 209 (2001/2002).

[95] *Id.* An example of an ends-focused result would be standardized testing as used in *Murphy*, *supra* notes 38-42. *See* Page, *supra* note 94, at 209, n.170.

[96] *Id.* at 209.

[97] *Id.* Examples of process-focused regulations include on-site inspections by state officials, or requirements that home-schooling programs be "substantially equivalent" to that offered at the public school. *Id.* at 209, n.171 (citing Jon S. Lerner, Comment*, Protecting Home-schooling Through the Casey Undue Burden Standard,* 62 U. CHI. L. REV. 363, 381, 386 (Winter, 1995)). Another process-focused regulation is one mandating minimum time requirements (hours per day, days per week, etc.) for actual home education. *See* Page, *supra* note 94, at 209.

more government involvement in a home-schooling program.[98] Most objections to government monitoring of home-schooling programs arise out of process-focused regulations.[99]

The states monitoring requirements for home-schooled children are typically codified in a statute. For example, Florida's home education program requirements are spelled out in § 1002.41.[100] This statute sets forth six stipulations for home-schooling parents:[101] (1) the parents must send the district school superintendent a notice of intent to home-school;[102] (2) the parents must maintain a portfolio of the child's work, attendance, etc.;[103] (3) the portfolio must be available for inspection by the superintendent within 15 days' notice;[104] (4) an annual evaluation must be submitted to the superintendent outlining the child's progress;[105] (5) "The portfolio shall be preserved by the parent for 2 years;"[106] and (6) if the home-schooling program is to be terminated, 30 days' notice must be provided to the superintendent.[107]

B. Rationales of the Statutes

So, what reasons do the States provide to justify the monitoring of home educational programs? "States have a substantial interest in ensuring that all children receive an adequate education."[108] As a result of this substantial interest, the states must ensure that "schools

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98 *Id.*

99 *See id.* at 209-10.

100 FLA. STAT. ANN. § 1002.41 (West 2004).

101 Vicky Goodchild, *Complying With the Home Education Law* (adapted from *An Orientation to Homeschooling in Florida*), FPEA GUIDE TO HOMESCHOOLING IN FLORIDA, Aug. 2004, at 3, *available at* http://www.notry.com/hschool/fla/hsguide2.htm Note that these requirements are fleshed out in greater detail in this article.

102 *Id.* at 3.

103 *Id.* at 3-6.

104 *Id.* at 6.

105 *Id.* at 6-9. Note that in lieu of a progress report, parents can arrange for their children to take a standardized test or a psychological evaluation. In addition, there are other evaluation methods available based on a mutual agreement between the parent and superintendent.

106 *Id.* at 9 (quoting FLA. STAT. ANN. § 1002.41).

107 *See,* Goodchild, *supra* note 101, at 9.

108 *See,* DeGroff, supra note 6, at 379 (citing *Wolman v. Walter*, 433 U.S. 229, 240 (1977), and *Levitt v. Comm. For Pub. Educ.*, 413 U.S. 472, 479 (1973)). Although DeGroff is referring

perform their basic educational function and . . . meet certain minimum standards."[109] In the private school context, the state justifies their mandated approval or accreditation to "ensure compliance with its educational standards."[110]

C. The Difference Between Religious and Secular Home-schooling

In a study on education statutes in Alabama, the regulation of home-schooling in the United States is categorized into a number of distinct approaches.[111] One of these approaches "involves states enacting statutes that expressly allow for home-schooling but also provide for some form of state approval or notification by the parents to the local school board."[112] The strictest of these approaches requires home-school teacher certification and permission from the state to home-school.[113] The approach used for home-schooling in Alabama is a combination of these two approaches.[114]

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specifically to private schools, this rationale applies to all education, regardless of the forum of classroom.

[109] *Id.* at 379-80. DeGroff cites *Pierce* as supporting these propositions. "Pierce explicitly recognizes a basis for reasonable state regulation of . . . minimal curricular requirements and reasonable qualifications for teachers." Note that while DeGroff is still referring to private schools, the rationale is still germane to home schools.

