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INTRODUCTION: THE *RACHEL L.* AND *JONATHAN L.* DECISIONS

On February 28, 2008, the California Court of Appeal for the Second Appellate District caused alarm on a national level[1] by ruling that home schooling[2] in California is illegal unless the parent has a teaching credential.[3] In reaching this conclusion, the court of appeal relied almost exclusively on a fifty-five year old California superior court appellate department case and a forty-seven year old California court of appeal case.[4] Both cases had held that statutory predecessors to the private school exemption[5] to California's compulsory school attendance statute[6] were inapplicable to home schooling.[7]

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1 Andrea Longbottom, *Rude Awakening Court Ruling Alarms Homeschool Community*, THE HOME SCHOOL COURT REPORT, May–Jun. 2008, at 11, (finding that a mayor, op-ed pieces of almost every major newspaper, the general public, the media, public school teachers, and people around the world were shocked that "an educational alternative as solidly established as homeschooling was actually being called illegal").

2 Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 576 n.1 (Cal. Ct. App. 2008) ("We use the terms 'home school' and 'home schooling' to refer to full-time education in the home by a parent or guardian who does not necessarily possess a teaching credential.").

3 *In re* Rachel L., 73 Cal. Rptr. 3d 77, 79–83 (Cal. Ct. App. 2008) (decertified for publication). The court discussed "whether parents can legally 'home school' their children" and held, based on two prior cases:

> that enrollment and attendance in a public full-time day school is required by California law for minor children unless (1) the child is enrolled in a private full-time day school and actually attends that private school, (2) the child is tutored by a person holding a valid state teaching credential for the grade being taught, or (3) one of the other few statutory exemptions to compulsory public school attendance applies to the child.

Id. (citation omitted).

4 *Id.* at 80–83.

5 CAL. EDUC. CODE § 48222 (West 2006).

6 CAL. EDUC. CODE § 48200 (West 2006).

7 People v. Turner, 263 P.2d 685 (Cal. App. Dep't Super. Ct. 1953); *In re* Shinn, 16

However, in the fifty years since these decisions, home schooling has grown explosively from a curiosity on the fringe of education to a competitive and widely-practiced instructional form.[8] As a result of *In re Rachel L.*, parents wondered if they would have to leave California to avoid criminal prosecution.[9] Home schooling advocates were shocked that an educational methodology—which had gained universal acceptance throughout the United States as a legal form of education—could be effectively outlawed in the country's most populous state.[10] Further, the court of appeal's decision to settle the general question of whether "parents can legally 'home school' their children,"[11] was particularly surprising since *Rachel L.* was a confidential dependency case involving issues unrelated to home schooling.[12] Less than a month later, the Court, perhaps on

Cal. Rptr. 165 (Cal. Ct. App. 1961). Aside from the private school exemption, the only exemption to California's compulsory school attendance statute which could apply to home schooling is Section 48224 of the California Education Code, the private tutor exemption. However, this exemption requires the tutor to have a state teaching credential for the grade being taught and therefore is not applicable to most home schooling parents. CAL. EDUC. CODE § 48224 (West 2006).

8 Kimberly A. Yuracko, *Education Off The Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 124 (2008) ("Home schooling is no longer a 'fringe' phenomenon.") (citations omitted); Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 591 n.31 (Cal. Ct. App. 2008) ("Studies indicate 2.2 percent of the entire student population of the United States was home schooled in 2003, up from 1.7 percent in 1999."); U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *The Condition of Education 2005*, June 2005, at 32, *available at* http://nces.ed.gov/pubs2005/2005094.pdf ("In 2003, the number of home schooled students was 1.1 million, an increase from 850,000 in 1999."); Patricia M. Lines, U.S. Department of Education, *Homeschoolers: Estimating Numbers and Growth*, Spring 1999, at 1, *available at* http://www.ed.gov/offices/OERI/SAI/homeschool/homeschoolers.pdf (finding "[a] retroactive estimate done in 1988 suggested 10,000 to 15,000 children received their education at home in the late 1970s" and that "[e]arlier estimates, based on different methodologies, suggested 60,000 to 125,000 school-aged children for the fall of 1983; and 122,000 to 244,000 for fall of 1985; between 150,000 to 300,000 for fall of 1988").

9 Longbottom, *supra* note 1, at 11 ("California member families called HSLDA [Home School Legal Defense Association], wondering if they should move out of the state, or when a truant officer would come knocking at their door and demand their children.").

10 *Id.* HSLDA President Mike Smith commented:

> To say that I was shocked that the court in California ruled that teacher's certification was the only legal way to teach a child in California is putting it mildly . . . . It reminded me of the days when HSLDA began 25 years ago and teacher's certification was the 'sacred cow' that states were clinging to in an effort to keep home schooling from becoming a viable option.

Id.

11 *In re* Rachel L., 73 Cal. Rptr. 3d 77, 79 (Cal. Ct. App. 2008) (decertified for publication).

12 *Id.* at 80 ("A Welfare and Institutions Code section 300 petition was filed on behalf of three minor children after the eldest of them reported physical and emotional mistreatment by the children's father.").

account of the overwhelmingly negative reaction to its decision, depublished its decision and granted a petition for rehearing.[13]

The court of appeal issued its new decision, *Jonathan L. v. Superior Court*, on August 8, 2008.[14] While refusing to back down from its position that no absolute constitutional right to home school exists,[15] the *Jonathan L.* court held that California's private school exemption[16] "permit[s] home schooling as a species of private school education."[17] The court of appeal found the statutory language of the exemption to be ambiguous with respect to its applicability to home schooling.[18] This allowed the court of appeal to conclude, based on various legislative acts relating to the private school exemption, that "[w]hile the Legislature has never acted to expressly supersede *Turner* and *Shinn*, it has acted as though home schooling is, in fact, permitted in California."[19] In addition, the *Jonathan L.* court found it significant that the Superintendent of Public Instruction, the Department of Education, the Governor, and the Attorney General all accepted home schooling as a legal type of private schooling.[20] Finally, the court of appeal stated that its interpretation of the private school exemption avoided serious constitutional questions about the validity of a law which renders home schooling illegal.[21]

The court of appeal concluded its opinion with the observation that, "the fact that home schooling is permitted in California as the result of implicit legislative recognition rather than explicit legislative action has resulted in a near absence of

13 Jonathan L. v. S.C.L.A., B192878, 2008 Cal. App. LEXIS 548 (Cal. Ct. App. Mar. 25, 2008). The *Jonathan L.* court received and considered sixteen amicus briefs from a wide range of governmental and private parties. Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 577 n.3 (Cal. Ct. App. 2008).

14 *Jonathan L.*, 81 Cal. Rptr. 3d 571.

15 *Id.* at 592 ("[N]o such absolute right to home school exists."). Because the court found that parents do not have an absolute right to home school, it held that a dependency court may restrict home schooling if necessary to achieve California's interest in ensuring a child's safety. *Id.* at 592–94. However, the court recognized that grave constitutional issues regarding parents' first amendment rights and the right to direct their children's upbringing would be raised "[i]f home schools are not permitted in California unless under the private tutor exemption (requiring the tutor to be credentialed)." *Id.* at 591.

16 CAL. EDUC. CODE § 48222 (West 2006).

17 *Jonathan L.*, 81 Cal. Rptr. 3d at 576. The Court remanded the case to the dependency court to consider whether the factual situation before it justified restricting home schooling because of an overriding governmental interest in the child's safety. *Id.* at 594.

18 *Id.* at 586.

19 *Id.* at 588–89.

20 *Id.* at 591.

