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## Parents Versus Parens Patriae: The Troubling Legality of Germany's Homeschool Ban and a Textual Basis for Its Removal

Luke Julian

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# **PARENTS VERSUS PARENS PATRIAE: THE TROUBLING LEGALITY OF GERMANY'S HOMESCHOOL BAN AND A TEXTUAL BASIS FOR ITS REMOVAL**

## **ABSTRACT**

*The Romeikes, a family from Germany, sought to educate their children in accordance with their religious values. The family observed that no local schools educated children in alignment with their values. In response, the family sought an exemption from Germany's homeschooling ban. In a string of court cases, Germany refused to accommodate the family's request, finding that the parents' right to educate their children in alignment with their values was outweighed by the state's obligation to educate. With no recourse left in Germany, the parents petitioned the European Court of Human Rights to recognize their right to homeschool according to their values. In *Konrad v. Germany*, the European Court of Human Rights refused to recognize such a right, finding that Germany's homeschool ban was within the "margin in appreciation" given to countries for differences in education policy. This decision allowed Germany to pursue harsh enforcement actions against the Romeikes, like forcing them to send their children to public school. Ultimately, the Romeikes fled Germany and sought asylum in the United States. The European Court of Human Rights' decision is problematic because it departs from the plain meaning of the European Convention on Human Rights. The court's ruling is also dangerous because it allows governments unparalleled opportunities to indoctrinate future generations by forcing them to attend schools that teach values regulated by the government. The case's harsh results highlight the troubling legality of Germany's homeschooling ban. In response, this Comment offers both a textual basis for its removal under the European Convention on Human Rights and policy arguments supporting this result.*

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## INTRODUCTION

In August 2008, the Romeike family fled Germany and sought asylum in the United States.<sup>1</sup> The family had grown concerned as the public schools in their area taught values that conflicted with their religious teachings.<sup>2</sup> At first, the family sought an exemption from Germany's compulsory school attendance laws, which require children to attend a public school or a heavily regulated private school.<sup>3</sup> After the German government refused, the family looked to the European Court of Human Rights (ECHR) to recognize their right to homeschool their children in accordance with their religious values.<sup>4</sup> When the ECHR refused to recognize such a right, the Romeikes faced prohibitive fines, the prospect of the local police forcibly taking their children to public school, and the state's attempt to remove the Romeike children from their parents' custody.<sup>5</sup> Faced with this dire situation, the family chose to seek asylum in the United States.<sup>6</sup> So far, the United States has not granted the family's request for asylum.<sup>7</sup>

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<sup>1</sup> *Romeike Fact Sheet*, HOME SCH. LEGAL DEF. ASSOC. [hereinafter HSLDA], <https://hsllda.org/post/romeike-fact-sheet> (last visited Oct. 5, 2020).

<sup>2</sup> JOHN J. WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 258 (4th ed. 2016).

<sup>3</sup> *Id.* at 258. German private schools are considered "heavily regulated" because the country's education regulations require German private schools to teach essentially the same curriculum as that of the country's public schools. Ingrid Wuerth, *Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech*, 31 VAND. J. TRANSNAT'L L. 1127, 1179 n.337 (1998).

<sup>4</sup> WITTE & NICHOLS, *supra* note 2, at 258.

<sup>5</sup> *Id.*

<sup>6</sup> HSLDA, *supra* note 1, at 1.

<sup>7</sup> WITTE & NICHOLS, *supra* note 2, at 258.

In the United States, the outcome of the Romeike's case would have been decided differently under U.S. Supreme Court jurisprudence.<sup>8</sup> Since the early twentieth century, the Supreme Court has made it clear that governments do not hold a monopoly on education and that both private and home schooling options are protected under the First Amendment's religious freedom guarantees.<sup>9</sup> In the United Kingdom, the legal right to homeschooling has even stronger protections.<sup>10</sup> The Education Act 1996 gives parents a statutory right to homeschool their children with only minimal oversight from the government.<sup>11</sup>

The European Union features a wide variety of homeschooling regulatory systems from all-out bans, like Germany's, to Ireland, which explicitly guarantees the right to homeschool.<sup>12</sup>

The ECHR's decision in the Romeike case to review Germany's homeschooling ban with "the margin of appreciation" for local political decisions about education is problematic in two major ways.<sup>13</sup> First, the ECHR's decision misinterprets the European Convention on Human Rights (Convention) by departing from the plain meaning of its religious freedom text and its specific protocols protecting parental rights over children's education. Second, the ECHR's position is dangerous because it allows governments unparalleled opportunities to influence and shape future generations and fails to appreciate the damage wrought by pressures from the majority culture. Consequently, this decision fails to give proper deference to both parental decisions and devout religious practice.

In contrast, the U.S. Supreme Court held that governments may not have a monopoly on the education of future generations.<sup>14</sup> Furthermore, the Court recognized the deleterious effects of majoritarian pressure on minority groups as a compelling reason to exempt a religious minority from a state's compulsory education laws.<sup>15</sup> This precedent reveals how U.S. jurisprudence on homeschooling respects both parental decisions and devout religious practice. This more respectful approach, adopted in other countries like the United

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<sup>8</sup> *Id.* at 268.

<sup>9</sup> *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

<sup>10</sup> *See* Education Act 1996, c. 56 (UK), [legislation.gov.uk/ukpga/1996/56/contents](http://legislation.gov.uk/ukpga/1996/56/contents).

<sup>11</sup> The United Kingdom's Education Act 1996 provides parents the statutory right to homeschool by allowing parents to fulfill their duty to educate their children "either by regular attendance at school or otherwise." *Id.* at pt. I, c. I, § 7.

<sup>12</sup> CONSTITUTION OF IRELAND 1937 art. 42.2.

<sup>13</sup> *Konrad v. Germany*, 2006-XIII Eur. Ct. H.R. 355, at 7.

<sup>14</sup> *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 510 (1925).

<sup>15</sup> *See Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

Kingdom and France, should be the benchmark by which the ECHR evaluates future cases pertaining to homeschooling. The ECHR's current permissive attitude to harsher forms of regulation like Germany's homeschool ban leaves the ECHR complicit in severe enforcement actions like removing children from their parents on the basis of the parents' religious beliefs. A court meant to protect human rights should not be sanctioning the routine use of this harsh conduct. This uncomfortable result and other problematic circumstances highlighted in this Comment establish the troubling legality of Germany's homeschooling ban. In response to this problem, this Comment provides both a textual basis for its removal under the Convention and policy arguments in support of this result.

Part I outlines how a comparative analysis of Germany, the United States and other European countries will reveal the troubling nature of Germany's homeschool ban and places the Comment in the broader context of existing literature. Part II draws attention to the various provisions in the Convention that support a European right to homeschool and compares various European approaches to home-education regulation. Part III demonstrates the inhuman nature of Germany's homeschooling ban by following the Romeikes' plight from their first encounter with the German court system to their attempts to seek asylum in the United States. Part IV compares U.S. Supreme Court jurisprudence protecting the right to homeschool with the ECHR's approach in *Konrad v. Germany*.<sup>16</sup> Additionally, Part IV provides a detailed look at the U.S. case *Wisconsin v. Yoder* to emphasize the troubling nature of Germany's homeschooling policy.<sup>17</sup> Part V surveys various American approaches to homeschooling regulation to show how different states balance the right to homeschool against the need to ensure the education of their residents. Finally, the Conclusion discusses how the ECHR misinterpreted the Convention's plain language to arrive at its troubling decision, multiple textual bases and policy arguments supporting reversal, and a legal path to establish a right to homeschool across Europe.

## I. REASONS FOR COMPARATIVE ANALYSIS

Debate within legal scholarship rages back and forth between those who support homeschooling and those who advocate for bans on homeschooling. Those who support homeschooling include Professors John Witte, Jr.<sup>18</sup> and

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<sup>16</sup> WITTE & NICHOLS, *supra* note 2, at 142–43.