[110] *Id.* at 382-384. As justification for this assertion, DeGroff reports that twenty-six of the forty-seven states that responded to a survey reported that they required some approval or accreditation of private schools and most of these states "indicated that their curricular standards were relatively detailed and comprehensive." Interestingly, at least seven of these twenty-six states exempt church schools from the accreditation requirement. Note that Pennsylvania is one of the states that lacks the accreditation requirement, perhaps an important factor in *Newborn* (the other states that lack the accreditation requirement are Alabama, Maryland, Nebraska, Ohio, Tennessee and Wyoming). *See also supra* notes 5, 85-90, and accompanying text.

[111] William L. Campbell, Jr., Commentary*, Moving Against the Tide: An Analysis of Home School Regulation in Alabama*, 52 ALA. L. REV. 649, 656 (Winter 2001). Campbell uses three different approaches; "[t]he first approach is a constitutional provision that gives the state the power to regulate only public schools." This first approach is the least strict of all the approaches and is not relevant to this discussion since its applicability to home-schooling is minimal. "With no power to regulate private, church, or home schools, there are no grounds for challenges to home-schooling." *Id*. at 656, n. 46.

[112] *Id.*

[113] *Id.*

[114] *Id.*

The question of which approach is used depends on the type of home-schooling program.[115] If the home-schooling program is a "church school," it will receive a more lenient degree of state regulation than if the program is not backed by a church.[116] As a result of this dichotomy, a parent merely has to receive church backing to begin instruction with little interference from the state.[117]

However, while the specific challenges to home-schooling statutes often vary depending on whether or not the home-schooling program is religious based, their respective outcomes may turn out to be the same. For example the discrepancy (or lack thereof) of how the courts treat secular vs. non-secular home-schooling programs is seen in a home education statute that was been challenged in *Stobaugh v. Wallace*.[118] In *Stobaugh*, the plaintiffs, parents participating in a home education program, refused to participate in standardized testing and, thus, no results were sent to the school superintendent as part of their portfolio.[119] The Plaintiffs argued that the home education statute did not grant the superintendent authority to require standardized testing beyond that required by the statute[120] and that such a request created an "undue stress."[121] The

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115 *See id.* at 656.

116 *Id.* This dichotomy originates with an Alabama law that gives separate definitions to a private school ("Includes only such schools as hold a certificate issued by the State Superintendent of Education," and must conform to a number of requirements) and a church school ("Includes only such schools as offer instruction in grades K-12. . . and are operated as a ministry of a local church, group of churches, denomination, and/or association of churches on a nonprofit basis which do not receive any state or federal funding."). ALA. CODE §16-28-1(1), §16-28-1(2) (2004).

117 *See* Campbell, *supra* note 111, at 657-59. Campbell provides a stark example of the lack of regulations for a church-backed home-schooling program, as opposed to a non-secular home-schooling program. An example of this disparate treatment, the requirement of teacher certification, will be addressed later in this paper.

118 Stobaugh v. Wallace, 757 F. Supp. 653, 635-655 (W.D. Pa. 1990) (the challenged statute, the Pennsylvania Home Education Statute [hereinafter HEP], 24 P.S. § 13-1327.1(e)(1), requires a portfolio of the home schooled child's work to be submitted annually and include the results of a standardized achievement test to be taken every year). This is the same statute that the Newborns are challenging. *See* Newborn, *supra* note 5, at 86-90.

119 *Id.* at 655; *see also,* HEP, 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1) (2004) (HEP requires that "[t]he portfolio shall consist of a log made contemporaneously with the instruction which designates by title the reading material used, samples of any writings, work sheets, workbooks or creative materials used or developed by the student and in grades three, five and eight results of nationally normed standardized achievement tests . . .").

120 Stobaugh, 757 F. Supp. at 655-658.

121 *Id.* at 657.

court held that while the superintendent did not have authority to request testing above and beyond that required in the statute,[122] no undue stress was created because there was no deprivation of rights.[123] While *Stobaugh*, did not present a religious issue, it did create somewhat of a baseline standard to work from with regards to the home education statute.