21 *Id.*

objective criteria and oversight for home schooling."[22] The *Jonathan L.* court contrasted this lack of oversight with numerous limitations utilized by other states to regulate home schooling.[23] Consequently, the court of appeal stated that "additional clarity in this area of the law would be helpful."[24]

This Comment focuses on the *Jonathan L.* court's plea for clarity. First, this Comment proposes that the California Legislature explicitly legalize home schooling by enacting a new statutory exemption to California's compulsory school attendance statute. Second, it suggests that the government impose two limitations on home schooling: one which requires parents to file an annual notice of intent to home school their children, and another which requires home schooled students to take annual standardized tests. These requirements will protect California's compelling interest in an educated citizenry while minimizing any imposition upon the parental right to direct the education of their children.

A perusal of the history of education in America reveals a general trend toward government control over the education of children.[25] The universal adoption of compulsory school attendance laws is, perhaps, the clearest reflection of this tendency.[26] The enactment of such laws reflects the principle that states have a compelling interest in education.[27] However, this trend towards government oversight has its detractors.[28] Modern-day home schooling represents one clear educational form sharply divergent from the general trend towards government control. This educational form is founded upon a belief in the supremacy of the parental right to direct the upbringing and education of their children.[29]

In the context of home schooling, these two interests—the governmental and parental—are opposed because home schooling

22 *Id.* at 595.

23 *Id.* at 595–96 (listing a variety of common limitations imposed on home schooling in other states).

24 *Id.*

25 *See infra* Part I.

26 National Conference of State Legislatures, *Compulsory Education: Overview*, http://www.ncsl.org/programs/educ/CompulsoryEd.htm (last visited Jan. 9, 2010) ("Today, every state and territory requires children to enroll in public or private education or to be home-schooled.").

27 *See infra* Part II.C.

28 *See infra* Part I.

29 Rob Reich, *Why Home Schooling Should Be Regulated*, *in* HOMESCHOOLING IN FULL VIEW: A READER 109, 110 (Bruce S. Cooper ed., 2005) ("Home schoolers of all stripes believe that they alone should decide how their children are educated, and they join together in order to press for the absence of regulations or the most permissive regulation possible.").

parents want complete control over their children's environment and curriculum, removed from the supervision of public officials.[30] However, governmental oversight of some kind is necessary to protect the state's interest in ensuring that students are receiving an adequate education.[31] Without limitations, the California Constitution's assertion of a governmental interest in education becomes meaningless rhetoric, or at least, a mere desire which the state is unable to enforce.[32] On the other hand, home schooling limitations necessarily impose upon the parental interest to the degree they limit and direct the parents' actions.[33] Where such limitations unreasonably trample upon the parental interest in directing the education of their children, courts have found the restrictions unconstitutional.[34] Hence, the question arises as to what limitations, if any, should be adopted, which guarantee that each and every home schooled child receives an adequate education, but which do not unconstitutionally impose upon the parental interest.

In order to answer this question a consideration of both the state and parental interests in education is required. According to the United States Supreme Court, the parents' interest in directing the education of their children is a fundamental constitutional right.[35] Whereas, the state interest in an educated citizenry is a compelling interest in ensuring that students become economically independent and civically responsible.[36]

In order to select the most suitable limitations, a review of restrictions commonly adopted by other states is helpful because

30 *Id.*

31 *See infra* Part II.A.

32 CAL. CONST. art. IX, § 1.

33 *See* Reich, *supra* note 29.

34 Jeffery v. O'Donnell, 702 F. Supp. 516, 518 (M.D. Pa. 1988) (finding a private tutor statute which required the parent to be "properly qualified" and the curriculum "satisfactory" to be unconstitutionally vague); Mazanec v. N. Judson-San Pierre Sch. Corp., 614 F. Supp. 1152, 1160 (N.D. Ind. 1985) (finding that parents have the constitutional right to educate their children in a home environment and that "[i]t is now doubtful that the requirements of a formally licensed or certified teacher . . . would now pass constitutional muster"), *aff'd*, 798 F.2d 230 (7th Cir. 1986); People v. DeJonge, 501 N.W.2d 127 (Mich. 1993) (striking down a teacher certification requirement for private and home schools as unconstitutional); State v. Newstrom, 371 N.W.2d 525, 527, 532–33 (Minn. 1985) (finding that a requirement that private and home school teachers have qualifications "essentially equivalent" to public school teachers is too vague to "serve as a basis for a criminal conviction," and therefore an unconstitutional violation of due process under the 14th Amendment); State v. Popanz, 332 N.W.2d 750, 756 (Wis. 1983) (holding the state compulsory school attendance statute was "void for vagueness insofar as it fails to define 'private school'"); Roemhild v. State, 308 S.E.2d 154, 159 (Ga. 1983) (holding the state compulsory school attendance law to be "unconstitutionally vague").

35 Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion). See *infra* Part II.B for a discussion of the right of parents to direct the upbringing of their children.

36 *See infra* Part II.C.

these restrictions are widely accepted as reasonable and effective, and they have not been struck down as unconstitutional.[37]

Part I of this Comment summarizes the history of education in America discussing in particular the emergence of modern home schooling. Part II considers the conflict between the governmental and parental interests in education created by home schooling and provides an in-depth analysis of these dueling interests. Part III concludes with a proposal for enacting a home school exemption to California's compulsory school attendance statute, a consideration of limitations adopted by other states, and a proposal for adopting two specific home schooling restrictions.

I. EDUCATION IN AMERICA: HOME SCHOOLING AND THE TREND TOWARDS GOVERNMENT OVERSIGHT

Since the inception of the United States of America, a widespread appreciation of the importance of education has existed.[38] In fact, Thomas Jefferson proposed a system of free schools to be maintained by taxation.[39] However, until the public or common school movement, education was administered locally and usually privately.[40] In the early 1800s, prominent educators began to successfully advocate the creation of statewide public school systems.[41] Every state had a system of free public schools by 1850.[42] Fifty years later the public school movement accomplished its objective of mandatory public education for the elementary level in almost every state.[43] Today, every state has enacted compulsory school attendance statutes.[44]

Thus, the history of education in the United States is one which manifests a trend towards institutionalization and government control.[45] However, this trend has always had its detractors. For example, heavy opposition to publicly controlled schools came from Roman Catholics who believed that the values imparted in public schools had unpalatable Protestant biases.[46]

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37 *See infra* Part III.B.1.

38 ENCYCLOPEDIA BRITANNICA, INC., THE NEW ENCYCLOPEDIA BRITANNICA 18, at 48 (15th ed. 2002) ("Several of the Founding Fathers expressed belief in the necessity of public education . . . .").

39 *Id.*

40 *Id.*

41 *Id.* at 48–49.

42 MURRAY N. ROTHBARD, EDUCATION FREE & COMPULSORY 41 (Ludvig von Mises Inst. 1999) (1971).

43 *Id.*

44 *See* National Conference of State Legislatures, *supra* note 26.

45 EDGAR W. KNIGHT, EDUCATION IN THE UNITED STATES 44 (3rd ed. 1951).

46 Carl F. Kaestle, *Victory of the Common School Movement: A Turning Point in American Educational History*, *in* HISTORIANS ON AMERICA 23, 26 (George Clack & Paul

In the 1950s, home schooling arose as an alternative to the public school system.[47] At the outset, home schooling was dominated by liberal and progressive philosophies.[48] However, by the early 1990s, home schooling was predominately characterized by conservative Christian ideologies.[49]

Since its emergence, home schooling has experienced explosive growth throughout the nation. Estimates indicate that as few as 10,000 to 15,000 students were home schooled in the late 1970s.[50] This number increased dramatically in the 1980s—such that by the end of that decade an estimated 150,000 to 300,000 students were home schooled in America.[51] The 1990s saw a continuation of this rapid growth and by 1998 estimates put the number of home schooled children at nearly 1 million.[52] The National Center for Education Statistics reports that in 2003 the number of home schooled students had climbed to 1.1 million.[53]

As public education became universally available, a question arose regarding whether the states had the power to force every student to attend public schools and thereby eliminate any alternate forms of education.[54] Given that the public school movement included objectives such as uniting a widely diverse population and ensuring competent schooling to all citizens,[55] some thought that states had such a power.[56] However, in *Pierce v. Society of Sisters*, the United States Supreme Court unanimously held that a state act which requires all students to attend public school without providing an exception for private forms of education, "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[57] In stating that "[t]he child is not

Malamud eds., 2007), *available at* http://www.america.gov/publications/books/historians onamerica.html.