<sup>17</sup> *Id.*

<sup>18</sup> See JOHN J. WITTE, JR., CHURCH, STATE AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND

Ashley Berner.<sup>19</sup> Professor John Witte, Jr. observed that compulsory public-school attendance grants governments unchecked influence over children, thereby opening the door for tyrannical abuses of power.<sup>20</sup> Professor Ashley Berner praised the pluralistic education policies of countries like the United Kingdom and Denmark, which allow homeschooling with little government oversight.<sup>21</sup> In contrast, scholars like Professors Martha Fineman<sup>22</sup> and James G. Dwyer<sup>23</sup> have stridently rejected homeschooling and have called for comprehensive bans on home education in the United States. Professor Martha Fineman argues that allowing parents to homeschool their children unjustly elevates parental interests above both the children's and society's interests.<sup>24</sup> Professor James G. Dwyer asserted that the parental relationship is a state-created right. Therefore, the state immorally harms children by giving parents the right to homeschool because homeschooling prevents children from being exposed to the values of mainstream society.<sup>25</sup>

These perspectives all take a theoretical approach to examine the merits of home-education. In this Comment, theory will not take center stage. Instead, this Comment will take a practical look at how Germany (a country with a homeschooling ban), the United States (a country with a common law right to homeschool), and a few European countries like the United Kingdom (countries that provide a statutory right to homeschool) treat families who wish to homeschool their children for religious reasons. This Comment will also assess whether these policies extend or abrogate rights that these families are entitled to in their respective home countries.

In addition to being surrounded by a vigorous academic debate, home-education has a new position of prominence in the midst of the COVID-19 pandemic. Over 50.8 million public school students were affected by coronavirus-related school shutdowns in the United States alone.<sup>26</sup> Many parents

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MODERN LIBERTIES 357–58 (2019).

<sup>19</sup> See ASHLEY R. BERNER, PLURALISM AND AMERICAN PUBLIC EDUCATION: NO ONE WAY TO SCHOOL (EDUCATION POLICY) 2–3 (1st ed. 2017).

<sup>20</sup> See WITTE, *supra* note 18, at 358.

<sup>21</sup> See Berner, *supra* note 19, at 1–2.

<sup>22</sup> See Martha A. Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interest*, 46 U. BALT. L. REV. 57 (2016).

<sup>23</sup> See James G. Dwyer, *The Easiest Accommodation, Abandoning Other People's Children to Their Parents' Religious Views*, in THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 193–217 (Robin Fretwell Wilson ed., 2018).

<sup>24</sup> See Fineman & Shepherd, *supra* note 22, at 57.

<sup>25</sup> See Dwyer, *supra* note 23, at 212.

<sup>26</sup> *The Coronavirus Spring: The Historic Closing of U.S. Schools*, EDUC. WK. (July 1, 2020), <https://www.edweek.org/ew/section/multimedia/the-coronavirus-spring-the-historic-closing-of.html>.

were forced to homeschool their children for months as schools attempted to continue the school year with remote learning alternatives.<sup>27</sup> This experience has increased interest in homeschooling.<sup>28</sup> According to the Public Broadcasting Service, some parents who were forced to homeschool their children during the shutdown plan to keep homeschooling their children after the pandemic ends.<sup>29</sup> With a possible increase in homeschooling on the horizon, it is important to discuss how preexisting legal rights and policies protect or interfere with a family's decision to educate their children at home.

## II. VARIED APPROACHES TO HOMESCHOOLING POLICIES IN EUROPE

Currently, German law provides for an almost complete ban on home-education.<sup>30</sup> In place of homeschooling, Germany mandates that all children attend either a public school or a heavily regulated private school.<sup>31</sup> Compulsory school attendance requirements did not become law in Germany until the Weimar Republic era.<sup>32</sup>

This Weimar Republic policy, however, had no criminal penalties for parents who failed to educate their children and allowed some exemptions from mandatory educational requirements.<sup>33</sup> Under this regime, homeschooling could satisfy the state's mandatory education requirements.<sup>34</sup>

In 1938, the Nazis were the first to completely outlaw home-education in Germany and the first to create criminal penalties for those who refused to send children to Nazi-run schools.<sup>35</sup> In Hitler's own words, public education was key to keeping future German generations supportive of the Nazi regime.<sup>36</sup> In addition to controlling their education, Hitler announced that his regime was also

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

<sup>28</sup> *Homeschooling Through the Coronavirus Pandemic*, PUB. BROAD. SERV. (Aug. 30, 2020), <https://www.pbs.org/newshour/show/homeschooling-through-the-coronavirus-pandemic>.

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

<sup>30</sup> WITTE & NICHOLS, *supra* note 2, at 268.

<sup>31</sup> Aaron T. Martin, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT'L & COMP. L. 225, 234–35 (2010). German private schools are considered “heavily regulated” because the country's education regulations require German private schools to teach essentially the same curriculum as that of the country's public schools. Wuerth, *supra* note 3.

<sup>32</sup> Martin, *supra* note 31, at 234–35. The Weimar Republic era refers to the time in which the Weimar Republic, a democratic republic, governed Germany from 1919 to 1933. Eds. of the Encyc. Britannica, *Weimar Republic*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Weimar-Republic> (last visited June 15, 2021).

<sup>33</sup> Martin, *supra* note 31, at 235.

<sup>34</sup> *See id.* at 237.

<sup>35</sup> *Id.* at 235, 237.

<sup>36</sup> *Id.* at 229.

taking *de facto* custody of Germany's children, "[T]his new Reich will give its youth to no one, but will itself take youth and give to youth its own education and its own upbringing."<sup>37</sup> The Nazis were not alone in seeing children as the state's charge. The Bolsheviks, the founders of the repressive Soviet Union, also sought to "nationalize" children by taking parental responsibilities away from "parents, priests, or private schools."<sup>38</sup>

After World War II, the idea that the state should participate in the education of its citizens' children remained in German law.<sup>39</sup> The German Constitution (Basic Law), adopted in 1949 by the Federal Republic of Germany, provides in Article Six that the "care and upbringing of children is the natural right of the parents and a duty primarily incumbent upon them. *The state shall watch over them in the performance of this duty.*"<sup>40</sup> Accordingly, the Basic Law empowers the state to oversee how German parents raise their children. In line with this concept, Germany's homeschooling ban continued, and criminal penalties remained for those who decided to violate this law.<sup>41</sup>

The first resistance to Germany's compulsory school attendance laws began in the 1960s as discussions about children's rights and public-school shortcomings grew more prevalent.<sup>42</sup> However, it took until the 1980s for legal conflicts to arise between parents who wished to homeschool their children and the German Government.<sup>43</sup> In this decade, three very public legal battles took place in German courts.

In 1980, Helmut Stücher sought to homeschool two of his children because he believed public education conflicted with his Christian moral beliefs and values.<sup>44</sup> Stücher faced a long legal battle that resulted in fines, loss of custody of his children, and a five-day jail sentence.<sup>45</sup> It took him nine years to regain full custody of his children.<sup>46</sup>

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<sup>37</sup> *Id.* at 231 (quoting WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 343 (1959)).

<sup>38</sup> Lynn D. Wardle, *The "Withering Away" of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917-1926*, 2 *GEO. J.L. & PUB. POL'Y* 469, 489 (2004).

<sup>39</sup> See Grundgesetz [GG] [Basic Law], art. 6, § 2, translation at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

<sup>40</sup> *Id.* art. 6, § 2 (emphasis added).

<sup>41</sup> See Martin, *supra* note 31, at 226.

<sup>42</sup> Thomas Spiegler, *Home Education in Germany: An Overview of the Contemporary Situation*, 17 *EVAL. & RES. EDUC.* 179, 182 (2003).