Similar objections arise in *State v. McDonough*, where the Supreme Court of Maine ruled that parents who home-schooled their children be required to submit a home instruction program to their local school.[124] In *McDonough*, a defense regarding religious reasons for home-schooling did not arise.[125] Rather, the defendants in *McDonough* relied on a number of sections of both the United States Constitution[126] and the Maine State Constitution[127] in their claim that the state was unconstitutionally impinging on their right to educate their children at home.[128] This question of the state's right to monitor in the context of home-schooling for religious purposes was addressed in *Blount v. Dept. of Educ. and Cultural Services*.[129]

In *Blount*, the Maine Supreme Court extended the reasoning used in *McDonough*[130] and denied the defendant's constitutional challenges to the prior approval requirement reserved by the State.[131] Rather than claiming almost a dozen state and federal constitutional challenges, like

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122 *Id.* at 656.

123 *Id.* at 657. In Stobaugh, the Court found that there was no deprivation of Plaintiff's rights because the home-schooling program was not interrupted and a procedure was set in motion where the home-schooling program *may* be revoked.

124 State v. McDonough, 468 A. 2d 977, 980-981 (Me. 1983) (the Court took a strong policy stance on this matter and said that "[f]or the state to allow home education without imposing some standards as to quality and duration would be, in many cases, to allow parents to deprive their children of any education whatsoever.").

125 *See, id.* at 978. The parents simply challenged the Maine statute (20 M.R.S.A. §§ 911, 914) arguing the statute unconstitutionally infringed on their alleged right to educate their children at home.

126 *Id.* at 979 (citing U. S. CONST. amend. IV, V, VIII-X, XIII, XIV). Defendants did not rely on the Free Exercise Clause but, rather, relied on several amendments to the U.S. Constitution, specifically the fourth, fifth, eighth, ninth, tenth, thirteenth, and fourteenth.

127 *See, id* (citing Me. CONST. Art. I §1-3, 5, 6, 6-A, 24). Defendants relied on the Maine State Constitution.

128 *See id.*

129 Blount, 551 A. 2d 1377 (Me. 1988). *See supra* note 29.

130 *See* Stobaugh, *supra* notes 118-120, at 658.

131 Blount, 551 A. 2d at 1378.

the plaintiffs in *McDonough*,[132] the defendants in *Blount* challenged the monitoring requirement of the compulsory education statute under the Federal Free Exercise Clause.[133] The court denied the defendant's claim and ruled that the state had a compelling interest to monitor home-schooling programs and the means currently used to monitor these programs was the least restrictive method available.[134]

The foregoing analysis shows that there are a number of theories behind the forming and application of monitoring requirements. It also shows that there is a disparate treatment of home-schooling programs, depending on whether there is a religious rationale behind the home-schooling. The following shows a sample of some of the principle means of state monitoring and what all the fuss is about.

IV. MEANS OF STATE MONITORING

A. Teacher Certification Requirements

One of the most hotly contested methods of state monitoring of non-public schools programs (including home-school programs) are teacher certification requirements.[135] Religious schools, almost always oppose mandatory certification for a variety of reasons.[136] In order for a court to allow any sort of teaching certification requirement, the government must show that such a requirement "is rationally related to a legitimate state interest."[137]

Statutes mandating teacher certification are not illegal, per se.[138] While the teacher certification statutes have been overturned in some states, mainly because they were viewed as

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132 *See supra* notes 56-58.

133 *Blount*, 551 A. 2d at 1379.

134 *Id.* at 1381-83.

135 *See* DeGroff, *supra* note 6, at 386.

136 *Id.* at 387 (these religiously affiliated schools are so vehemently against a mandatory certification "because of its perceived impact on key mission-driven personnel decisions and because of the practical difficulties of finding and attracting teachers whose views are harmonious with the church and whose qualifications are acceptable to the state." (citing *Fellowship Baptist Church v. Benton*, 815 F. 2d 486, 492 (8th Cir. 1987), which discusses the Iowa statutory scheme on teacher certification).

137 *See* Campbell, *supra* note 111, at 664. Campbell also explains that the result of a challenge to a teacher certification requirement would depend on how the state interest is defined by the parties. This state interest usually takes shape depending on whether the home-schooling program is religious-based.