47 Yuracko, *supra* note 8, at 125.

48 *Id.* at 125–26.

49 *Id.*

50 Lines, *supra* note 8, at 1 ("A retroactive estimate done in 1988 suggested 10,000 to 15,000 children received their education at home in the late 1970s . . . .").

51 *Id.* ("Earlier estimates, based on different methodologies, suggested 60,000 to 125,000 school-aged children for the fall of 1983; and 122,000 to 244,000 for fall of 1985; between 150,000 to 300,000 for fall of 1988 . . . .").

52 *Id.* ("[T]he number could have reached about 1,000,000 children by the 1997–98 school year.").

53 *The Condition of Education 2005*, *supra* note 8, at 32.

54 Pierce v. Soc'y of Sisters, 268 U.S. 510, 531 (1925) (finding Oregon statute's "manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade").

55 ROTHBARD, *supra* note 42, at 44.

56 *Id.*; *Pierce*, 268 U.S. at 531.

57 *Pierce*, 268 U.S. at 534–35. Notably, the Oregon statute provided an exception for individualized private instruction. Hence the Court's ruling in *Pierce* means that the

the mere creature of the State"[58] the Court definitively determined that the "compulsory" character of the public school system is far from absolute. Rather, certain exceptions must exist for alternative forms of education because parents "who nurture [their child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[59] In later decisions, the Supreme Court reaffirmed the principles laid down in *Pierce*.[60]

In summary, since the founding of America, education has generally progressed toward government oversight and control. However, forms of education diverging from this general trend have developed and gained the protection of the Constitution under *Pierce*. Home schooling is one such instructional type which has undergone significant growth during the past few decades.

II. DUELING INTERESTS: AN ANALYSIS OF PARENTAL AND STATE INTERESTS AND HOW THEY CONFLICT

If the history of education in the United States reflects a trend towards governmental oversight,[61] the emergence of home schooling clearly represents a diverging movement towards independent parental control.[62] The latter adopts, as a fundamental principle, the parents' interest in directing the upbringing of their children.[63] In the context of home schooling, this interest inevitably conflicts with the state's interest in education.[64] The resolution of this conflict depends upon the character of each interest.

A. Oversight and Control: An Inevitable Conflict between Parents and the State

In asserting that "[n]o question is raised concerning the power of the State reasonably to regulate all schools," the United States Supreme Court made it clear that *Pierce* does not constitute a complete rejection of the idea that the state has an interest in the education of its citizens which might at times

state cannot assure the rights of parents by merely providing a single, alternative form of education to public school. *Id.* at 530 n.* (1925).

58 *Id.* at 535.

59 *Id.*

60 *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Troxel v. Granville, 530 U.S. 57 (2000).

61 *See supra* Part I.

62 *See* Reich, *supra* note 29.

63 *See* Reich, *supra* note 29.

64 *See infra* Part II.A.

justify interfering with parental decisions regarding education.[65] However, the Court warned that this power is not absolute—it must not unreasonably burden parents' right to educate their children.[66] Thus, *Pierce* indicates that both the state and parents have a valid interest in the education of children.[67]

Ideally, both of these interests—which have as their object the promotion of excellence and maturity in the student, in the one case due to love and a high sense of obligation and in the other due to civic and economic concerns—will be in perfect harmony. However, in the context of home schooling, parents desire absolute control over the educational environment, completely removed from supervision by public officials.[68] Without any governmentally imposed restrictions—including a basic notice requirement—on home schooling, the state's interest in an educated citizenry is rendered unenforceable since the state cannot determine whether the children are being educated at all, much less, whether they are being adequately educated. Therefore, home schooling creates an inevitable conflict between the parents' interest in directing their children's education, free from any governmental impositions, and the state's interest in adopting some kind of home school restrictions which ensure that home schooled children are adequately educated.

There are three possible solutions to this conflict. First, the parental interest could completely prevail over the state interest—resulting in the complete deregulation of home schooling.[69] Second, the state interest could absolutely overcome the parental interest—rendering home schooling unlawful.[70] Third, the two interests could be balanced—preferably by restrictions that ensure that every home schooled student is given an adequate education without unreasonably imposing on the parental interest. The appropriate solution depends on the legal import of the parental and state interests in education. Therefore, the answer to the *Jonathan L.* court's request for "additional clarity" requires a consideration of both of these interests.[71]

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

66 *Id.* at 535.

67 *See infra* Part II.B–C.

68 *See* Reich, *supra* note 29.

69 See *infra* note 104 for an example of an organization which supports this alternative.

70 See *infra* note 103 for an example of one thinker who supports this possibility.

71 Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 596 (Cal. Ct. App. 2008).

B. The Fundamental Constitutional Right of Parents to Direct the Upbringing of Their Children

Western civilization, with rare exceptions, has always recognized that parents have a special interest in directing the upbringing of their children.[72] When America was born, no one dreamed that the government would ever challenge the rights of fit parents to exercise authority over their children.[73] Hence, there is no express inclusion of parental rights in the Constitution or Bill of Rights.[74] However, the United States Supreme Court has a long history of recognizing that the Fourteenth Amendment Due Process clause affords parents a fundamental constitutional right to direct the upbringing and education of their children.[75]

In *Troxel v. Granville*, the Supreme Court held that parents have a "fundamental right to make decisions concerning the care, custody, and control of" their children.[76] The Court stated that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[77] Further, the Court cited a lengthy history of Supreme Court decisional authority supporting its assertion that the United States Constitution protects the fundamental right of parents to direct the upbringing of their

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72 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923). The Court discussed Plato's theory that children should be held in common without knowing their parents and Sparta's practice of taking children from their parents at a young age and found that:

> [a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Id.

73 Mike Farris, *Parental Rights: Why Now is the Time to Act*, THE HOME SCHOOL COURT REPORT, Mar.–Apr. 2006, at 6.

> Moreover, it was unimaginable that a socialistic state which purported to care for children over and against fit and willing parents would ever result from the state and national governments being created in the wake of our separation from Britain. No one would ever envision a form of government that pitted fit parents against the state over the right to make decisions concerning their children.

Id. at 8.

74 *Id.* at 7.

75 Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion) (finding that the Fourteenth Amendment Due Process Clause guarantees parents a fundamental constitutional right to direct the upbringing and education of their children and reciting an extensive history of United States Supreme Court cases recognizing that this parental right is rooted in the Fourteenth Amendment).

76 *Id.* at 71; *id.* at 77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring).

77 *Id.* at 65 (plurality opinion).

children.[78] Among the cited authority was *Wisconsin v. Yoder* wherein the Court stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[79] The *Troxel* decision also referenced *Pierce*,[80] wherein the Court found that the parental right to control the education of children was a constitutional right stating that:

> As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[81]

Pierce was itself based on the earlier *Meyer v. Nebraska* decision, which recognized "the power of parents to control the education of their own."[82]

In summary, the decisional history of the United States Supreme Court reflects the established principle that parents have a fundamental right, protected by the Federal Constitution, to direct the education of their children. However, the state also has an undeniable interest in the education of its citizens, which may clash with this parental right.

