

Homeschooling Response: Questioning Presumptions of the Primordial State

Michael P. Donnelly*

In her article entitled *Homeschooling and the Right to Education: Are States Fulfilling Their Constitutional Obligations to Homeschooled Students?*, Sonia Muscatine argued that all states have a duty to regulate homeschooling sufficiently to ensure that every homeschooled child is receiving an “effective and appropriate” education.¹ She acknowledged that education is not a federal constitutional right but posited that upon conveying a right to education, each state incurs a federal constitutional duty under the Fourteenth Amendment to ensure fulfillment of this “non-waivable” right to public education.² Thus, Muscatine reasoned, states that do not affirmatively regulate home education by collecting evidence of educational outcomes have “abdicated” their constitutional responsibility.³

Relying on Kimberly Yuracko, whom Muscatine cited and quoted scores of times, Muscatine claimed: “In short, oversight of homeschooling in several states is so lax as to be nonexistent . . .”⁴ She charged these many states with failing to (1) fulfill their affirmative obligation to educate children, (2) track which children are actually receiving education, and (3) maintain reliable data on the educational outcomes of such students.⁵

In this Counterpoint, I explore two presumptions at the core of Muscatine’s prescription for state regulation of homeschooling. First is the proposition that a main purpose of education in a democratic society is to ensure the “autonomy” of the individual.⁶ Second, and a necessary condition to Muscatine’s argument for asserting mandatory regulation, is the proposition that education is (a) a primary, pre-eminent function of the state that precedes, or at least supersedes, the natural authority of the parent, and (b) “delegated” to the states rather than a reserved power

* Michael Donnelly, J.D. (Boston Univ.) and LL.M. (London Sch. Econ.), is Senior Counsel and Director of Global Outreach at the Home School Legal Defense Association (HSLDA).

1. Sonia Muscatine, *Homeschooling and the Right to Education*, 49 J.L. & EDUC. 67, 97 (2020).

2. *Id.* at 76.

3. *Id.* at 97.

4. *Id.* at 88.

5. *Id.*

6. *Id.* at 68.

under the Ninth Amendment of the Constitution.⁷ In other words, the state, in relation to education in society is a primordial, rather than consequent, authority.

Autonomy is often proposed to mean a kind of self-critical education intended to promote students' questioning the values of their native community and family, particularly of a religious nature.⁸ In her article, Muscatine displayed distaste for certain "religious" or "fundamentalist" homeschooling parents who she suggests are misogynist or even racist.⁹ Without providing support directly or through the Yuracko citations, Muscatine's accusations are unbecoming in a serious scholarly analysis of whether homeschooling should be more or less regulated and indicative of troubling bias. Muscatine admitted that "too much oversight can interfere in otherwise successful endeavors,"¹⁰ but such rhetoric taints an otherwise legitimate discussion about homeschooling regulation.

Second, the notion that education is an inherent and a priori function of the state, such that homeschooling is merely an extension of the state and subject to a constitutionally mandated level of regulation, is a novel and statist notion. It has scant legal, cultural, or historical support. None debate the value of education to individuals and to society, but the question as to who gets to decide the content, methods, metrics, and goals is of great importance – especially in a free and participatory republic.

DEMOCRACY, EDUCATION, AUTONOMY

Muscatine presumed that "[e]ducation is part of the foundation of a functioning democracy; it allows meaningful civic participation and personal and financial autonomy."¹¹ She suggested what she meant by autonomy and accompanying liberal values by adopting much of

7. *Id.* at 92.

8. Rita Koganzon, *Pork Eating Is Not a Reasonable Way of Life: Yeshiva Education vs. Liberal Educational Theory*, in RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK 32, 34 (Jason Bedrick, Jay P. Green & Matthew H. Lee eds., 2020).

9. Muscatine, *supra* note 1, at 71, 79.

10. *Id.* at 68.