138 *See* DeGroff, *supra* note 6, at 387. The United States Supreme Court has never forbidden a state from requiring teacher certification.

unreasonable,[139] other state and federal courts have found such a requirement reasonable.[140] Although teacher certification requirements are not illegal, per se, there is a strong objection to them.

For example, there is at least one dissenting voice over the validity of teacher certification requirements.[141] Klicka spends the first half of his discussion on the topic about the lack of correlation between proper teaching certification and the quality of a child's education.[142] While this evidence may be true, it does not address the legality of the matter. In the second part of his discussion, Klicka addresses the legal aspect by explaining what he views as a "Statutory Trend Lessening Teacher Qualification Requirements."[143] He believes that "[t]he trend across the United States is to remove all teacher qualifications standards for home-schoolers."[144] While this may or may not be true, the fact still remains that teacher certification requirements are legal.

Courts have treated the enforcement of teaching certification requirements for home-school instructors differently, depending on whether the home-school was backed by a church (religious reasons) or was non-religious based. For example, in Alabama, all teachers are

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[139] *Id.* at 387-89 (DeGroff notes that teaching requirement statues have been overturned include Ohio, Kentucky, and Vermont, but these decisions were based more on the specific circumstances of the individual cases, "rather than a general rejection of teacher certification requirements.").

[140] *Id.* at 389. States overturning the statues include Iowa, Nebraska, North Dakota, Alabama, Massachusetts, Maine, and Michigan.

[141] CHRISTOPHER J. KLICKA, THE RIGHT TO HOME SCHOOL A GUIDE TO THE LAW ON PARENTS' RIGHTS ON EDUCATION 135-47 (Carolina Academic Press 2002) (1995).

[142] *Id.* at 133-41 (Klicka presents various forms of evidence to support this theory, citing a public opinion poll saying that seventy-one percent of Americans "do not believe the lack of a teacher certification in private schools means their teachers are less qualified than public school teachers." (citing Carol Innerst, *Parents Prefer Private Schools*, WASHINGTON TIMES, July 24, 1991, at A3). *See also* Klicka, *supra*, note 141 (further discussion of studies that show little positive correlation between a teacher's educational background and the students' educational performance).

[143] *Id.* at 141-47. Klicka begins his book by describing the present teaching requirements in various states. He then takes a very one-sided analysis of some of the cases that have overruled teaching certification requirements to support his theory here. *See also, supra* note 138 and accompanying text for further information on teacher certification. For further support, *see* the following cases the author references including: *DeJonge*, (*supra* notes 43-57 at 11), *New Jersey v. Massa*, 231 A. 2d 252, 256-57 (Morris County Ct. 1967) (citing the trend of many non-certified teachers in New Jersey schools and the legislative purpose of providing for "equivalent education elsewhere than at school," the court held that the teaching certification was not necessary).

[144] *See* Klicka, *supra* note 142, at 141.

required to receive state certification except those teaching at church schools.[145] This difference in teaching certification requirements indicates a disparate treatment of home-schooling programs.[146]

A stark contrast in the dichotomy of enforcing teaching certification requirements can be seen when one compares *People v. Bennett*[147] and *People v. DeJonge*.[148] Recall that in each case, the defendants were home-schooling parents who challenged the same Michigan statute that required teacher certification for home-school programs.[149] Recall, also, that the parents in *DeJonge* were able to show that the teaching certification requirement did not apply to them due to their religious purposes for home-schooling,[150] but the parents in *Bennett* were forced to comply with this requirement.[151]

Although both the DeJonges and the Bennetts were home-schooling their children, the purpose for this disparate treatment was the *reasons* for home-schooling; not the *means* of home-schooling, not the *results* of the home-schooling program, not *what is taught* in the home-schooling program, but the reasons for a home-schooling program. Something about this seems inherently unfair to families like the Bennetts or, conversely, too privileged for the DeJonges. If the reason for the disparate treatment was to allow the teaching or practice of religion, a disparate treatment would make more sense. Such treatment favors home-schooling for religious reasons, not home-schooling.

I believe that a teacher certification requirement should be necessary regardless of the reason for home-schooling. However, the acquisition of such a certification should require a

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145 *See* Campbell, *supra* note 111, at 657-58.

