Homeschooling: The Next Generation of Legal Debate

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In the Winter 2020 issue of this *Journal*, Sonia Muscatine, a legal manager at a financial investment company,[1] proposed the adoption of results-focused state regulation of homeschooling.[2] More specifically, she suggested that the first step be data collection for longitudinal tracking of student outcomes including, but not at all limited to, standardized testing.[3] The stated purpose of her proposal—"to determine (1) which [homeschooling] alternatives . . . are effective and appropriate and (2) whether each [homeschooled] child is in fact receiving such an education"[4] —seems sensible on its face, but the proposal does not explain how this first step would be effectively implemented and enforced.[5] Moreover, the specification of the second and culminating step is limited to "implementing appropriate requirements for homeschools that are based on actual information."[6] The unaddressed problems are in the reliability, validity, and completeness of the "actual information," and its interpretation and implementation in terms of the specific contents of "appropriate requirements."

As the foundation for her rather cryptic proposal, Muscatine relied almost entirely on secondary sources to set forth (a) an analysis of the legal framework for education in our society, ultimately pointing to state constitutions and statutes;[7] (b) an overview of homeschooling,

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1. ValueAct Capital focuses on clients that are large institutional investors. VALUEACT CAPITAL, https://valueact.com/. Muscatine's title at this investment company is Vice President of Legal & Compliance. *Team*, VALUEACT CAPITAL, https://valueact.com/team/.

2. Sonia M. Muscatine, *Homeschooling and the Right to Education: Are States Fulfilling Their Constitutional Obligations to Homeschooled Students?*, 49 J.L. & EDUC. 67, 97–98 (2020).

3. *Id.*

4. *Id.*

5. As an example, using Muscatine's subsequent assessment of the research on whether homeschooling is successful, *id.* at 84–85, it is not at all clear how the collection of such information would meet empirical norms to determine which "alternatives" are "effective and appropriate."

6. *Id.* at 98.

7. *Id.* at 67–77.

including the limited data on its effectiveness;[8] (c) the similarly limited oversight in many states;[9] and (d) the unstructured and outlier variation of "unschooling."[10]

In the accompanying Counterpoint, Michael Donnelly, who is a senior official with the Home School Legal Defense Association, challenged two presumptions that he attributed to Muscatine's analysis.[11] The first, according to Donnelly, is "the proposition that a main purpose of education in a democratic society is to ensure the 'autonomy' of the individual."[12] The second is the presumption that "the state, in relation to education in society is a primordial, rather than consequent, authority."[13] Although the cited bases for these two propositions do not necessarily square with his characterization,[14] assume for purposes of further analysis that they are the underlying bases of Muscatine's analysis. Donnelly's Counterpoint provides a philosophically opposing analysis to each of these propositions, relying largely on his own selection of secondary sources.[15]

Readers should examine and evaluate the Muscatine and Donnelly articles on their own. I only offer two observations for consideration. First, although complete objectivity in such matters is almost as difficult as it is for religion, in the broad spectrum of perspectives, Muscatine would appear to be within the relatively wide intermediate area, whereas

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8. *Id*. at 79–85.

9. *Id*. at 86–92.

10. *Id*. at 92–97.

11. Michael P. Donnelly, *Homeschooling: Questioning Presumptions of the Primordial State*, 50 J.L. & EDUC. 66 (2021).

12. *Id*.

13. *Id.* at 67.

14. For the first proposition, the cited part of Muscatine's article, as Donnelly subsequently clarified, *id*., extends to civic participation. Muscatine, *supra* note 2, at 68 ("Education . . . allows meaningful civic participation and personal and financial autonomy"). For the second proposition, the connection is much less clear. Muscatine, *supra* note 2, at 92 (providing an overview of Texas's pertinent legislation, which she characterized as "delegat[ing] homeschooling responsibility almost entirely to parents," and then starting an overview of the aforementioned unstructured variation of "unschooling").

15. While correctly observing Muscatine's repeated but not sole reliance on Yuracko, Donnelly repeatedly, but not exclusively, relied on the work of Koganzin and Glanzer. These scholars rather obviously represent the respective polar perspectives against and for homeschooling. In countering the opposing perspective Donnelly, *supra* note 11, at 73, also singled out Dwyer and Peters. Although Muscatine had not cited them, these two scholars are apparently part of the larger debate. *E.g.*, James G. Dwyer & Shawn F. Peters, *Homeschooling: A Response to Ahlberg, Howell, and Justice*, 18 THEORY & RES. EDUC. 256 (2020).

Donnelly clearly is an unreserved advocate for homeschooling. Second, and more importantly, both rely largely on secondary sources that either take a partisan view of the applicable case law or provide public policy arguments that go beyond this case law to ideological views of the role of parents and governmental institutions regarding basic education.