11. *Id.*

Yuracko's scholarship. Here is an example of her reliance on Yuracko, a strident homeschooling critic:¹²

To what extent should we as a society “condone or constrain homeschooling, particularly as practiced by religious fundamentalist families explicitly seeking to shield their children from liberal values of sex equality, gender role fluidity and critical rationality”? Some scholars argue that “homeschooling in some cases may be incompatible with the state’s obligation to ensure that children receive a liberal multicultural education that promotes at least minimal autonomy.” Homeschooling, and particularly unschooling, are ostensibly in tension with compulsory attendance laws. Given that homeschooling parents have complete control over their children’s educations, it is crucial for states to have oversight. State oversight of homeschooling is necessary for states to fulfill their affirmative obligations to provide education.¹³

These advocates for autonomy envision a secular society as a primary motivating value in public education. As Perry Glanzer pointed out, “[I]nstead of exposing students to both secular and religious ways of viewing the world, American schools give preference only to secular views of the world . . . because a secular approach to education is mistakenly understood as consistent with democratic tradition.”¹⁴ Thus, “liberal values” in public education serve as a primary vehicle for curtailing the role of religion in society in favor of a new norm of tolerance.¹⁵

Such anti-religious assertions are similar to those of Gutmann and Porath, who argued that education’s importance in safeguarding democracy demands state oversight and a secular character.¹⁶ So called

12. Michael Farris, *Tolerance and Liberty: Answering the Academic Left’s Challenge to Homeschooling Freedom*, 88 PEABODY J. EDUC. 393, 395 (2013).

13. Muscatine, *supra* note 1, at 68.

14. Perry Glanzer, *Saving Democratic Education from Itself: Why We Need Homeschooling*, 88 PEABODY J. EDUC. 342, 344 (2013).

15. Farris, *supra* note 12, at 398–400.

16. Amy Gutmann & Sigal Ben-Porath, *Democratic Education*, in THE ENCYCLOPEDIA OF POLITICAL THOUGHT, D, 1-12 (Michael T. Gibbons ed., 2015).

“democratic education,” they argued, requires autonomy as a primary objective as essential to safeguarding her view of democracy.¹⁷ But even if one agrees that autonomy is a primary value, there may be other means to support and respect autonomy instead of using the state’s coercive power of compulsory education to impose state-approved views, values, and outcomes for all children. The conflict comes when parents reject the state’s preferred value system for their own—whether religiously based or not—and seek private means for education, such as homeschooling. While many would say that it is not the role of state education to impose any particular worldview on children, this is precisely what autonomy-based “democratic education” does. Muscatine appeared to favor this approach to education and seemed to share Yuracko’s and other critics’ suspicion that homeschoolers do not value this kind of autonomy.¹⁸

Moreover, Glanzer explained that the danger in “democratic education” is that it elevates a person’s political persona to the highest value and can ignore other important aspects of a person’s existence, harmfully narrowing society’s view of the purpose of education.¹⁹ The goal of education, Glanzer suggested, should be to focus more on human flourishing and not just on political goals.²⁰ This goal of human flourishing is even recognized in international human rights texts. For example, the Universal Declaration of Human Rights states: “Education shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms.”²¹ But, while an educated citizenry may be important to a democracy, education is far more than simply the formation of citizens who can get a job and vote.

Thus, as Glanzer pointed out, home education is necessary in a free democratic society to counterbalance and check an education system that weighs a person’s political identity too heavily over other equally valid outcomes. He explained, “A robust system of homeschooling

17. *Id.*

18. *E.g.*, Kimberly Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123 (2008).

19. Glanzer, *supra* note 14, at 345.

20. *Id.* at 350.

21. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 26, Sec. 2 (Dec. 10, 1948).

supports humanistic forms of education and protects liberal democracy from developing overly politicized forms of education with a narrow focus.”²² Homeschooling parents, Glanzer observed, “can also engage in greater creativity than public schools regarding visions of human flourishing in which they might seek to educate children.”²³

Also raising concerns about an excessive focus on “autonomy,” Rita Koganzon was critical about New York City school leaders’ proposal to impose new restrictions on Yeshivas, orthodox Jewish schools that prioritize study of the Jewish sacred writings.²⁴ The Yeshivas, critics claimed, did not provide sufficient breadth of education to allow for graduates to exercise sufficient autonomy in their lives during or after their education.²⁵ Koganzon argued that autonomy is simply not a sufficient reason to give rise to such concern and that “autonomy” is not a good value on which to build an educational program:

Although autonomy aimed at liberal education purports to give children a neutral and broad selection of lives, it is neither neutral nor broad in reality, but highly normative and narrow. Second, although childhood diversity is intended to expand our liberty and capacity for independent thought as adults, it actually undermines the development of the very virtues necessary to exercise such independence.²⁶

Values such as self-control and discipline, she argues, are not part of the autonomy envisioned by liberal education. Rather, a liberal, democratic Rawlsian approach to education entails the “moral elevation of an elite, cosmopolitan educational and professional trajectory above more attainable and rooted ways of life, and . . . the deprioritization of the virtues of commitment, constancy, and self control”²⁷

As a homeschooling parent of seven children, I seek autonomy for my children as they grow. But the autonomy I envision is not devoid of values that I find important. Like most parents I know, my aim is to

22. Glanzer, *supra* note 14, at 350.

23. *Id.* at 35.