146 *Id.* at 658.

147 *Bennett*, 501 N.W. 2d at 106.

148 *DeJonge*, 501 N.W. 2d at 127. What makes this comparison even more ironic is that both *Bennett* and *DeJonge* were handed down on the same day. *See,* DeGroff, *supra* note 6, at 378.

149 *See, supra* notes 44, 46-47, 52-54 and accompanying text for the Michigan statute, Mich. Comp. Laws § 380.1561 and M.S.A. §15.1923, and the specific claims of *Bennett* and *DeJonge* which challenged the statute.

150 *DeJonge*, 501 N.W. 2d at 268. The Court held "that the teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified instructors. Such families, therefore, are exempt from the dictates of the teacher certification requirement." This was based on a strict scrutiny standard.

151 *Bennett*, 501 N.W. 2d at 120. The Court held "that the Fourteenth Amendment does not provide parents a fundamental right to direct their children's secular education, and . . . that the defendants have not met the burden of establishing that teacher certification is not reasonably related to the state's legitimate interest." Remember that this was reasoned upon a rational basis standard, rather than the strict scrutiny standard used in *DeJong*. *See also supra* note 149.

minimum burden on the parents. Therefore, the educator should have, at minimum, a high school education (or an equivalent) and the parent's proficiency of this level should be proven by a standardized test. I also believe that each home-schooling parent must be made aware of any standards that their children would be required to meet, including test scores, subjects they would be required to teach, and hours of study. The parents awareness should be memorialized by a signed form.

B. Testing Requirements

Perhaps the most common method of state monitoring is achieved through standardized testing requirements. Typically, home-schooled children are required to take a standardized achievement test annually as a means of measuring their progress.[152] The reason this method of monitoring is so common may be due to its lack of intrusiveness on both the home-schooled child and the family. This can be seen in *Murphy v. Arkansas*.[153]

Murphy illustrates a great example how mandating a standardized achievement test is a valid means for a state to monitor its home-schooling programs. In *Murphy*, an Arkansas statute's constitutionality was challenged based on, inter alia, a violation of the plaintiffs' right to the free exercise of religion.[154] The statute was upheld because it was the least intrusive method of enforcing a compelling state interest.[155]

A home-school monitoring program should, at bare-minimum, require that each home-schooled child to take an annual standardized achievement test. *Murphy* shows that such a requirement will stand up to a Free Exercise challenge. *Murphy* also demonstrates that this is one of the least restrictive, and probably one of the most effective, means of ensuring that home-schooled children are receiving an education that is comparable to that administered by a public school.

C. Approval of Home-schooling Programs

Christopher Klicka takes a rather strong (and perhaps extreme) side when it comes to certain forms of monitoring home-schooling programs.[156] In particular, Klicka is vehemently against a government's required approval of home-schooling programs to avoid the

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152 *See* Dorman, *supra* note 14, at 753, n.137 (citing PA. STAT. ANN. tit. 24 § 13-1327.1(e)(1)(1990) and W. VA. CODE § 18-8-1(4) (1988)) (each of these cited statutes require the administration of a standardized test). *See also,* ARK. CODE ANN. § 6-15-504 (2003), *supra* note 39 at 9.

153 *Murphy*, 852 F. 2d at 1039.

154 *Id.* at 1041. *See also, supra* note 39-40.

155 *Murphy*, 852 F. 2d at 1042.

156 *See* Klicka, *supra* note 141, at 46-48.

"standardization of education."[157] Although he does bring up a valid point regarding the dangers of uniformity in schools,[158] it appears to be quite an exaggeration.

While Klicka addressed the dangers of standardization of schools, the approval of a home-schooling program is not a measure that will automatically standardize all educational programs.[159] Klicka believes that "the less government control, the better."[160] Such a blanket statement ignores the state's "compelling interest" in education.[161] However, regardless of how much the government's right to monitor is challenged, the government will still have a compelling interest in education and this will still require some measure of home-school monitoring.[162]

V. THE NEWBORDS REVISITED

So, now that different home education cases, statutes, challenges, etc. have been addressed, what will become of the Newborns?[163] Since the religious freedom argument that the Newborns present does not prevent the teaching of religious beliefs, the Newborns are claiming "that [the statute] violates religious beliefs about the proper relationship between parents and the government."[164] The main argument is that, based on the Newborns' religious beliefs, the

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157 *Id.* The rather extreme stance taken by Klicka uses Hitler's totalitarian government in Germany during the 1930s to illustrate, what he refers to as, "the potential abuses of a totally state-controlled educational system." This example is probably a bit much, but it removes any doubt as to where Klicka stands on this issue.