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

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*



In 1985, the Bartmann parents, who were both professional teachers, sought to educate their son at home on the basis of his wishes and the parents' religious beliefs.<sup>47</sup> The case turned out similarly to the Stüchers' case with the Bartmanns facing fines and jail time.<sup>48</sup> However, the Bartmanns' case was the first to be appealed to German Federal Constitutional Court.<sup>49</sup> The court upheld the constitutionality of Germany's homeschool ban, finding the Bartmanns' claims were without merit.<sup>50</sup>

In 1987, a young boy who was suffering from severe physical pain wished to stop attending school.<sup>51</sup> Unlike the other two cases, the local court acquitted the parents, and exempted them from the fines levied against them by the public prosecutor.<sup>52</sup> The local prosecutor's office never appealed the decision.<sup>53</sup>

Today, several groups advocate for the legalization of homeschooling in Germany.<sup>54</sup> The largest and oldest group is the Philadelphia School, a Christian, gospel-centered group which sends teaching materials to many German families.<sup>55</sup> In addition, *Schulunterricht zu Hause e.v.* exists to provide legal counsel for families who take the risk to homeschool in Germany.<sup>56</sup> Despite these two groups' Christian background, those who seek to legalize homeschooling in Germany are not all religious.<sup>57</sup> Some Germans believe that public schools do not serve their children's secular educational needs and want to homeschool their children according to their unique circumstances.<sup>58</sup> Due to the secretive nature of homeschooling in Germany, it is difficult to get accurate statistics on how many families homeschool in the country.<sup>59</sup>

Though Germany's homeschool ban remains on the books largely unchanged from the Nazi era, the enforcement of this policy varies at the local level as demonstrated by the outcomes of the 1980s cases.<sup>60</sup> Enforcement of the

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<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

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

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

<sup>51</sup> *Id.* at 182–83.

<sup>52</sup> *Id.* at 183.

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

<sup>54</sup> *Id.* at 183–84.

<sup>55</sup> *Id.* at 183.

<sup>56</sup> *Id.* at 184.

<sup>57</sup> *Id.* at 185.

<sup>58</sup> *Id.* at 186.

<sup>59</sup> *See id.* at 184.

<sup>60</sup> *Id.*

ban occurs at the state level (the *Land*),<sup>61</sup> and German authorities at the national level have not intervened to make enforcement of the homeschool ban more consistent.<sup>62</sup> The policy of Baden-Württemberg, the Romeikes' former *Land*, is offered as an example of how a *Land* authority enforces Germany's national homeschool ban. In the Land Constitution of Baden-Württemberg, Article Fourteen, Section One mandates school attendance for all the state's children.<sup>63</sup> The Baden-Württemberg School Act provides that permanent residents of school age must attend a German school.<sup>64</sup> This law also empowers school supervisory authorities (local school officials) to give exemptions from mandatory attendance laws to individuals in extraordinary circumstances.<sup>65</sup> In the Romeikes' locality, these local authorities granted exemptions only for children whose parents worked abroad or those whose parents were not settled in the *Land* because they traveled across the country for work.<sup>66</sup> These policies leave homeschooling parents at the whim of local authorities, thereby forcing these parents to take huge risks when deciding to educate their children at home according to their religious convictions.<sup>67</sup>

It is important to note that Germany is not the sole European country which bans homeschooling.<sup>68</sup> For example, the Netherlands also has no legal recognition of homeschooling.<sup>69</sup> Dutch parents who do not enroll their children in school face penalties.<sup>70</sup> However, the Netherlands' policy differs from Germany's policy in one key aspect. The Dutch policy allows children to be exempted from the Netherlands' compulsory school attendance laws when "the conscience of the parents cannot be satisfied with the available schools in the neighborhood and there are not enough parents locally with the same concerns to justify starting a new school."<sup>71</sup> Accordingly, the Netherlands provides some relief to certain parents with minority religious beliefs who want to homeschool their children.<sup>72</sup> It is estimated that around one hundred Dutch families avail

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<sup>61</sup> A German state is known as a *Land*.

<sup>62</sup> Spiegler, *supra* note 42, at 185.

<sup>63</sup> Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 355, at 9.

<sup>64</sup> *Id.* at 5.

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

<sup>66</sup> *Id.* at 9.

<sup>67</sup> Spiegler, *supra* note 42, at 185.

<sup>68</sup> See *Homeschooling in Your Country*, HOME SCH. LEGAL DEF. ASSOC., <https://hslida.org/legal/international> (last visited Jan. 11, 2021).

<sup>69</sup> *The Netherlands: Homeschooling in Your Country in the Netherlands*, HOME SCH. LEGAL DEF. ASSOC., <https://hslida.org/post/the-netherlands> (last visited Jan. 11, 2021).

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

<sup>71</sup> *Id.*

<sup>72</sup> See *id.*

themselves of this narrow exception in the Netherlands' compulsory school attendance law.<sup>73</sup>

#### A. *European Convention on Human Rights*

Though German law provides no relief for these families, the text of the European Convention on Human Rights, which the ECHR applies, provides grounds for the right to homeschool for religious reasons in several of the document's provisions. Article 8 of the Convention requires signatory governments, including all governments in the European Union, to respect individuals' private and family lives.<sup>74</sup> If a state chooses to interfere with a private or family matter, the state must show that it does so only when necessary to protect key interests like national security, public safety, or the economic well-being of the country.<sup>75</sup> Furthermore, Article 9 of the Convention guarantees citizens freedom of conscience and religious freedom.<sup>76</sup> Along with this right, the Convention gives people the right to publicly and privately manifest their religious beliefs.<sup>77</sup> The decision to homeschool children to shield them from beliefs offensive to the family's religion pertains to religious freedom. If a family is prevented from making such a decision, this should be seen as the state preventing families from publicly and privately manifesting their religious beliefs. According to the Convention, if a state chooses to interfere with religious freedom in such a manner, it can do so only to serve an interest necessary to democratic society, like public safety or for the protection of public health or morals.<sup>78</sup> In *Konrad v. Germany*, the ECHR found that "any interference with the applicants' rights" under Articles 8 and 9 of the Convention were justified by these provisions.<sup>79</sup>

The Convention provision that most clearly supports a right to homeschool for religious reasons is Article Two of the Convention Protocol Number One.<sup>80</sup>

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<sup>73</sup> *See id.*

<sup>74</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 8, Nov. 4, 1950, E.T.S. 5 [hereinafter Convention].

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* art. 9, § 1.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* art. 9, § 2.

<sup>79</sup> *Konrad v. Germany*, 2006-XIII Eur. Ct. H.R. 355, at 3.

<sup>80</sup> Article Two of the Convention Protocol Number One is titled "Right to Education." Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Mar. 20, 1952, E.T.S. 9 [hereinafter Protocol]. This Article in its entirety states, "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." *Id.* Protocols are additions and amendments to the Convention that must be

The member states ratified Protocol Number One in 1954.<sup>81</sup> A provision from this protocol says: “the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.”<sup>82</sup> In light of this provision, a homeschooling ban and an accompanying mandate to send children to public schools that offer perspectives offensive to some individuals’ religious beliefs is impermissible. Notably, unlike the other provisions, this mandate does not allow the state to infringe this right under any circumstances, even to serve an interest necessary to a democratic society.<sup>83</sup> Despite these three articles, the ECHR ruled against the Romeikes and upheld Germany’s homeschooling ban.<sup>84</sup>

### *B. Less Restrictive Approaches from Other European Countries*

Despite the stance of the European Court of Human Rights and Germany, other European countries take a much more liberal approach to homeschooling.<sup>85</sup> For example, in the United Kingdom, there is a “great deal of flexibility” given to parents to direct the education of their children.<sup>86</sup> The right to homeschool with minimal state intrusion is codified in the United Kingdom by the Education Act of 1996.<sup>87</sup> Under this law, local school authorities must accept parents’ decisions to educate their children at home.<sup>88</sup> Schools retain some discretion in the event that parents want to homeschool their children only part-time.<sup>89</sup> This statute places the obligation to educate children solely on the children’s parents after the child becomes five years old.<sup>90</sup> When children are homeschooled, parents do not need to follow the “national curriculum” taught in the country’s public schools.<sup>91</sup>

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signed and ratified by all State members to take effect. European Court of Human Rights, *Protocols of the European Convention on Human Rights*, [https://www.echr.coe.int/Documents/Archives\\_evolution\\_Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Archives_evolution_Convention_ENG.pdf) (last visited Feb. 16, 2021).