C. The State Interest in Ensuring that Citizens are Economically Independent and Civically Responsible

Though the parental interest in directing the education of children rises to the level of a constitutionally protected fundamental right, it is not an absolute right. The California Court of Appeal held as much in its *Jonathan L.* decision, finding that no "absolute right to home school exists."[83] Relying on United States Supreme Court and California Supreme Court authority, the *Jonathan L.* court ruled that the parental "right must yield to state interests in certain circumstances."[84] Thus,

78 *Id.* at 65–66.
79 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).
80 *Troxel*, 530 U.S. at 65.
81 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).
82 Meyer v. Nebraska, 262 U.S. 390, 401 (1923).
83 Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 592 (Cal. Ct. App. 2008).
84 *Id.* at 592–93 (citing *Yoder*, 406 U.S. at 233–34 for the rule that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it

the parental right to control the education of their child may be subjected to reasonable limitations where the state demonstrates a compelling interest that cannot be protected without the limitations.[85]

One such compelling state interest is ensuring that its citizens are educated.[86] The idea that governments have an interest in education which empowers them to exercise control over the education of their citizens reaches back to the foundations of western civilization.[87] However, the fundamental concept of liberty upon which America was founded, and which remains deeply rooted in its legal traditions and constitutional heritage, would never allow the government to completely deprive parents of the control over their children short of extenuating circumstances.[88] Nonetheless, every state does have an indisputable interest in ensuring that its citizens are educated.[89]

But in what does the state's interest in education consist? A purview of American jurisprudence reveals that this interest has two crucial elements—the interest that citizens be civically responsible, and the public policy interest that citizens become economically self-sufficient so as not to constitute a societal burden.

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appears that parental decisions will jeopardize the health or safety of the child" and *In re* Marilyn H., 851 P.2d 826, 833 (Cal. 1993) for the principle that the "welfare of a child is a compelling state interest that a state has not only a right, but a duty to protect" and finding that the state has a compelling interest in a child's safety and therefore may interfere with parental right to home school where it has been judicially determined that there is a substantial risk to the child's safety because the parents have been found to be abusive and unfit in the dependency court).

85 Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.") (citations removed).

86 *Jonathan L.*, 81 Cal. Rptr. 3d at 596 (stating that California has a "compelling interest in educating all of its children"); CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."); *Meyer*, 262 U.S. at 401 ("That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear . . . .").

87 *Meyer*, 262 U.S. at 401–02.

88 *Id.* at 402 (finding that entrusting total control of a child to public officials would do "violence to both letter and spirit of the Constitution"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

89 *Jonathan L.*, 81 Cal. Rptr. 3d at 596 (finding that California has a compelling interest in educating its citizens). *See also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the State reasonably to regulate all schools . . . .").

Undoubtedly, any consideration of California's interest in education should begin with an examination of the preeminent law of California—its Constitution.[90] Article 9, Section 1 of the California Constitution states that, "A general diffusion of knowledge and intelligence *being essential to the preservation of the rights and liberties of the people*, the Legislature shall encourage by all suitable means the promotion of *intellectual*, scientific, moral, and agricultural improvement."[91] This constitutional language demonstrates that California's interest in education is to ensure that its citizens become civically responsible and thereby capable of preserving "the rights and liberties of the people."[92]

Since the parents' fundamental right to control the upbringing and education of their children is protected by the Federal Constitution, the United States Supreme Court's statements regarding a state's interest in an educated citizenry are particularly significant. On numerous occasions the Supreme Court has held that the government's compelling interest in education basically consists in ensuring the civic competence and economic independence of its citizens. In *Yoder*, the Court asserted that a state's compelling interest in education consists in "prepar[ing] individuals to become self-reliant and self-sufficient participants in society."[93] The Court also spoke of education as the preparation for "citizens to participate effectively and intelligently in our open political system."[94] In *Plyler v. Doe*, the Court stated that, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."[95] In this case, the Court held that a state is only required to ensure that students are provided with a minimum level of education so that they are able to lead "economically productive lives" and maintain "the fabric of our society."[96] In *Pierce*, the Court noted that a state has the power to require "that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[97] Thus, according to the United States Supreme Court, a state's interest in an educated citizenry is one which provides the basic competency

90 Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 834 (Cal. 1991) ("The California Constitution is the supreme law of our state . . . .").

91 CAL. CONST. art. IX, § 1 (emphasis added).

92 *Id.*

93 Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

94 *Id.*

95 Plyler v. Doe, 457 U.S. 202, 221 (1982).

96 *Id.*

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

necessary to ensure that students are economically productive as well as civically active and conscientious citizens.

Further, the California Supreme Court has also focused on the economic and civic independence of the student in discussing California's interest in education.[98] In *Serrano v. Priest*, the court stated that, in today's state, education "has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life."[99] Beyond this, other courts have found that a state's interest in education is limited to ensuring that students receive the minimum educational skills necessary to function as economically and civically independent adults.[100] Finally, scholars have also posited that a state's interest in education is limited to two basic types: economic and civic.[101]

Thus, a state's interest in education requires educators to provide students with the basic skills minimally necessary to become economically productive as well as civically conscientious citizens. In other words, 'education'—understood as the object of a state's interest—refers to a basic competency in those core subjects necessary for independent functioning in the democratic society of America.[102]

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98 Veterans' Welfare Bd. v. Riley, 208 P. 678, 681 (Cal. 1922) ("It is recognized that the function of education is to fit the scholar for the problem of every-day life . . . ."); *In re* Shinn, 16 Cal. Rptr. 165, 168 (Cal. Ct. App. 1961) ("A primary purpose of the educational system is to train school children in good citizenship, patriotism and loyalty to the state and the nation as a means of protecting the public welfare.").

99 Serrano v. Priest, 487 P.2d 1241, 1255–56 (Cal. 1971).

100 Yuracko, *supra* note 8, at 155 & n.159 (citing several examples of courts which have "emphasized the democracy- and citizenship-promoting purposes of the [constitutional education] clauses as well as their importance for economic prosperity").

101 Thomas W. Washburne, *The Boundaries of Parental Authority: A Response to Rob Reich of Stanford University*, April 22, 2002, http://www.hslda.org/docs/nche/000010/200204230.asp ("It is well understood from a legal perspective that the government's *compelling* interest in education is limited. It has been held numerous times that the government's interest in education is basically only of two varieties: civic and economic."); Rob Reich, *Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling*, *in* NOMOS XLIII, MORAL AND POLITICAL EDUCATION 275, 286 (Stephen Macedo & Yael Tamir eds., 2002) (stating that "[f]irst, the state has an interest in educating children to become able citizens. Second, the state has an interest in performing a backstop role to the parents in assuring the healthy development of children into independently functioning adults"); Yuracko, *supra* note 8, at 138–42 (citing scholars who argue that the state constitutions and the Federal Constitution impose a duty on states to ensure that their citizens receive an adequate education in basic skills and an opportunity for equal citizenship).

102 *See* Yuracko, *supra* note 8, at 136 ("[C]ourts have interpreted clauses of every type as obligating states to establish and operate public schools that provide children with a basic minimum or adequate education."). A thorough treatment of the definition of 'education' and analysis of what particular skills or subjects constitutes the minimal education necessary to satisfy the state's interest is beyond the scope of this Comment.

In summary, in the context of home schooling, the parental and state interests are, to a degree, in conflict. The solution to this conflict depends upon the import of each interest. The parents' interest is a fundamental constitutional right to direct the education of their children. The state interest is a compelling interest in ensuring that citizens are economically independent and civically responsible.