158 *Id.* at 46. The author of this article agrees with Klicka when he writes, "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."

159 However, where such an authorization is required, it should be based on a pre-determined minimum set of topics to cover, based on a standard such as an achievement test. In other words, the author believes that a program should not automatically be denied authorization based on teaching a topic that the authorization committee disapproves of, such as the teaching of a religion.

160 *See* Klicka, *supra* note 145, at 45.

161 *See* Klicka, *supra* note 141 at 47. Klicka addresses this issue using cases such as *Meyer,* 262 U.S. at 390, and *Murphy*, 852 F.2d at 1039, for example, and claims that state legislative actions have made all of these cases moot or ineffective.

162 *See, e.g., Yoder*, 406 U.S. at 205; *Blount,* 551 A.2d at1377; *McDonough,* 468 A.2d at 977. *See also,* DeGroff, *supra* note 6 at 368-69.

163 *See* Newborn, *supra* note 5, notes 87-90, and accompanying text.

164 Howard Richman, Religious Suits Filed Against PA Home Ed Law, Pennsylvania Homeschoolers (Summer 2004), *available at*

government lacks jurisdiction to monitor their home-schooling program.[165] This case appears to be destined for the Pennsylvania Supreme Court and could go either way, according to the Newborns' attorney.[166] Larry Frankel, the Pennsylvania ACLU director, vehemently believes that this suit will fail.[167] Indeed, a similar suit from 1995-1998 that challenged the constitutionality of the same statute failed in the Federal Court for the Middle District of Pennsylvania.[168] While Richman believes that a change in counsel will change the ultimate outcome of the case, I believe that Larry Frankel's opinion bears a fairly accurate representation to the strength of the Newborns' claim.[169] I believe that the Newborns will lose their case.

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http://www.pahomeschoolers.com/newsletter/issue87a.htm, ("The suit's religious freedom argument is weakened by the fact that the PA home education law specifically has parents write their own educational objectives which 'shall not be utilized by the superintendent in determining if the home education program is out of compliance.'").

[165] *Id.* Richman has his own unique way of summing up the remainder of the religious argument. "The rest of the suit throws everything against a wall hoping that something will stick- that the courts will find one or another aspect of the home education law to be unconstitutional." As for the other arguments the Newborns present, Richman writes that the privacy argument "is especially strong," but the "due process argument is especially weak."

[166] *See* Richman, *supra* note 164 at 33. The Newborns' attorney is Dee Black, a representative of the Home School Legal Defense Association.

[167] *Id.* as quoted by reporter Ben Finley in the Bucks County *Courier Times* on May 5, 2007, these suits will fail:

> "I'd be surprised if the court agrees," said Larry Frankel, legislative director of the Pennsylvania ACLU. Frankel said if the Hankins and Newborns are successful in their claims of religious freedom, then Satanists could justify not teaching their children to read. He said the court cases would give the Religious Freedom Protection Act a bad name. "The law doesn't say they can't teach their children x, y and z. The school districts just want some evidence that students are actually being educated," he said. "The school district has a right to expect that something is happening, that their children are not running free all day."

[168] Howard Richman, The Similar Suit that Failed, Pennsylvania Homeschoolers (Summer 2004), http://www.pahomeschoolers.com/newsletter/issue87a3.htm. The unpublished case, *Lawvere v. East Lycoming School District*, 133 F. 3d 910 (3d Cir. 1997) (cert. denied, 503 U.S. 1089 (1998), involved a home-schooling family that "refused to fill out a home education affidavit." Despite the failure of the aforementioned case, Richman believes that the Newborns can win, mainly because the Newborns are represented by the Home School Legal Defense Association Lawyers, while the Plaintiffs of the failing case represented themselves.