<sup>81</sup> *Details of Treaty No. 009*, COUNCIL OF EUR., <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/218?module=treaty-detail&treatynum=009> (last visited Feb. 16, 2021).

<sup>82</sup> Protocol, *supra* note 80, art. 2.

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

<sup>84</sup> Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 355, at 355.

<sup>85</sup> *See* Collin Koons, *Education on the Homefront: Home Education in the European Union and the Need for Unified Policy*, 20 IND. INT’L & COMP. L. REV. 145, 148 (2010).

<sup>86</sup> *Id.* at 149.

<sup>87</sup> Education Act 1996, *supra* note 10, at pt I, c.I, § 9.

<sup>88</sup> *Educating Your Child at Home*, GOV.UK, <https://www.gov.uk/home-education> (last visited Sept. 20, 2020).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

Though the United Kingdom takes a very liberal approach in its homeschooling policies, families are not completely free from the government's oversight.<sup>92</sup> Local school councils have the authority to evaluate whether a child is getting a suitable education at home.<sup>93</sup> There is little case law defining what constitutes a suitable education in the United Kingdom, but one case held that a suitable education "primarily equips a child for life within the community of which he is a member."<sup>94</sup> If the council decides that the child's home-education is unsuitable, the local school council has the authority to compel the child to return to school.<sup>95</sup> However, this enforcement power is rarely utilized.<sup>96</sup> France and Ireland also have accommodating policies for families desiring to homeschool their children.<sup>97</sup>

### III. THE ROMEIKES

Uwe and Hannelore Romeike and their five children lived in the German town of Bissingen—a town near Stuttgart in Baden-Württemberg.<sup>98</sup> The Romeikes are devout Christians who believe in the Bible and its teachings.<sup>99</sup> The Romeikes asserted that the area's public schools conflict with their Christian beliefs by teaching sexual education in elementary school and reading stories about witches.<sup>100</sup> They also complained about the bullying behavior they observed in public school students.<sup>101</sup> In response to their concerns, they applied to the local education office for an exemption to Germany's compulsory school attendance law.<sup>102</sup> Local education officials quickly denied their application for an exemption.<sup>103</sup> This denial of an exemption is consistent with "how virtually

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<sup>92</sup> See Koons, *supra* note 85, at 150.

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

<sup>94</sup> *England: Legal Status and Resources on Homeschooling in the United Kingdom*, HOME SCH. LEGAL DEF. ASSOC. (quoting *R v. Secretary of State for Education and Science, ex parte Talmud Torah Machzikei Hadass School Trust*, TIMES, Apr. 12, 1985), <https://hsllda.org/post/united-kingdom> (last visited Feb. 16, 2021).

<sup>95</sup> *Id.*

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

<sup>97</sup> Koons, *supra* note 85, at 149. Koons explains that England, Ireland and France "have legalized homeschooling, and although there may be minor restrictions, these three countries give a great deal of flexibility in allowing parents to shape their education." *Id.*

<sup>98</sup> HSLDA, *supra* note 1.

<sup>99</sup> *Id.*

<sup>100</sup> Petition for Writ of Certiorari at 4, *Romeike v. Holder, cert. denied*, 571 U.S. 1244 (2014) (No.12-3641), 2013 WL 5652549 (Oct. 10, 2013).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

all German authorities respond to applications from parents who homeschool for reasons of conscience.”<sup>104</sup>

However, in the fall of 2006, the Romeike parents still withdrew their children from public school and began to homeschool according to their religious beliefs.<sup>105</sup> Almost immediately, the principal of their local school visited the family, and threatened them with fines and police action.<sup>106</sup> In the coming weeks, the Romeikes received letters from both this principal and their mayor reiterating the notion that what the Romeikes were doing was illegal and threatening state action.<sup>107</sup> On October 20, 2006, the local police arrived at the Romeike home in the morning, forced the Romeike children into a police van, and took the children back to the local public school.<sup>108</sup> Mrs. Romeike picked up her children from school at recess and hid them at her sister’s house that day out of fear the police would return to their house.<sup>109</sup>

The following Monday, armed police officers once again came to the Romeike home for the children.<sup>110</sup> However, this time the officers were met with peaceful protesters and a member of the press.<sup>111</sup> The police once again entered the Romeike home, and the parents refused to let the police officers go upstairs to gather their children.<sup>112</sup> Eventually, the mayor of the town ordered the officers to leave the home without the Romeike children.<sup>113</sup> After these tense moments, the Romeikes continued to homeschool but received expensive fines from the state.<sup>114</sup>

In February 2007, the Romeikes challenged these fines in court, but the Baden-Württemberg State Court upheld their penalties.<sup>115</sup> The court ruled that parents could not obtain an exemption from the state’s general attendance requirements for the purposes of educating their children in alignment with their religious views.<sup>116</sup> The Romeikes appealed their decision all the way to the

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 5.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 5–6.

<sup>109</sup> *Id.* at 6.

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

<sup>111</sup> *Id.* at 6–7.

<sup>112</sup> *Id.* at 7.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 7–8.

Federal Constitutional Court of Germany, but their appeal was rejected.<sup>117</sup> Previously, in 2003, the Federal Constitutional Court of Germany rejected a similar appeal from the Konrad family who were also from Baden-Württemberg.<sup>118</sup> When the court rejected the Konrad's application for an appeal, it ruled that Germany's homeschooling ban was a proportionate interference with the parents' rights given the state interest in preventing the emergence of parallel societies based on separate philosophical convictions.<sup>119</sup> The court also noted that minorities with separate religious or philosophical views "should not exclude themselves" from the predominant views of German society.<sup>120</sup>

At the ECHR, the Romeikes sought relief mainly under Article Two of Protocol Number One of the Convention, asserting that their Christian beliefs gave them a non-transferable duty to educate their children in alignment with their faith.<sup>121</sup> The Romeikes argued that existing public and private school options would not allow the parents to fulfill this duty because their religious neutrality or incompatible religious views would "endanger their children's religious education."<sup>122</sup> In interpreting Article Two of Protocol Number One, the court stated that the primary purpose of the provision was "safeguarding pluralism in education."<sup>123</sup> Then, the court suggested that the state could ensure pluralism in education only through public schools.<sup>124</sup> After making these determinations, the ECHR decided that the language allowing parents to educate their children in alignment with their religious and philosophical convictions was not a separate right, but a qualification of the general right to education listed in the first sentence of Article Two of Protocol Number One.<sup>125</sup> Thus, in the court's view, a parents' religious and philosophical convictions could affect their child's education only when their desires did not conflict with their right to general education.<sup>126</sup>

Turning to the Romiekes, the ECHR stated that "it cannot be formally said that the applicant parents are seeking to impose their religious convictions against their children's will."<sup>127</sup> Regardless of this determination, the ECHR

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<sup>117</sup> *Id.* at 8.

<sup>118</sup> Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 355, at 3.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2–3.

<sup>121</sup> *Id.* at 5–6.

<sup>122</sup> *Id.* at 6.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 6–7.