III. PROPOSAL: STRIKING THE PROPER BALANCE BETWEEN PARENTAL AND STATE INTERESTS IN EDUCATION

As discussed above, two authorities have valid interests in education—the state in ensuring that children are provided with an education which makes them civically responsible and economically independent, and the parents in directing and controlling the education of their children. Home schooling presents unique difficulties to the state's attempt to ensure that its citizens are receiving adequate education since parents exercise nearly absolute control over the educational environment. Simply stated, home schooling creates an inevitable conflict between the two interests because the state must either leave its interest unprotected or impose on the parental interest. Therefore, the question is, "What method should the state adopt to protect its interest without unreasonably imposing on the parents' right?"

In answering this question, some have proposed that home schooling be rendered illegal,[103] while others have asserted that the state should refrain from any regulation of home schooling whatsoever.[104] The problem with either of these positions is that they allow one interest to eliminate the other.[105] However, each interest is a compelling interest which deserves protection.[106] Therefore, the best method for resolving the conflict must balance both interests according to their respective purposes and importance. Some restrictions should be adopted to protect the state's interest. However, to prevent the state from needlessly trampling parental rights, these restrictions should be limited to those necessary to ensure that children are receiving the basic education sufficient to make them economically independent and civically responsible.

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103 Reich, *supra* note 101, at 298 ("Levinson would presumably rule out homeschooling as an educational alternative.").

104 Yuracko, *supra* note 8, at 127 (finding that HSLDA is committed "to ensuring parents' unfettered right to homeschool").

105 Further, the former proposal would violate the parents' constitutional rights. *See supra* Part II.B.

106 *See supra* Part II.B–C.

In order to avoid permitting the imposition of unreasonable limitations on a fundamental constitutional right, any attempt to infringe upon the parents' right to direct the education of their children should be subjected to strict scrutiny.[107] This heightened level of scrutiny is particularly necessary in cases involving home schooling since many parents have religious reasons for home schooling.[108] Both a right to educate and a right to free exercise of religion are at stake for these families.

According to the court of appeal in *Jonathan L.*, to satisfy the standard of strict scrutiny "a state must establish: (1) that the law in question is supported by a compelling governmental interest and; (2) that the law is narrowly tailored to meet that end."[109] The *Jonathan L.* court noted that "[a]s an alternative phrasing of the second element, the statute must represent the 'least restrictive means' of achieving the interest."[110] Therefore, California should adopt home school limitations which utilize the least restrictive means to protect its interest in education—that is, restrictions which encroach as little as possible on the parents' fundamental right to direct the upbringing of their children.

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107 Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights."); Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 592–93 (Cal. Ct. App. 2008) (finding that "[i]n light of *Troxel*, two California cases have applied strict scrutiny in cases alleging violations of the parental liberty interest." Also, that "if a restriction on the right satisfies strict scrutiny, the restriction is constitutional") (citations omitted). S*ee also Troxel*, 530 U.S. at 65, where the Court found that:

> [t]he Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests.

(plurality opinion) (citations omitted); *id.* at 76–77 (Souter, J., concurring) (rejecting the "State's particular best-interests standard" as too loose a standard which renders the statute "unconstitutional on its face" since it violates the fundamental parental constitutional right to direct the upbringing of children).

108 *See supra* Part II; Yuracko, *supra* note 8, at 126–27 (finding that modern home schooling is dominated by a conservative Christian movement); *Jonathan L.*, 81 Cal. Rptr. 3d at 592 (citing prior cases to find that "it has been suggested that when a parental liberty interest claim is combined with a free exercise claim, strict scrutiny is required") (emphasis omitted). Numerous states have enacted legislation which requires state action to pass strict scrutiny if it substantially burdens parents' free exercise of religion. ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (2004); CONN. GEN. STAT. ANN. § 52-571b (2005); FLA. STAT. ANN. § 761.03 (West 2005); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); MO. ANN. STAT. § 1.302 (West 2009); NEV. REV. STAT. ANN. § 392.700 (LexisNexis 2008); N.M. STAT. ANN. § 28-22-3 (LexisNexis 2006); 51 OKLA. STAT. ANN . tit. 51, § 253 (West 2008); 71 PA. STAT. ANN. § 2404 (West Supp. 2009); R.I. GEN. LAWS § 42-80.1-3 (2006); S.C. CODE ANN. § 1-32-40 (2005); VA. CODE ANN. § 57-2.02. (2007).

109 *Jonathan L.*, 81 Cal. Rptr. 3d at 593.

110 *Id.* (quoting Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 91 (Cal. 2004)).

First, this Comment proposes that the California Legislature legalize home schooling in the state by enacting a statutory exception to the state's compulsory school attendance statute. Second, to adequately protect California's interest in an educated citizenry, this Comment suggests that the government adopt two home schooling limitations: one which requires parents to file an annual notice of intent to home school and, another which requires home schooled students to take annual standardized tests.

A. Enacting a Home Schooling Exemption to California's Compulsory School Attendance Statute

The court in *Jonathan L.* observed that the reason California has no "objective criteria and oversight for home schooling" rests in the fact that home schooling "is permitted in California as the result of implicit legislative recognition rather than explicit legislative action."[111] The court of appeal noted that home schooling parents must theoretically adhere to some of the other requirements of the private school exemption to California's compulsory school attendance statute.[112] However, the court also found that, practically, there is no "enforcement mechanism" to ensure that, beyond filing a private school affidavit, home schooling parents are complying with the statutory requirements of the private school exemption.[113]

Indeed, even though the *Jonathan L.* court ultimately concluded that this exemption applies to home schooling, it noted that past case authority and legislative history appears to conflict with this ruling.[114] To further complicate the issue,

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111 *Jonathan L.*, 81 Cal. Rptr. 3d at 595.

112 *Id.* at 595 n.35. The court noted that:

> The remaining restrictions on home schooling in California, which are not at issue in this case, include: (a) home schooling parents must file a private school affidavit; (b) home schooling parents must be capable of teaching; (c) home schooling parents must teach in English and shall offer instruction in the subjects required to be taught in public schools; and (d) home school education must be a 'full-time' school.

Id.

113 *Id.* at 596 ("California impliedly allows parents to home school as a private school, but has provided no enforcement mechanism. As long as the local school district verifies that a private school affidavit has been filed, there is no provision for further oversight of a home school.").

114 *Id.* at 585–90. The court noted that "two California cases which have addressed the issue have concluded that a home school cannot constitute a private full-time day school[,]" and that

> [t]he most persuasive interpretation of the legislative history of the original statutory provisions supports the conclusion that a home school is not a private school. However, the most logical interpretation of subsequent legislative enactments and regulatory provisions supports the conclusion that a home

numerous legislative enactments have created exceptions, for home schools, to various requirements imposed on traditional private schools.[115] In fact, according to the court of appeal, many of the restrictions pertaining to private schools "would be absurd if applied to every home school."[116] Hence, the very legislative acts upon which the *Jonathan L.* court based its holding—those that purport to apply to all private schools but which include exceptions for home schools—draw out the markedly different characters of traditional private schools and home schools and create double standards. Consequently, the regulatory scheme of the private school exemption makes it virtually impossible for California to ensure that its interest in education is being protected in home schools—in part, no doubt, because the exemption was designed for traditional private schools, not home schools.[117]

For these reasons, this Comment proposes first that the California Legislature adopt a new statutory exemption to the state's compulsory school attendance statute which explicitly permits home schooling in California. The benefit of such an explicit exemption is manifold. First, any question as to the validity of home schooling under California law will be put to rest.[118] Second, creating a distinct home schooling exemption will eliminate the unnecessary legal complexity and confusion generated by the legislatively created "home school" exceptions to the numerous regulations and statutes intended to apply to traditional private schools. That is, the creation of a new statutory exemption for home schooling will simplify the body of law relating to California's compulsory school attendance statute. Third, and arguably most important, an exemption which explicitly permits home schooling serves as the basis for adopting explicit home school restrictions to protect California's interest in education.

> school can, in fact, fall within the private school exception to the general compulsory education law.