[169] *See* Newborn, *supra* notes 5, 87-90, and accompanying text.

VI. RECOMMENDATIONS AND CONCLUSION

This country places the freedom of religion as one of the most important values. We see this freedom everywhere in our society, from special tax treatment for religious groups to religious garb in public. However, this freedom is not unlimited. As has been shown, there is an ongoing struggle between home-schooling parents (both secular and non-secular) and the government as to how much regulation and monitoring of home-schooling programs should be allowed.

There are many religious-based home-schooling parents that would like nothing better than to be left completely alone in the education of their children. However, this will not happen. The government has a compelling interest in the education of their citizens and must ensure that this education takes place using the least restrictive means available. This least restrictive requirement sets the government's limitation on home-school regulation. With these parameters in mind, the state should mandate a home-schooling monitoring program for religious and non-religious based programs as follows.[170] Note that I group both religious and non-religious based programs together because these requirements will not restrict what can be taught or practiced at home. These requirements will ensure minimum standards for home-schooling programs in the least burdensome way. While I do not necessarily agree with this disparate treatment, it is the prevailing law and I will work within its parameters.

First and foremost, each home-schooled child should be required to take a monitored annual standardized achievement test. The Arkansas home-schooling statute provides an excellent example on how this requirement should be administered.[171] A parent gets to choose the exact test to be administered from a pre-approved list. If a child does not meet the minimum scores for their age level, they must be placed into a public, private, or parochial school.

Second, and probably most controversial, there should be a certification requirement for home-schooling teachers. Many states require that a parent hold at least a GED,[172] as they should. In addition to this GED requirement, I propose that home-schooling teachers be required to take a standardized test similar to the Praxis 1 exam that substitute teachers in New Jersey are required to pass.[173] No extra classes and no exorbitant degrees; just pass a test. Anyone with a high school education should be qualified to pass such an exam.[174] Due to the minimum

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170 Since the primary means of challenging statues that monitor home-schooling programs are based on the Free Exercise Clause, these proposed requirements will not impose on an individual's free exercise of religion. Since states can probably mandate stricter requirements for non-secular home-schooling, they should make such mandates as they feel necessary, so long as they can constitutionally do so.

171 *See supra* notes 49-40.

172 *See supra* note 91.

173 *See* The Praxis Series, http://www.ets.org/praxis (The Praxis exam is used by various states to determine whether to grant a license to teachers).

174 *Id.* Since the Praxis tests "are designed to be taken early in a student's college career," anyone with a high school or equivalent education should be able to pass. *Id.*

knowledge requirement, this would place a small, but necessary, burden on home-schooling parents in order to ensure their qualifications.

Finally, each home-schooled child should be required to submit a portfolio at the beginning and middle of each academic year based on a state pre-approved list of the minimum educational requirements for a child of that age.[175] The list would be available to every home-schooling parent before submitting the portfolio. The first portfolio should show what the parent intends to teach the child for the first half of the year. The second portfolio should include samples of the child's work showing what he or she has accomplished during the first half of the year and what the parent plans to teach during the second half of the year. The child's work in the second portfolio will serve as evidence that the child is being taught what was outlined in the first portfolio. Each portfolio would need to be approved by administrators and its approval would be based on whether it meets the list of pre-approved requirements. No portfolio would be needed at the end of the academic year due to the standardized achievement test.

In conclusion, this note has addressed the evolution of home-schooling law and its rationales. It has also addressed the reasons for home-schooling and what methods home-school supporters have at their disposal to challenge state regulations. Also, this note has addressed the types of regulation the state uses, and why they are or are not valid. Finally, I have provided an ongoing case with the Newborns. By balancing the state's compelling interest in education with the First Amendment Freedoms of the Free Exercise Clause, I have concluded that every home-school program should require annual standardized testing, a one-time teacher certification, and a bi-annual portfolio

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[175] *See, e.g., supra* notes 124-128 (discussing *McDonough,* 468 A. 2d at 977); *see also supra* notes 129, 131, 133-134 (discussing *Blount*, 551 A.2d at 1377).