<sup>125</sup> *See id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 7.

agreed with the regional administrative court that the Romeike children were too young to “foresee the consequences of their parents’ decision for home education . . . .”<sup>128</sup> The court also noted Article Two of Protocol Number One inherently called for state regulation by establishing a general right to education, and that there was no consensus on the legality of homeschooling in the European Union.<sup>129</sup> From these assertions, the ECHR concluded that a compulsory education law that banned homeschooling was a valid way for a state to meet the obligations of Article Two of Protocol Number One.<sup>130</sup>

To bolster their conclusion, the court endorsed the German courts’ conclusions that students needed to learn how to integrate into German society by attending public school, and that homeschooling would be unable to teach children how to live in German society.<sup>131</sup> Instead of analyzing these assertions, the court held them valid by holding that they were in the “margin of appreciation” given to member states to set up and interpret “rules for their education systems.”<sup>132</sup> The ECHR addressed the parental rights issues by finding that parental rights were not “disproportionately” affected by Germany’s policies because parents could still educate children in conformity with their religious convictions when the children were not in school.<sup>133</sup> In light of all these findings, the ECHR rejected the Romeikes’ complaint under Article Two of Protocol Number One.<sup>134</sup>

After rejecting the main complaint, the court also dismissed the Romeikes’ alternative arguments under Articles Eight and Nine of the Convention.<sup>135</sup> The ECHR found that the infringement of the Romeikes’ rights protected by these articles was justified “as being provided for by law and necessary in a democratic society and in the public interest of securing the education of the child.”<sup>136</sup> The final argument raised by the Romeikes pertained to the anti-discrimination language found in Article Fourteen of the Convention.<sup>137</sup> The Romeikes alleged discrimination in a number of ways, claiming that Germany’s homeschooling ban discriminated against them on the basis of religion, and that

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 7–8.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*



the policy was not fairly enforced because it allowed for other exemptions like the one for parents who worked in other countries.<sup>138</sup> The ECHR acknowledged that Germany did discriminate against the Romeikes, but that this policy had a reasonable relationship of “proportionality” between the means employed and the aim sought to be realized.<sup>139</sup> In other words, the court held that this discrimination was a proper means to accomplish a legitimate government objective. The ECHR also relied on the margin of appreciation to approve this discriminatory policy.<sup>140</sup>

Once the court rejected the Romeikes’ arguments, it unanimously declared the Romeikes’ application inadmissible—the equivalent of the U.S. Supreme Court denying *certiorari* to a case.<sup>141</sup> With the family’s last recourse exhausted, the Romeikes faced the wrath of the German Government.<sup>142</sup> The family was assessed large civil penalties they could not afford.<sup>143</sup> The local authorities considered removing the children from their parents’ custody.<sup>144</sup> Finally, the local police began arriving at the family’s house to forcibly take the Romeike children to school.<sup>145</sup>

Left with almost no other options, the family fled to the United States in August 2008.<sup>146</sup> In January 2010, the U.S. Immigration Court granted the family asylum, holding that Germany’s homeschooling ban was “utterly repellant to everything we believe in as Americans.”<sup>147</sup> Unfortunately, the U.S. Board of Immigration Appeals overturned the decision which granted the Romeikes asylum.<sup>148</sup> The U.S. Court of Appeals for the Sixth Circuit affirmed the ruling of the U.S. Board of Immigration Appeals, and the U.S. Supreme Court denied *certiorari* of the Sixth Circuit’s decision.<sup>149</sup>

In spite of all this, the Romeikes were able to remain in the United States because in 2014, the Department of Homeland Security granted their case “indefinite deferred action status,” meaning the Department essentially agreed

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<sup>138</sup> *Id.* at 9.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> WITTE & NICHOLS, *supra* note 2.

<sup>143</sup> *See* Petition for Writ of Certiorari, *supra* note 100, at 7.

<sup>144</sup> WITTE & NICHOLS, *supra* note 2.

<sup>145</sup> *See id.*

<sup>146</sup> HSLDA, *supra* note 1.

<sup>147</sup> WITTE & NICHOLS, *supra* note 2.

<sup>148</sup> HSLDA, *supra* note 1.

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

to stop prosecuting their case.<sup>150</sup> At that time, Congress considered a law that would grant relief to the Romeikes and other families that flee to the United States for reasons relating to homeschooling.<sup>151</sup> Unfortunately, the law was not passed and the federal government changed their stance in 2019.<sup>152</sup> In July of that year, the Romeikes were given twelve months to leave the country.<sup>153</sup> At time of this writing, the Romeikes face an uncertain fate, but remain living in the United States with their now seven children.<sup>154</sup>

The Romeikes' plight reveals the harsh nature of Germany's comprehensive homeschooling ban. The German Government refused to provide the Romeikes with a workable solution beyond the inadequate suggestion that the parents could educate their children beyond school hours. To educate their children in accordance with their values, the Romeikes were forced to abandon their home country and submit themselves to the whims of another country's asylum policy. Furthermore, the notion that parents' desire to educate their children at home because of their religious values could subject their family to having their children forcibly taken to public school by government authorities is disconcerting. This draconian enforcement measure does not seem appropriate for a Western liberal democracy, particularly for one whose prohibition on homeschooling originated in the Nazi era. Though the Romeikes proved unsuccessful in U.S. immigration courts, homeschooling remains widely accepted across the United States. Next, this Comment turns to homeschooling policies in the United States.

#### IV. HOMESCHOOLING JURISPRUDENCE IN THE UNITED STATES

Unlike the German Constitution, the U.S. Constitution does not explicitly reference education or parents' right to direct their children's education.<sup>155</sup> However, in a line of cases from the twentieth and twenty-first centuries, the U.S. Supreme Court has made clear that the government cannot have a monopoly on education in a democratic society.<sup>156</sup>

During the early twentieth century, the U.S. Supreme Court used the doctrine of substantive due process to find a fundamental right to religious liberty.<sup>157</sup>

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<sup>150</sup> WITTE & NICHOLS, *supra* note 2.

<sup>151</sup> *Id.*

<sup>152</sup> *See* HSLDA, *supra* note 1.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Martin, *supra* note 31, at 251, 253.

<sup>156</sup> WITTE & NICHOLS, *supra* note 2, at 268.

<sup>157</sup> *Id.* at 112.

Twice in the 1920s, the Court utilized this fundamental right to strike down laws that tried to control how parents chose to educate their children.<sup>158</sup> In *Meyer v. Nebraska*, the Supreme Court used the fundamental right to religious liberty to strike down a Nebraska statute that prohibited any student below ninth grade from studying a foreign language.<sup>159</sup> With this holding, the Court overturned the convictions of a few Nebraska school teachers who were prosecuted under this Nebraska state statute for teaching young children Bible stories in German.<sup>160</sup>

A few years later, in *Pierce v. Society of Sisters*, the Supreme Court made clear that the state does not have a monopoly in educating children.<sup>161</sup> The majority opinion stated, “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.”<sup>162</sup> With this reasoning, the Court struck down an Oregon statute which would have made it mandatory for resident children to attend Oregon public schools.<sup>163</sup> Consequently, the Supreme Court safeguarded the ability of parents to send their children to private school.<sup>164</sup>

The Supreme Court took the next step when it decided *Wisconsin v. Yoder* in 1972.<sup>165</sup> According to Professor John Witte, Jr., this case spawned the modern homeschooling movement in the United States.<sup>166</sup> The facts and ultimate outcome of this case dramatically contrasts with the Romeikes’ plight. Accordingly, this case will be discussed comprehensively.

Joel Yoder, Wallace Miller, and Adin Yutz sought to exempt their children from Wisconsin’s compulsory school attendance law which mandated that children must attend school until the age of sixteen.<sup>167</sup> These respondents, who were all members of the Old Order Amish, sought this exemption on the basis of their right to exercise their religion freely.<sup>168</sup> The Amish wanted their children exempted from Wisconsin’s compulsory school law after eighth grade because

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<sup>158</sup> *Id.*

<sup>159</sup> *See Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923).