Id.

115 *Id.* at 588–89.

116 *Id.* at 589 n.28.

117 *Id.* at 587–88.

118 *See*, *e.g.*, *In re* Rachel L., 73 Cal. Rptr. 3d 77 (Cal. Ct. App. 2008) (decertified for publication); *In re* Shinn, 16 Cal. Rptr. 165 (Cal. Ct. App. 1961); People v. Turner, 263 P.2d 685 (Cal. App. Dep't Super. Ct. 1953). *But see Jonathan L.*, 81 Cal. Rptr. 3d 571, 576 (holding that "California statutes permit home schooling as a species of private school education").

B. Adopting Specific Limitations on Home Schooling in California

An explicit exemption permitting home schooling is only the first step which serves as a basis for adopting the restrictions necessary to protect California's interest in an educated citizenry. As discussed above, the government should only adopt limitations that pass the strict scrutiny test, that is, are the least restrictive means to protect California's interest.[119] Hence, this section first considers home school limitations widely used by other states. Second, it suggests and discusses two home schooling restrictions; namely, mandatory filing of notice of intent to home school and standardized testing. Third, this section concludes with an analysis of the reasons for rejecting the other commonly adopted limitations.

1. Common Limitations Imposed by Other States

In order to protect their interest in education, other states have enacted explicit home schooling statutes and imposed limitations on home schools.[120] A summary of the widely used restrictions is helpful for two reasons. First, the fact that these restrictions became law indicates that a significant number of legislators thought they would be effective. Second, that these limitations have remained law in many states suggests that experience has bestowed its imprimatur upon them.

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119 *See supra* Part III.

120 A majority of the states and the District of Columbia have enacted statutes which expressly apply to home schooling. Further, the rest of the states permit home schooling under more general statutory exceptions to compulsory school attendance laws. ARIZ. REV. STAT. ANN. § 15-802 (2004); ARK. CODE. ANN. §§ 6-15-501 to -508 (2007); COLO. REV. STAT. ANN. § 22-33-104.5 (West 2005); DEL. CODE ANN. tit. 14, § 2703A (2007); D.C. CODE ANN. §§ 38-202, -205 (LexisNexis 2007); FLA. STAT. ANN. § 1002.41 (West 2005); GA. CODE ANN. § 20-2-690(c) (2009); HAW. REV. STAT. ANN. § 302A-1132(a)(5) (LexisNexis 2006); IOWA CODE ANN. §§ 299A.1–299A.10 (West 2009); LA. REV. STAT. ANN. § 17:236 (2001); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008); MD. CODE ANN, EDUC. § 7-301 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 380.1561(3)(f) (West 2005); MINN. STAT. ANN. § 120A.22 (West 2008); MISS. CODE ANN. § 37-13-91(3)(c) (2008); MO. ANN. STAT. § 167.031(2) (West 2000); MONT. CODE ANN. § 20-5-102(2)(e) (2009); NEV. REV. STAT. ANN. §§ 392.700, 392.070 (LexisNexis 2008); N.H. REV. STAT. ANN. §§ 193-A:1 to -10 (LexisNexis 2006); N.M. STAT. ANN. § 22-1-2 to -2.1 (LexisNexis 2006); N.Y. EDUC. LAW § 3204(1) (McKinney 2009); N.C. GEN. STAT. §§ 115C-563 to -565 (2007); N.D. CENT. CODE §§ 15.1-20-02 to -04, 15.1-23-1 to -19 (2003); OHIO REV. CODE ANN. § 3321.04(A)(2) (West 2005); OR. REV. STAT. ANN. §§ 339.030, 339.035 (West 2007); 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 2006); R.I. GEN. LAWS § 16-19-1(a) (2006); S.C. CODE ANN. § 59-65-40 (2005); TENN. CODE ANN. § 49-6-3050 (2009); UTAH CODE ANN. § 53A-11-102(2) (2006); VT. STAT. ANN. tit. 16, §§ 11(a)(21), 166b (2009); VA. CODE ANN. § 22.1-254.1 (2007); WASH. REV. CODE ANN. §§ 28A.200.010, 28A.225.010 (West 2006); W. VA. CODE ANN. § 18-8-1a(c) (LexisNexis 2008); WIS. STAT. ANN. §§ 118.15, 118.165(1) (West 2004); WYO. STAT. ANN. §§ 21-4-101, -102 (2009).

The most prevalent restriction enacted requires parents to file an affidavit of intent to home school with local school board or county superintendent of schools.[121] Nearly half of the states also require parents to keep records of courses taken, attendance, or academic progress.[122] A significant number of states require the instructor[s] to meet certain minimum qualifications such as being "competent" to teach, passing a state or national teaching test, having a high school diploma or general equivalency diploma, having a baccalaureate, or having a state teaching certification.[123] About half of the states utilize standardized testing as a method for ensuring that home schooled students are

121 ARIZ. REV. STAT. ANN. § 15-802 (2004); ARK. CODE ANN. § 6-15-503 (2007); COLO. REV. STAT. ANN. § 22-33-104.5(3)(e) (West 2005); DEL. CODE ANN. tit. 14, § 2704 (2007); FLA. STAT. ANN. § 1002.41 (West 2005); GA. CODE ANN. § 20-2-690(c) (2009); HAW. ADMIN. R. § 8-12-4(5) (2009); KY. REV. STAT. ANN. § 159.030 (West 2006); LA. REV. STAT. ANN. § 17:236.1 (2001); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008); MD. CODE REGS. 10.01.01.B (2009); MISS. CODE ANN. § 37-13-91(3)(c) (2008); MO. ANN. STAT. § 167.042 (West 2000); Mont. Code Ann. § 20-5-109 (2009); NEV. REV. STAT. ANN. § 392.700 (LexisNexis 2008); N.H. REV. STAT. ANN. §§ 193-A:5 (LexisNexis 2006); N.M. STAT. ANN. § 22-1-2.1 (LexisNexis 2006); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (2008); N.C. GEN. STAT. §§ 115C-552, -560 (2007); N.D. CENT. CODE § 15.1-23-02 (2003); OHIO ADMIN. CODE § 3301-34-03(A) (2009); OR. ADMIN. R. 581-021-0026(4) (2009); 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 2006); S.D. CODIFIED LAWS § 13-27-3 (2004); TENN. CODE ANN. § 49-6-3050(b)(1), (8) (2009); UTAH CODE ANN. § 53A-11-102 (2006); VT. STAT. ANN. tit. 16, § 166b (2009); VA. CODE ANN. § 22.1-254.1 (2007); WASH. REV. CODE ANN. § 28A.200.010(1) (West 2006); W. VA. CODE ANN. § 18-8-1(c) (LexisNexis 2008); WIS. STAT. ANN. § 115.30(3) (West 2004); WYO. STAT. ANN. § 21-4-102(b) (2009).

122 COLO. REV. STAT. ANN. § 22-33-104.5(3)(g) (West 2005); DEL. CODE ANN. tit. 14, § 2704 (2007); FLA. STAT. ANN. § 1002.41 (West 2005); GA. CODE ANN. § 20-2-690(c) (2009); HAW. ADMIN. R. § 8-12-15 (2009); IND. CODE ANN. § 20-33-2-20 (West 2008); KY. REV. STAT. ANN. § 159.040 (West 2006); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008); MD. CODE REGS. 10.01.01.D-E (2009); MINN. STAT. ANN. § 120A.22 (West 2008); MO. ANN. STAT. § 167.031.2(2)(a) (West 2000); MONT. CODE ANN. § 20-5-109 (2009); N.H. REV. STAT. ANN. § 193-A:6(I) (LexisNexis 2006); N.M. STAT. ANN. § 22-1-2.1 (LexisNexis 2006); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (2008); N.C. GEN. STAT. §§ 115C-548, 556 (2007); N.D. CENT. CODE § 15.1-23-05 (2003); 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1) (West 2006); S.C. CODE ANN. § 59-65-40 (2005); S.D. CODIFIED LAWS § 13-27-3 (2004); TENN. CODE ANN. § 49-6-3050(b)(2) (2009).