For example, in describing the tension between compulsory education laws and parental rights, Muscatine incorporated the conclusion of a cited law review article that "[c]ourts have recognized that parents have a constitutionally protected right to homeschool their children."[16] However, the authors of the cited law review article were homeschoolers, not adjudicators or neutral scholars. Moreover, they relied solely on a Ninth Circuit decision in 1997 about a principal who was demoted for choosing to homeschool his children.[17] The constitutional ruling was limited to the conclusion that the perceptions of "uninformed and prejudiced persons" about the principal's ability to perform his leadership position effectively did not amount to the requisite compelling interest to outweigh his constitutional rights of religion and parenting.[18] In clear contrast to Muscatine's assertion, this ruling did not establish a per se constitutional right of homeschooling. Moreover, the homeschooling context of the Ninth Circuit's ruling was an unchallenged state statute under which the district had the authority to insist on the parent providing information on "the proposed home instruction curriculum," to make an informed decision about both its permissibility and, ultimately, the principal's assignment.[19]

As another example, Donnelly cited a 1987 Massachusetts case in seeming support of a constitutional right for homeschooling.[20] However, as a closer reading of Donnelly's Counterpoint reveals, this case referred to the broader constitutional right for parental child-rearing, which has obvious limits in relation to public schooling.[21] More importantly, the quoted language, which a careful reading of the court's

16. Muscatine, *supra* note 2, at 77 (citing Tanya K. Dumas, Sean Gates, & Deborah R. Schwarzer, *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, 16 WIDENER L. REV. 63, 67 (2010)) (alteration in original).

17. Peterson v. Minidoka Cnty. Sch. Dist. No. 331, 118 F.3d 1351 (9th Cir. 1997).

18. *Id*. at 1357–58.

19. *Id*. at 1357.

20. Donnelly, *supra* note 11, at 75 (citing Care & Prot. of Charles, 399 Mass. 324, 333 (1987)).

21. *Care & Prot. of Charles*, 399 Mass. at 332-33.

full sentence reveals and which Donnelly in his advocacy omits, was the plaintiff's "contention," not the court's holding.[22]

Instead, without the polar perspectives of the advocates for and against state regulation of homeschooling, a representative sampling of the specifically and directly applicable case law establish that (1) there is not a specific or absolute constitutional right on either religious[23] or more general[24] grounds for homeschooling; and, instead, in states that choose to permit homeschooling, (2) the U.S. Constitution allows their laws to reasonably regulate homeschools.[25]

Whether Muscatine's proposal is reasonable is a matter of not only what the courts have broadly interpreted as constitutionally permissible but also—and more importantly in considering Donnelly's view in tandem with hers—what is proper public policy in determining the contents of applicable state laws within these constitutional boundaries. For we are in a new generation,[26] in which the primary issue is determining the specific provisions in each state law rather than limning the outer limits of the Constitution.

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22. *Id*. Indeed, the court upheld the constitutionality of the district approval requirement under the applicable state law, and, by way of guidance, identified illustrative "reasonable educational requirements," including and going beyond the test-outcomes part of Muscatine's proposal. *Id*. at 600–02.

23. *E.g*., Duro v. Dist. Att'y, Second Jud. Dist. of N.C., 712 F.2d 96 (4th Cir. 1983); Frances v. Barnes, 69 F. Supp. 2d 801 (E.D. Va. 1999); State v. Schmidt, 29 Ohio St.3d 32, 505 N.E.2d 627 (Ohio 1987); State v. Patzer, 382 N.W.2d 631 (N.D. 1986); Howell v. State, 723 S.W.2d 755 (Tex. App. 1986).

24. *E.g.,* Murphy v. State, 852 F.2d 1039 (8th Cir. 1988); Goodall v. Worcester Sch. Comm., 405 F. Supp. 3d 253 (D. Mass. 2019); Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988); Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980); Scoma v. Chi. Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974); Jonathan L. v. Super. Ct., 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008); Blount v. Dep't of Educ., 551 A.2d 1377 (Me. 1988); State v. Edgington, 663 P.2d 374 (N.M. 1983); In re Franz, 390 N.Y.S.2d 940 (N.Y. App. Div. 1977); State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

25. *E.g*., Combs v. Homer Ctr. Sch. Dist., 540 F.3d 231 (3d Cir. 2008); Vandiver v. Hardin Cnty. Bd. of Educ., 925 F.2d 927 (6th Cir. 1991); Battles v. Anne Arundel Cnty. Bd. of Educ., 904 F. Supp. 471 (D. Md. 1995); Floyd v. Smith, 820 F. Supp. 350 (E.D. Tenn. 1993), *vacated*, Goggans v. Smith, 23 F.3d 406 (6th Cir. 1994); Null v. Bd. of Educ., 815 F. Supp. 937 (S.D. W.Va. 1993); Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980); State v. Rivera, 497 N.W.2d 878 (Iowa 1993); In re Charles, 504 N.E.2d 592 (Mass. 1987); People v. Bennett, 501 N.W.2d 106 (Mich. 1993); State v. Brewer, 444 N.W.2d 923 (N.D. 1989).

26. Another emerging factor is the role of technology, which has blurred at least the location distinction between traditional public and home schooling. The current resort to remote learning under COVID-19 and the ongoing development of cyber schools, including those under state charter school laws, are examples of this new factor.