<sup>160</sup> *Id.* at 403.

<sup>161</sup> *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925).

<sup>162</sup> *Id.* at 535.

<sup>163</sup> *Id.* at 510.

<sup>164</sup> *See id.*

<sup>165</sup> WITTE & NICHOLS, *supra* note 2, at 142.

<sup>166</sup> *Id.*

<sup>167</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

<sup>168</sup> *Id.* at 208–09.

the parents sought to educate their children in Amish traditions before the children assumed adult responsibilities in their Amish community.<sup>169</sup>

When the respondents' children did not attend school after eighth grade, public officials complained and the parents were charged with violating the Wisconsin statute, resulting in a fine of five dollars to each family.<sup>170</sup> At trial, the respondents asserted that the exemption from Wisconsin's compulsory school attendance laws was essential to the survival of their faith.<sup>171</sup> In their view, the Amish faith required lives separate from mainstream society, and high school attendance exposed their children to worldly influence that conflicted with the Amish faith.<sup>172</sup> The trial court judge ruled that Wisconsin's compulsory school attendance law did interfere with a sincere religious belief, but also held that the law was a "'reasonable and constitutional' exercise of government power."<sup>173</sup> Thus, the court denied an exemption for the Old Order Amish.<sup>174</sup> The Wisconsin Circuit Court affirmed the trial court's ruling,<sup>175</sup> but the Wisconsin Supreme Court reversed the decision.<sup>176</sup>

The U.S. Supreme Court upheld the Wisconsin Supreme Court's reversal.<sup>177</sup> First, the Court agreed with the finding that Amish objections to formal education beyond eighth grade were firmly grounded in central aspects of their faith like the Amish command to keep children away from "worldly influences."<sup>178</sup> Chief Justice Burger explained in great detail the ways in which high school education would serve as a "serious barrier to the integration of the Amish child into the Amish religious community."<sup>179</sup> The Court also acknowledged that the Amish consented to elementary education because it did not "significantly expose their children to worldly values."<sup>180</sup> Interestingly, the Court also stressed the good reputation of the Amish by emphasizing they were "law-abiding and generally self-sufficient" people.<sup>181</sup>

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<sup>169</sup> *Id.* at 211.

<sup>170</sup> *Id.* at 208.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 211.

<sup>173</sup> *Id.* at 213 (internal quotation marks omitted) (citing 182 N.W.2d 539 (Wis. 1971)).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 207.

<sup>178</sup> *Id.* at 218.

<sup>179</sup> *Id.* at 211–12.

<sup>180</sup> *Id.* at 212.

<sup>181</sup> *Id.* at 212–13.

Diving into precedent, the Court read *Pierce v. Society of Sisters* as expressing the proposition that the state's responsibility to provide an education can yield "to the right of parents to provide an equivalent education in a privately operated system."<sup>182</sup> From this notion, the Court reasoned that the state's interest in universal education, though highly important, is not free from being weighed against the traditional interests of parents to direct the religious upbringing of their children.<sup>183</sup> The Court also observed that the values protected by the religion clauses of the First Amendment have been protected at the expense of other interests "of admittedly high social importance."<sup>184</sup>

As a threshold issue, the Court addressed whether the Amish insistence to not send their children to high school was a practice tied to a religious belief, noting that "subjective evaluation and rejection of the contemporary secular values" on a non-religious basis would not receive protection under the First Amendment.<sup>185</sup> The Court decided the "record in this case abundantly supports" the assertion that Amish concerns grew out of a "deep religious conviction[.]"<sup>186</sup> As part of this finding, the Chief Justice emphasized how the Amish had not changed their practices for centuries.<sup>187</sup>

Next, the Court observed that the Amish way of life had increasingly come under pressure as the majority of society adopted lifestyles and values that diverged from unchanged Amish traditions.<sup>188</sup> The values taught by the modern secondary school were a dangerous source of this pressure because it comprehensively exposed Amish children to worldly influence while pulling them out of their religious community.<sup>189</sup> Accordingly, Wisconsin's compulsory school attendance law threatened the Amish with "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."<sup>190</sup>

Next, the Court dismissed Wisconsin's contention that the Amish parents' religiously-motivated conduct fell outside the scope of the First Amendment.<sup>191</sup> In doing so, Chief Justice Burger recognized that the Amish parents' decision to

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<sup>182</sup> *Id.* at 213.

<sup>183</sup> *Id.* at 214.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 216.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 216–17.

<sup>188</sup> *Id.* at 217.

<sup>189</sup> *Id.* at 218.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 219–20.

not send their children to a contemporary high school could not be categorized as a belief or an action.<sup>192</sup> Furthermore, the Court refused to uphold the law on the basis of its religious neutrality.<sup>193</sup> In a similar fashion to another Supreme Court case pertaining to the Free Exercise Clause, the Court held that religious neutrality was not dispositive here because “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”<sup>194</sup>

In balancing the respondents’ free exercise rights with Wisconsin’s interest in compulsory education, the Court weighed the interests Wisconsin sought to promote by its compulsory education statute and the impediment to these objectives that would result if the Amish were granted an exemption to the statute.<sup>195</sup> Under this analysis, the additional one or two years of schooling beyond eighth grade did little to serve the state’s interest in preparing Amish children to be “self-sufficient participants in society[.]” because these children were preparing for a life in Amish society—not the modern world.<sup>196</sup>

The Court refused to entertain the state’s assertion that the Amish were “fostering ignorance” by refusing to send their children to high school.<sup>197</sup> Instead, the Court recognized that the Amish were not opposed to education beyond the eighth grade, but rather the format in which Wisconsin offered contemporary education.<sup>198</sup> While recognizing this distinction, the opinion stressed that the Amish perspective was not to be maligned because it diverged from the majority’s views on schooling.<sup>199</sup> The Court also refused to accept Wisconsin’s assertion that granting the Amish this exemption would leave Amish children who desired to leave the faith unprepared for life in normal society.<sup>200</sup> In response, Chief Justice Burger explained that the practical skills taught to Amish children in their adolescent years, though dramatically different from a normal high school’s curriculum, still constituted an education that could equip Amish children to succeed in, and outside of, Amish society.<sup>201</sup>

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<sup>192</sup> *Id.* at 220.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Walz v. Tax Commission*, 397 U.S. 664 (1970)).

<sup>195</sup> *Yoder*, 406 U.S. at 221.

<sup>196</sup> *Id.* at 221–22.

<sup>197</sup> *Id.* at 222 (internal quotation marks omitted).

<sup>198</sup> *Id.* at 223.

<sup>199</sup> *Id.* at 223–24.

<sup>200</sup> *Id.* at 224.

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

In contrast to the long-standing traditions of the Amish, the Court recognized that mandatory school attendance beyond the eighth grade was a relatively recent development in the United States.<sup>202</sup> With this notion, Chief Justice Burger determined that Wisconsin was only speculating that an additional one or two years of mandatory school attendance was necessary for students to understand their duties as citizens.<sup>203</sup> Furthermore, the Court delved into the history of the Wisconsin statute, finding that the state's decision to require school attendance until sixteen was meant primarily to keep students out of the labor force and in school.<sup>204</sup> In regard to this interest, Wisconsin's concern for Amish children was less substantial because working on the family farm under parental guidance from age fourteen to age sixteen was an "ancient tradition that lies at the periphery of the objectives of [child labor laws]."<sup>205</sup> Thus, Wisconsin did not need to enforce this statute against the Amish because Amish children were going to continue their practical education on the farm instead of going straight into a job.<sup>206</sup>

Wisconsin asserted that this exemption would cause the state to fail its *parens patriae* obligation to the children to provide them with a secondary education regardless of the wishes of their parents.<sup>207</sup> The Supreme Court acknowledged that the free exercise of religion was not totally free from legislative restrictions, but held that this situation did not oblige Wisconsin to intervene as the *parens patriae* because the record indicated no evidence of harm to the children or the public welfare.<sup>208</sup>

On a related note, the Court explicitly mentioned that the children were not parties to this litigation, illustrating how this case centered around the rights of the parents to withdraw their children from school on the basis of a religious conviction.<sup>209</sup> Chief Justice Burger dismissed claims positing that Amish parents were imposing this lifestyle on their possibly unwilling children by affirming that state intrusion "into family decisions in the area of religious training would give rise to grave questions of religious freedom. . . ."<sup>210</sup> The notion that the state, as *parens patriae*, had the ability to "save" a child from his Amish upbringing with high school would essentially give the state a controlling

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<sup>202</sup> *Id.* at 226.