123 GA. CODE ANN. § 20-2-690(c)(3) (2009); IOWA CODE ANN. § 299A.2 (West 2009); KAN. STAT. ANN. § 72-1111 (2007); N.M. STAT. ANN. § 22-1-2.1(C) (2008); N.Y. EDUC. LAW § 3204 (McKinney 2009); N.C. GEN. STAT. § 115C-564 (2008); N.D. CENT. CODE § 15.1-23-03 (2003); OHIO ADMIN. CODE § 3301-34-03(A)(9) (2008); 24 PA. CONS. STAT. ANN. § 13-1327.1(a) (West 2006); S.C. CODE ANN. § 59-65-40(1) (2005); TENN. CODE ANN. § 49-6-3050(b)(4), (7) (2009); VA. CODE ANN. § 22.1-254.1 (2007); WASH. REV. CODE ANN. § 28A.225.010 (West 2006); W. VA. CODE ANN. § 18-8-(c) (LexisNexis 2008). *But see* Mazanec v. N. Judson-San Pierre Sch. Corp., 614 F. Supp. 1152, 1160 (N.D. Ind. 1985) ("It is now doubtful that the requirements of a formally licensed or certified teacher as there required would now pass constitutional muster."); People v. Dejonge, 501 N.W.2d 127, 129 (Mich. 1993) ("We hold 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.").

making adequate progress.[124] Finally, a few jurisdictions permit "home visits" by school officials.[125]

This Comment proposes that the California Legislature adopt two of these limitations to provide sufficient oversight and effective enforcement for protecting California's interest in an educated citizenry.

2. Requiring Parents to File an Annual Affidavit of Intent

California should require all home schooling parents to annually submit an affidavit containing a statement of intent to home school. This limitation serves the purpose of putting California on notice as to which children are being educated at home. Notice is a *sine qua non* for protecting California's interest in education because it allows the government to distinguish between truant students and home schooling students. Further, it provides the government with information needed to enforce the standardized testing restriction. Finally, it provides the government with statistical information which can be used in making critical decisions regarding the public school system.

This restriction has been adopted in a majority of states, indicating nearly universal consensus as to its value in ensuring a state's interest in education.[126] It is also minimally intrusive on the parents' right since it requires a negligible amount of effort on the part of the parents—they need only provide basic information once a year to the local school superintendent or board of education. No less intrusive method could provide California with notice regarding which children are being home schooled. Further—inasmuch as it is already required under the private school exemption—this restriction will not change the current impositions on home schooling in California.[127]

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124 ARK. CODE. ANN. § 6-15-504 (2007); COLO. REV. STAT. ANN. § 22-33-104.5(3)(f) (West 2005); GA. CODE ANN. § 20-2-690(c)(7) (2009); HAW. ADMIN. R. § 8-12-18 (2009); IOWA ADMIN. CODE r. 281-31.4 (2008); LA. REV. STAT. ANN. § 17:236.1 (2001); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008); MINN. STAT. ANN. § 120A.22 Subd.11 (West 2008); NEB. REV. STAT. ANN. § 79-318(5) (LexisNexis 2007); N.H. REV. STAT. ANN. § 193-A:6 (LexisNexis 2006); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (2008); N.C. GEN. STAT. §§ 115C-549, -564 (2007); N.D. CENT. CODE §§ 15.1-23-09, -11 (2003); OHIO ADMIN. CODE § 3301-34-04 (2009); OR. REV. STAT. ANN. § 339.035(3) to (5) (West 2007); 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1) (West 2006); S.C. CODE § 59-65-40 (2005); S.D. CODIFIED LAWS § 13-27-3, -7 (2004); TENN. CODE ANN. § 49-6-3050(b)(5) (2009); VT. STAT. ANN. tit. 16, § 166b (2009); VA. CODE ANN. § 22.1-254.1(C) (2007); WASH. REV. CODE ANN. § 28A.200.010 (West 2006); W. VA. CODE ANN. § 18-8-1(c)(2)(D) (LexisNexis 2008).

125 KY. REV. STAT. ANN. § 159.040 (West 2006); MINN. STAT. ANN. § 120A.26 Subd.1 (West 2008); NEB. REV. STAT. ANN. § 79-318(5) (LexisNexis 2007) (granting the Nebraska State Board of Education the power to adopt regulations including testing and visitation).

126 *See supra* note 121.

127 CAL. EDUC. CODE § 48222 (West 2006).

3. Requiring Students to Undergo Standardized Testing

Merely requiring an affidavit of intent to home school, although minimally intrusive, does not adequately protect California's interest in an educated citizenry. That is, filing an affidavit in no way guarantees that children are receiving the basic education required to become economically independent and civically conscientious.[128] Hence, the government should enact a second restriction requiring home schooled students to take annual standardized tests.[129] This limitation enables California to ensure that every home schooled student is making adequate academic progress since a passing score means that the student has acquired at least everything that he must know for the core subjects in his grade level.[130] Further, the determination is made using an impartial methodology—standardized testing.

A standardized testing requirement passes muster under strict scrutiny.[131] It does not infringe upon the parents' freedom to direct the child's education in any way—except to the extent that the parents must provide the child with minimal competence in basic, core subjects. Further, the imposition on the parents' time is slight since the testing will only be administered once a year. Additionally, nearly half of the states have adopted standardized testing as a way of establishing that home schooling children are making adequate progress.[132] Finally, standardized testing is single-handedly sufficient to ensure adequate academic progress.[133]

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128 *See supra* Part II.C.

129 Although standardized testing satisfies strict scrutiny, the California Legislature—in recognition of the different circumstances and exigencies of each family—may choose to include an exception to the requirement of annual standardized testing in the event that the family and the local school district mutually agree to some other reasonable method for guaranteeing that the home schooled children are receiving a minimally adequate education. Such an exception would generate extra costs for the local school district which would have to analyze and approve an alternative method for protecting the state's interest on a case-by-case basis. Therefore, the decision to allow an alternative method should be left to the discretion of the local school board—the parents would have no right to require consideration of an alternative method to standardized testing. For similar reasons, the school board would not have the authority to require parents, who are in compliance with the standardized testing requirement, to adopt an alternative method for ensuring the state's interest in education.

130 Standardized Testing and Reporting Program, http://www.startest.org/cst.html (last visited Jan. 18, 2010) (stating that California Standards Tests "measure students' progress toward achieving California's state-adopted academic content standards, which describe what students should know and be able to do in each grade and subject tested").

131 *See* Murphy v. Arkansas, 852 F.2d 1039, 1043 (8th Cir. 1988) (finding "the state has no means less restrictive than its administration of achievement tests to ensure that its citizens are being properly educated").

132 *See supra* Part III.B.1.

133 The California Department of Education should adopt remediation regulations applicable to cases where a child's test scores show inadequate progress. Given that students perform poorly on standardized tests for a wide variety of reasons—not all of

4. An Analysis of the Rejected Limitations

In contrast to these two simple limitations, the other commonly used restrictions, discussed above, either do not as effectively advance the state interest, or unnecessarily trample parents' fundamental constitutional right to direct the education of their children.[134] Clearly, adding any of these restrictions to the two proposed would violate the least restrictive means prong of the strict scrutiny standard since these two alone adequately protect California's interest in education.

As stated above, many states require parents to keep detailed records.[135] This requirement constitutes a regular, often daily, imposition on the instructor and therefore is a much more burdensome method for ensuring that the students are making adequate progress than the standardized testing requirement.[136] Hence, this restriction would probably not pass muster under strict scrutiny.