24. Koganzon, *supra* note 8, at 40.

25. *Id.* at 35.

26. *Id.*

27. *Id.*

equip children with the capacity to seek for themselves an identity of their own choosing. I agree that the values Koganzon identifies such as self-control, discipline, faith, and respect of others are more important to a functioning free society.

But even as Muscatine proposed to impose strict state oversight over homeschooling, at least in part because of her suspicion about some homeschoolers' motivations and beliefs, we are well advised to remember the words of Justice Jackson from *West Virginia v. Barnette*:

But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.²⁸

THE PRIMORDIAL STATE?

Muscatine's second underlying proposition regarding regulation is that because a state "delegates" educational authority to a parent, all states *must* regulate homeschooling to avoid abdicating their constitutional responsibility.²⁹ To justify stringent regulation as a "constitutional obligation," Muscatine argued that the state is imbued with primordial education authority. But the reverse is true, thus defeating this argument for a constitutional obligation for high regulation.

While Muscatine argued that stringent regulation must prove "the pedagogical validity and outcomes of homeschooling and unschooling as compared to public schools," she failed to explain why public schools

28. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

29. See *supra* note 9 and accompanying text.

are the relevant comparator.³⁰ Instead, Muscatine bemoaned “lax/nonexistent” homeschooling regulations, castigating non-regulating states of abdicating supposed obligations.³¹ For Muscatine, proper regulation is stringent because “states must know whether homeschooling works”³² to ensure students receive their educational entitlement.³³ Muscatine’s sophisticated tautological maneuver is self-serving. She wanted to make the case for more stringent regulation on homeschooling families, but on one hand she *presumes* that “only the state [can] monitor and enforce student rights” basing her reasoning on a mere *suspicion* that homeschooling is not sufficiently “democratic.”³⁴ However, Muscatine presented no evidence that homeschooling is not supportive of a democracy. And her presumption that the state is the only legitimate authority in education is precisely the philosophical question that demands debate – this proposition may not be *presumed*.

Asserting a presumptive pre-eminence of education as an a priori state function places homeschooling and virtually all private education within reach of the state’s powerful regulatory apparatus. This questionable presumption flows from a larger philosophical idea as to the state’s pre-eminent role in the lives of children as superior to the parent. Muscatine is not alone in this assertion. Gutmann, Yuracko, Ross, West, Fineman, and Bartholet are among those who have made various forms of this argument with resulting prescriptions for stringently regulating home education.³⁵

Attempting to further the case for stringent regulation of homeschooling, Shawn Peters and James Dwyer authored *Homeschooling: The History and Philosophy of a Controversial Practice*. Being respectively a legal philosopher and historian, going so far as to assert that the parent-child relationship exists solely because it is sanctioned by the state. They also suggested that “custodial authority

30. *Id.* at 87.

31. *Id.* at 88.

32. *Id.*

33. *Id.* at 98.

34. *Id.* at 86.

35. See generally Yuracko, *supra* note 18; Robin West, *The Harms of Homeschooling*, 29 (3/4) PHIL. & PUB. POL’Y Q. 7 (2009); Martha A. Fineman, *Taking Children’s Interests Seriously*, in WHAT IS RIGHT FOR CHILDREN 229 (Fineman & Worthington eds., 2009); Catherine Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL OF RIGHTS J. 991 (2010); Gutmann & Ben-Porath, *supra* note 16; Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights To Education & Protection*, 62 ARIZ. L. REV. 1 (2020).