<sup>203</sup> *Id.* at 227.

<sup>204</sup> *Id.* at 228.

<sup>205</sup> *Id.* at 229 (citing G. ABBOTT, *THE CHILD AND THE STATE* 266 n.16 (Greenwood reprint. 1968)).

<sup>206</sup> *Id.*

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

<sup>208</sup> *Id.* at 230.

<sup>209</sup> *See id.* at 231.

<sup>210</sup> *Id.* at 231–32.

influence in the religious future of the child.<sup>211</sup> The Court was offended by this possibility, noting that parents' role as the primary actors in the upbringing of children was "established beyond debate[.]"<sup>212</sup> As a corollary to this principle, the Court expressed that children could never be "mere creature[s] of the State[.]"<sup>213</sup> From these principles, the Supreme Court held that Wisconsin's assertion of *parens patriae* was odious to the religion clauses of the First Amendment because it represented an "all-encompassing" assertion of state power that had the capability to produce "broad and unforeseeable" consequences.<sup>214</sup>

In its last sentences, the Court reemphasized the unchanging nature of Amish traditions and the ways in which these traditions were threatened by compulsory secondary education.<sup>215</sup> After an extensive discussion of parental rights, First Amendment jurisprudence, and Amish beliefs, the Court affirmed the holding of the Wisconsin Supreme Court, thereby granting the Old Order Amish an exemption from mandated secondary school attendance.<sup>216</sup>

The central holding of *Wisconsin v. Yoder* was unanimous, revealing the importance of this issue to the Supreme Court.<sup>217</sup> However, the Justices diverged on a few issues relevant to providing a religious exemption to parents that desire to homeschool their children. A concurring opinion, joined by Justices White, Brennan, and Stewart, agreed with the outcome in this case, but used stronger language to support the state's power to mandate education.<sup>218</sup> They found this case was acceptable only because the Amish still allowed their children to attend state elementary education.<sup>219</sup>

Justice Douglas agreed with the outcome, but dissented in part over his concerns pertaining to parents imposing their religious views on their children.<sup>220</sup> In his view, children's rights needed to be addressed and honored because children have no other forum to vindicate their religious liberty rights if their views conflict with those of their parents.<sup>221</sup> The dissenter acknowledged that this issue had never been explicitly presented before the Court, but claimed

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<sup>211</sup> *Id.* at 232.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 233 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925)).

<sup>214</sup> *Id.* at 234.

<sup>215</sup> *Id.* at 235–36.

<sup>216</sup> *Id.* at 236–37.

<sup>217</sup> *Id.* at 205.

<sup>218</sup> *Id.* at 238–41.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 241–42.

<sup>221</sup> *Id.* at 242–43.



that children's rights could be seen in recent Supreme Court cases where the Court had extended Fourth Amendment principles to juvenile defendants in criminal cases.<sup>222</sup> Accordingly, Justice Douglas asked for the case to be remanded and for a hearing to be held to discern the children's wishes in this case.<sup>223</sup>

The outcome of *Wisconsin v. Yoder* stands in marked contrast to the harsh nature of Germany's homeschooling ban. Here, the U.S. Supreme Court treated the Wisconsin Amish with dignity and respect instead of applying pressure on them to conform to mainstream society like the German Government did in the Romeikes' case. This distinction is evident in how the Court generously accommodated the Wisconsin Amish by allowing them to homeschool their children beyond high school. The Justices sympathized with the Amish's plight in a changing world by recognizing their need to keep Amish children from the temptations of a modern American high school. In its opinion, the Court did not denounce the community's desire to keep their children separate from mainstream society. Finally, the Wisconsin Amish did not have to flee their homes to continue living by their religious convictions as a result of the Supreme Court's decision.

It must be acknowledged that there is an important difference in these two cases. The Romeikes sought to homeschool their children from elementary school onwards.<sup>224</sup> The Wisconsin Amish sought to homeschool their children only after they completed eighth grade in public school.<sup>225</sup> Despite this difference, the comparison of these two cases is fruitful because they highlight a fundamental difference in how the European Court of Human Rights and the U.S. Supreme Court treat minority religious beliefs. As indicated by *Konrad v. Germany*, the ECHR views a common education meant to expose every child to the majority's perspective as a legitimate exercise of state power that does not meaningfully infringe on citizens' rights. Accordingly, from this perspective, the pressure exerted by the country's majority is an acceptable burden on minority groups with opposing views like religious beliefs. In contrast, as shown by *Wisconsin v. Yoder*, the U.S. Supreme Court is less tolerant of state attempts to expose children to society's mainstream in ways that greatly burden minority communities with divergent religious beliefs. Thus, in this case, the Court gave the Wisconsin Amish an exemption from the state's mandatory high school

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<sup>222</sup> *Id.* at 243–44.

<sup>223</sup> *Id.* at 245.

<sup>224</sup> Petition for Writ of Certiorari, *supra* note 100, at 4.

<sup>225</sup> *Yoder*, 406 U.S. at 215–16.

attendance policy on the grounds that it so burdened the Wisconsin Amish that it would threaten their continued survival as a community.

From this comparison, it is evident that the ECHR is more trusting of countries (like Germany) because its decisions grant European countries the ability to force resident children to attend schools that teach curriculum devised by the government. As a result, these countries have the ability to greatly influence their future adult citizens. The U.S. Supreme Court, on the other hand, appreciates how the lack of a central, government-operated education system serves as a check on the government. Also, the ECHR allows countries to encourage the integration of all their resident children into a common society regardless of the burden this policy places on the country's minority religious groups. In contrast, the U.S. Supreme Court is much more protective of minority religious groups, going so far as to allow the Wisconsin Amish to expand their separation from mainstream society in an effort to encourage the group's survival in modern America.

## V. HOMESCHOOLING IN THE UNITED STATES

Today, homeschooling is legal across the United States.<sup>226</sup> In 2016, there were an estimated 169,000 homeschooled students between ages five through seventeen with a grade equivalent of kindergarten through twelfth grade.<sup>227</sup> In 2016, this represented an estimated 3.3% of all school-aged children in the United States.<sup>228</sup> These numbers were slightly down from 2012 when there were an estimated 177,300 homeschooled students, comprising approximately 3.4% of all school-aged children in the United States.<sup>229</sup>

States differ in how they regulate home-education.<sup>230</sup> According to the Home School Legal Defense Fund, states can be organized into four categories according to the extent they regulate homeschooling within their borders.<sup>231</sup> In the first group of states, known as *no notice required states*, parents do not have

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<sup>226</sup> *Homeschool Laws by State*, HOME SCH. LEGAL DEF. ASSOC., <https://hsllda.org/legal> (last visited Sept. 20, 2020).

<sup>227</sup> Digest of Education Statistics, *Table 206.10. Number and Percentage of Homeschooled Students Ages 5 Through 17 with a Grade Equivalent of Kindergarten Through 12th Grade, by Selected Child, Parent, and Household Characteristics: Selected Years, 1999 Through 2016*, NAT'L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d19/tables/dt19\\_206.10.asp?current=yes](https://nces.ed.gov/programs/digest/d19/tables/dt19_206.10.asp?current=yes) (last visited Feb. 16, 2020).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Homeschool Laws by State*, *supra* note 226.