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which are related to academic ability—the remedial response should not be to immediately suspend the parents' right to educate their child at home. Such a draconian response is probably an unconstitutional violation of the parents' fundamental rights. However, some remedial response is necessary if California's interest in education is to have any meaningful protection at all. Although a full consideration of the best remedial regulations is beyond the scope of this Comment, it should be noted that other states use remedial responses ranging from requiring the child to take another test before the end of the school year to requiring the child to be evaluated for learning disabilities and having a certified teacher supervise the child's progress during the remediation period. *See*, *e.g.*, COLO. REV. STAT. ANN. § 22-33-104.5(5) (West 2005) (requiring child to be placed in a traditional school if child scores at or below the thirteenth percentile and the child's scores do not improve upon re-testing using an approved test selected by parents); IOWA CODE ANN. § 299A.6 (West 2008) (requiring child who scores below the thirtieth percentile to be placed in a traditional school unless the child receives a better score on a second test administered before the beginning of the next school year or the director of the department of education approves a plan of remediation); N.H. REV. STAT. ANN. § 193-A:6 (LexisNexis 2006) (giving parents one year to bring child's educational progress up to "a level commensurate with his ability"); N.D. CENT. CODE §§ 15.1-23-11 to -13 (2003) (requiring child to be evaluated for disabilities by a multidisciplinary assessment team, if child's scores fall below the thirtieth percentile, and requiring parents to file a plan of remediation developed in consultation with a certified teacher); OHIO ADMIN. CODE §§ 3301-34-04, -05 (2009) (requiring parents to submit a remediation plan and quarterly progress reports if child's score falls below the twenty-fifth percentile); OR. REV. STAT. ANN. § 339.035(4) (West 2007) (requiring up to three additional tests, if child's score is below the fifteenth percentile and continues to decline, and granting the superintendent of education the discretion to order the child's education supervised by a certified teacher or to place the child in a traditional school for up to twelve months); S.D. CODIFIED LAWS § 13-27-7 (2004) (allowing school board to refuse to grant a certificate of excuse to home school for a child who makes "less than satisfactory" academic progress); W. VA. CODE § 18-8-1(c)(2) (LexisNexis 2008) (requiring parents to initiate remediation program if child's score is below the fiftieth percentile and allowing the superintendent of education to seek court order denying right to home school if there is clear and convincing evidence that the child is suffering from educational neglect).

134 *See supra* Part III.B.1.

135 *See supra* Part III.B.1.

136 For an example of home schooling regulations requiring parents to maintain attendance records, see *supra* note 122.

Some states require the instructor to have minimum qualifications such as a teaching certificate or a college degree.[137] The teaching certificate requirement is inadequate because it does not ensure that the parent will actually provide higher quality education.[138] Similarly, a college degree requirement insufficiently guarantees adequate instruction since merely having some degree does not assure that the parent can impart the basic required skills.[139]

Finally, a few states have procedures for "home visits" by school officials.[140] These visits probably violate strict scrutiny since parents could submit any information regarding their instructional format without a highly intrusive home visit.[141]

In summary, the government should adopt two home schooling restrictions from those commonly used in other states; namely, the requirement that parents file an annual notice of intent to home school and the requirement that home schooled children take an annual standardized test. These two restrictions pass muster under a strict scrutiny analysis and together assure California's interest in economically independent and civically responsible citizens. The government should not adopt any additional limitations to avoid violating the least restrictive means prong of the strict scrutiny test.

CONCLUSION

The *Jonathan L.* court's decision to overrule its earlier holding and recognize home schooling as legal in California demonstrates that home schooling is no longer a fringe curiosity but has become a socially accepted form of education. However, as the court of appeal stated, California has no regulatory scheme which allows the state to guarantee that its interest in economically independent and civically conscientious citizens is

137 *See supra* Part III.B.1.

138 People v. DeJonge, 501 N.W.2d 127, 141 (Mich. 1993) (finding that "empirical studies disprove a positive correlation between teacher certification and quality education").

139 This is also true of other instructor qualification requirements of this type, such as having a high school diploma or general equivalency diploma.

140 *See supra* Part III.B.1.

141 *See, e.g.*, CAL. CONST. art. I, § 1 (establishing privacy as an inalienable right belonging to all people); Brunelle v. Lynn Pub. Sch., 702 N.E.2d 1182, 1184, 1186 (Mass. 1998) (finding that "[w]ith appropriate testing procedures or progress reports, there may be no need for periodic on-site visits," viewing a home visit requirement "carefully in light of constitutional considerations," and finding that such a requirement "may call into play issues of family privacy in seeking to keep the home free of unwarranted intrusion").

adequately protected in each home school.[142] Hence, under current California law, the state's interest in education is put at risk by home schooling.[143] Therefore, the government should explicitly regulate home schooling. However, parents have a fundamental constitutional right to direct the upbringing and education of their children.[144] Thus, any attempt to restrict home schooling must pass muster under judicial strict scrutiny so that it does not trample this parental right.[145]

In answer to the *Jonathan L.* court's plea for clarity, the California Legislature should legalize home schooling by enacting a home schooling exemption to the state's compulsory school attendance statute. This new exemption would lay to rest any question of the validity of home schooling in California. Moreover, it would simplify the law relating to California's compulsory school attendance statute. Finally it would serve as the basis for adopting restrictions which advance California's interest in education.

Additionally, the government should impose two limitations on home schooling: a filing of annual notice of intent to home school requirement, and an annual standardized testing requirement. The first requirement allows California to determine which students are truant and which are home schooled, to enforce the second requirement; and to collect information regarding education in California. This requirement clearly passes strict scrutiny since no viable, less intrusive means exist for informing the state of the parents' intent to home school. However, this requirement alone is not sufficient to guarantee that students are receiving a minimally adequate education.

Therefore, the second restriction enables the state to ensure that students are receiving an adequate education by testing their basic competency levels in the core classes required by the California school system. This limitation passes muster under strict scrutiny because it does not significantly infringe upon the parents' freedom or ability to direct the child's education and has been adopted, in some form or another, by nearly half of the states.[146] Further, it guarantees that the child is receiving an adequate education without requiring further limitations on the parental right. In contrast, the other restrictions widely used by

142 Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 596 (Cal. Ct. App. 2008) (noting that California lacks "regulatory framework for homeschooling" and stating that "additional clarity in this area of the law would be helpful").

143 *See supra* Part III.A.

144 *See supra* Part II.B.

145 *See supra* Part III.

146 *See supra* Part III.B.1 and 3.

different states either constitute a greater imposition on parental rights or do not as effectively protect the state's interest.[147]

Finally, there may be pragmatic reasons for California to place even less restrictive limitations on home schooling than required by the Federal Constitution. For example, home schooling's more individualized focus gives parents greater flexibility and thereby permits them to adapt the curriculum to take into account different learning styles of their children. Further, home schooling allows for experimentation in educational methodologies in a way which is difficult, if not impossible, in a large, bureaucratic public education system.[148] Thus, relaxed home schooling regulations may encourage the variable and experimental aspects of home schooling.[149]

147 *See supra* Part III.B.4.

148 Such experimentation and improvement may be badly needed since some believe that the public school system in California is providing an inferior education to many students. *See*, *e.g.*, Stanford University School of Education, News Bureau, http://ed.stanford.edu/suse/news-bureau/displayRecord.php?tablename=press&id=58 (last visited Jan. 18, 2010) ("California students, parents and community leaders agree: comprehensive change is needed to fix education system.").

149 For example, yearly standardized testing may limit the parents' ability to adopt alternative educational methods because of the need to ensure that their children are annually advancing in certain subjects, at a certain rate, so that they can pass the tests.