‘is not the natural right of the parents; it emanates from the State.’”³⁶ Asserting that the parent-child relationship is state-created and non-existent unless recognized by the state,³⁷ they explained that for education, it is not a question of “whether but simply how” the state decides to recognize the role of parents.³⁸

Dwyer argued that the historical record suggests that the state precedes the parent in making educational decisions for children. However, these claims are questionable. As Koganzon pointed out, Dwyer and Peters’ account:

draws on anachronistic texts, misrepresents historiographical sources, and, in a particularly bizarre section, invokes 19th-century protective statutes used to seize poor and indigenous children as evidence of broad support for the primacy of the state in child-rearing — fall[ing] far short of establishing anything like an age-old embrace of state educational control in America.³⁹

Koganzon acknowledges that there were many among the founding generation who advocated for a public run system of schools, but they did not advocate for compulsory schooling for every child. Koganzon wrote:

A more honest review of our history indicates that the republican tradition hardly represents the lone understanding of education in America. In fact, for all the evidence that Americans have long viewed state control of education to be the ideal, there is equal evidence demonstrating a prevailing skepticism of public educational institutions.⁴⁰

36. JAMES G. DWYER & SHAWN F. PETERS, *HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE* 62 (2019).

37. *Id.* at 122.

38. *Id.* at 126.

39. Rita Koganzon, *A Tale of Two Educational Traditions*, NATIONAL AFFAIRS (Spring 2021), <https://www.nationalaffairs.com/publications/detail/a-tale-of-two-educational-traditions> (last visited Oct. 23, 2021).

40. *Id.*

While Muscatine admitted that “states must balance parental rights to raise and educate their own children as they see fit . . . ,”⁴¹ the question is one of primacy, weight, and “who gets to decide?” If the state’s authority over education were pre-eminent or primordial, Muscatine’s assertion that states that do not regulate homeschooling abdicate their responsibility would be on much stronger ground. Such a truth might justify highly intrusive state regulations. If, instead, a parent’s authority is pre-eminent, then the state must otherwise justify and satisfy the high burden of strict scrutiny when it imposes on the constitutionally protected rights of parents. As a federal constitutional matter, the Supreme Court has determined with finality that parents do have a fundamental liberty interest in the education of their children and that the state’s role is not primordial, preeminent, or preferred.⁴²

Historically, court and statutory authorities indicate that very few have adopted Muscatine’s views related to regulatory obligations towards homeschooling.⁴³ Although the Supreme Court of the United States has never determined that home education is a federally protected constitutional right, it has recognized since its 1925 decision in *Pierce v. Society of Sisters* that parents have a protected liberty interest in directing the education of their children.⁴⁴ Additionally, in *Troxel v. Granville*, the Court traced the legal history of parental rights to establish that parents are presumed to make decisions in the best interest of their children holding, “In light of extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”⁴⁵

Several state courts have explicitly affirmed that the Court’s Fourteenth Amendment substantive due process jurisprudence includes homeschooling. The history of homeschool regulation is that while states may regulate homeschooling within certain constitutional boundaries, states violate no constitutional duty if they choose not to

41. Muscatine, *supra* note 1, at 77.

42. See *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Reno v. Flores*, 507 U.S. 292, 304 (1993); *Troxel v. Granville*, 530 U.S. 57 (2000).

43. Bartholet, *supra* note 35, at 57.

44. *Pierce*, 268 U.S. at 534-35.

45. *Troxel*, 530 U.S. at 66.

impose a stringent or rigorous regulatory regime.⁴⁶ It is entirely constitutional for states to presume that parents who homeschool their children are meeting their obligations as parents and that the state which chooses not to collect data, register children, inspect homes, or enact other intrusive regulatory regimes is not “abdicating” anything from a federal constitutional perspective.

In our federal system, every state has officially recognized this fundamental liberty interest either in court, by statute, or both.⁴⁷ For example, in Massachusetts, a state that is considered highly regulated for homeschooling, the Supreme Judicial Court wrote in its seminal homeschooling case that parents’ “right to educate their own children [is] a right protected by the Fourteenth Amendment to the United States Constitution.”⁴⁸ Other state legislatures have passed laws explicitly codifying the Fourteenth Amendment liberty interest. For example, Arizona law states:

The liberty of parents to direct the upbringing, education, health care and mental health of their children is a fundamental right Any political subdivision of this state or any other governmental entity shall not infringe on these rights without demonstrating that the compelling governmental interest as applied to the child involved is of the highest order, is narrowly tailored and is not otherwise served by a less restrictive means.⁴⁹

Similarly, Michigan’s legislation provides:

It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with

46. Eleven states require no notice by homeschooling families while another sixteen or so require only the filing of a notice making the state aware of a parent’s intention to homeschool their children. See HOME SCH. LEGAL DEF., www.hslda.org/laws.

47. PROTECTING PARENTAL RIGHTS AT THE STATE LEVEL, <https://parentalrights.org/states/> (last visited Dec. 4, 2020).

48. *Care & Protection of Charles*, 399 Mass. 324, 333 (1987).

49. ARIZ. REV. STAT. § 1-601 (LexisNexis 2020).

the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment.⁵⁰

As a matter of homeschooling regulation, at least eleven states do not require any formal notification when a parent chooses to homeschool, sixteen require mere notification with no other requirements, eighteen have notification plus some other requirement, such as testing. In five states, notification requirements are supplemented with other requirements such as approval, annual or more frequent reporting, or other more burdensome regulations.⁵¹ The fact that numerous states have significantly reduced oversight requirements since 2000 indicates that they do not believe they have a constitutional duty to impose stringent regulations on homeschooling parents.⁵²

The foregoing facts suggest a practical recognition that states do not perceive themselves to have a constitutional obligation to “track[] homeschooled students” with a “focus on results.”⁵³ Although Muscatine fears that “children who are vulnerable and unable to advocate for themselves” may not “receive the education to which they are entitled,”⁵⁴ it appears that state policymakers do not share this concern.

CONCLUSION

I have written elsewhere that “a society that mandates the state have the primary role in educating children or imposes strict controls on the right of parents to homeschool borders on tyranny.”⁵⁵ Repression of private education and homeschooling has been a characteristic of totalitarian regimes, including most notably and catastrophically in

50. MICH. COMP. LAWS SERV. § 380.10 (LexisNexis 2020).

51. HSLDA STATE LAWS ANALYSIS (2020), <https://hsllda.org/legal>.

52. James R. Mason III, *Special Feature: A Report Card on the Last 10 Years of Homeschool Freedom Homeschool*, THE COURT REPORT 9 (2015), <https://www.nxtbook.com/nxtbooks/hsllda/2015q1/index.php#/p/8>.

53. Muscatine, *supra* note 1, at 98.

54. *Id.*

55. Michael P. Donnelly, *An Impossible (and Impermissible) Dream: Substantial Equivalency in Homeschools*, in RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK 124 (Jason Bedrick, Jay P. Green & Matthew H. Lee eds., 2020).

Germany under the National Socialists.⁵⁶ Totalitarian regimes like Nazi Germany weaponized education in order to control their populations by indoctrinating their youth.⁵⁷ This is also one reason that Article 26(3) of the Universal Declaration on Human Rights contains the recognition that parents have a prior right to decide how their children will be educated.⁵⁸

Unlike the more strident opponents of homeschooling, Muscatine acknowledged that homeschooling is constitutionally protected and that it ought to be considered a legitimate form of alternative education.⁵⁹ However, like these critics she advances the arguments that homeschooling must be stringently regulated everywhere because states have an affirmative obligation to preserve “autonomy.”⁶⁰ Her proposition that states must presume that homeschooling is neither “effective” or “appropriate,” absent affirmative evidence to the contrary presumes that the state is pre-eminent in education decision making.⁶¹ However, this proposition does not follow from either the legal or cultural history of the United States, or from observed legislative policy. Rather, these arguments seek to advance a regulatory agenda to curtail home education because of skepticism about homeschooling parents’ values and their educational methods.

Fortunately, so many courts and legislatures have clearly articulated the presumption of parental rights in education and validated the current regulatory approaches that they constitute “deeply rooted traditions.”⁶² Thus, these norms and traditions should be considered beyond debate in our society. Even if parents have a duty to ensure their children are educated, legislatures are not required to establish any particular regulatory framework because parents are endowed with clearly recognized and inalienable rights to make decisions about how their children are educated and raised; legislative bodies do not violate any constitutional norms when they determine that little or no active

56. See LISA PINE, EDUCATION IN NAZI GERMANY 14-15 (Berg eds., 2010).

57. *See id.*

58. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 26, Sec. 3 (Dec. 10, 1948).

59. Muscatine, *supra* note 1, at 97.

60. *Id.* at 68.

61. *Id.*

62. *Troxel*, 530 U.S. at 66; *Yoder*, 406 U.S. at 232.

oversight or monitoring of homeschooling is necessary. Educational authority does not flow from the state to the parent but, rather, as one would expect in a self-governing republic, from the people to the state.