<sup>231</sup> *Id.*

to register their children with the local school district.<sup>232</sup> Along with the no registration requirement, these states have no substantive regulation on homeschooling, meaning parents do not have to abide by state standards for curriculum nor have their students tested by the state.<sup>233</sup> Eleven states across a wide geographic range have these policies including Texas, Illinois, and New Jersey.<sup>234</sup>

The next group of states, known as *low regulation states*, require parents to register their children with their local school district.<sup>235</sup> However, generally these states also have no substantive regulations on curriculum or state testing.<sup>236</sup> Sixteen states across the country employ this homeschooling model including California, Arkansas, and Delaware.<sup>237</sup>

In *moderate regulation states*, parents also have to register their children with their local school districts.<sup>238</sup> In addition, states monitor the academic progress of homeschool students by mandating that students take state standardized tests and/or requiring parents to submit professional evaluations of their children's progress to their local school district.<sup>239</sup> Eighteen states across the country maintain these requirements for homeschooled students, including Hawaii, Tennessee, and Maine.<sup>240</sup>

The final group of states are known as *high regulation states*.<sup>241</sup> Unsurprisingly, these states are the ones that maintain the strictest standards for homeschooling in the United States.<sup>242</sup> These states generally mandate all the requirements found in moderate regulation states, in addition to other regulations. Some of these additional requirements can include home visits by state officials, curriculum plans reviewed by the state, and state teaching certifications for parents.<sup>243</sup> The five states that follow these policies are clustered in the northeast and include Massachusetts, New York, and Pennsylvania.<sup>244</sup>

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<sup>232</sup> *See id.*

<sup>233</sup> *See id.*

<sup>234</sup> *Id.*

<sup>235</sup> *See id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *See id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

From this survey of U.S. homeschooling policies, it is clear the United States' treatment of homeschooling families bears no relation to Germany's comprehensive ban on such education. The small number of states with high regulation suggests that most state officials are confident that homeschooling provides a sufficient education to students who learn at home. This confidence stands in stark contrast to Germany's claim in the Romeike case that homeschooling could not provide a complete education for Germany's children. Also, many localities in the United States do not force families to educate their children according to one standard curriculum even though some states might mandate certain subjects or review curriculum plans devised by parents. In Germany, parents have little choice in deviating from the state curriculum because even private schools are required to teach content that is substantially similar or identical to what public schools teach.<sup>245</sup>

Accordingly, the United States allows societal minorities to teach their children according to their philosophical and religious views, while Germany subjects all children to the same state-created educational perspective. This divergence is ironic given that the Convention provides parents the explicit right to educate their children in accordance with their religious and philosophical views and the U.S. Constitution says nothing explicit about parental rights or education.<sup>246</sup>

#### CONCLUSION

From the following, it is evident that Germany takes a uniquely harsh approach to homeschooling regulation that differs enormously from other large western liberal democracies. When this policy was challenged before the ECHR, the court misinterpreted the text of the Convention, thereby allowing Germany's policy to stand regardless of the conflicts that exist between Germany's stance on homeschooling and the text of the Convention. In addition to being problematic on textual grounds, Germany's homeschooling policy is also problematic on policy grounds because it gives governments too much influence over future generations and fails to respect the decisions of parents, especially those who are religiously devout.

Turning to the text of the Convention, Article 8 requires member states to respect the private and family lives of their citizens.<sup>247</sup> The same provision

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<sup>245</sup> See Wuerth, *supra* note 3.

<sup>246</sup> Martin, *supra* note 31, at 251; Koons, *supra* note 85, at 156.

<sup>247</sup> The Convention, *supra* note 75, art. 8.

mandates that this right be abridged in a democratic society only when necessary: “in the interests of national security, public safety, or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”<sup>248</sup> In *Konrad v. Germany*, the ECHR found that the Romeikes’ rights protected by this provision were infringed, and this burden was legal because it was necessary in a democratic society in light of the public interest in ensuring children are educated.<sup>249</sup>

However, as demonstrated previously by several other democratic countries including the United Kingdom, the United States and France, a homeschooling ban is not absolutely required for a democratic society as these three countries readily allow homeschooling with varying degrees of regulation. Thus, the ECHR’s understanding of “necessary” in this line of reasoning is more expansive than the plain meaning of the word and fails to align with reality. If the ECHR had abided by the plain meaning of the text, the ECHR would have held that Germany’s homeschooling ban is not necessary for a democratic society and that therefore Germany’s policy needlessly infringes on the Romeikes’ rights regarding their private and family life.

Article 9 of the Convention requires member states to guarantee its citizens “the right to freedom of thought, conscience, and religion . . . and in public or private, [the right] to manifest his religion or belief, in worship, teaching, practice and observance.”<sup>250</sup> This “[f]reedom to manifest one’s religion or beliefs shall be subject only to legal limitations . . . necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of rights and freedoms of others.”<sup>251</sup>

Similar to its treatment of Article 8, the ECHR relied on an expansive understanding of “necessary,” and held that the Romeikes’ right to publicly and privately manifest their religious beliefs was legitimately infringed by Germany’s homeschooling ban because it was “necessary” in a democratic society in light of the public interest in ensuring children are educated.<sup>252</sup> However, once again, the examples of countries like the United States and the

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<sup>248</sup> *Id.*

<sup>249</sup> *Konrad v. Germany*, 2006-XIII Eur. Ct. H.R. 355, at 9. Necessary means “absolutely required.” Necessary Definition, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/necessary> (last visited Oct. 8, 2021).

<sup>250</sup> The Convention, *supra* note 75, art. 9, § 1.

<sup>251</sup> *Id.* art. 9, § 2.

<sup>252</sup> *Konrad*, 2006-XIII Eur. Ct. H.R. at 9.

United Kingdom reveal that a homeschooling ban is not a necessity for a democratic society to further the public interest of educating children. Consequently, the ECHR should have acted in accordance with the plain-meaning of the text and held that the infringement on the Romeikes' right to publicly and privately manifest their religious beliefs and practices by educating their children at home was unnecessary. With this finding, the ECHR should have concluded Germany's homeschool ban impermissible under the Convention.

Finally, and most importantly, Article Two of the Convention Protocol Number One provides that “[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”<sup>253</sup> In *Konrad v. Germany*, the ECHR emphasized that this provision was meant to ensure pluralism in education, but then went on to say that the state could ensure pluralism in education through only state-sanctioned public and private schools.<sup>254</sup> In light of this right's purpose, the Court's conclusion is contradictory. It seems unlikely that a state could ensure pluralism in education by requiring all children to attend school where the curriculum is closely regulated by the government.

Furthermore, the ECHR held that the language requiring children to be educated in alignment with their parents religious and philosophical convictions was not a separate right. Instead, the ECHR understood this language as a qualification of the Article's first sentence.<sup>255</sup> From this interpretation, the Court determined that parents' religious and philosophical convictions could not interfere with the state's provision of a general education.<sup>256</sup> Consequently, the Court repeated the perspective of the German courts, finding that the Romeikes' desire to homeschool their children would interfere with Germany's duty to provide a “German education” to the Romeike children, and that this Article did not redeem the Romeikes' situation.<sup>257</sup>

The ECHR's reading of Article Two of the Convention Protocol Number One's second sentence renders it essentially meaningless. If parents' religious and philosophical convictions only matter when they do not interfere with a

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<sup>253</sup> Protocol, *supra* note 80, art 2.

<sup>254</sup> *Konrad*, 2006-XIII Eur. Ct. H.R. at 7.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

country's general education standards, then states have unchecked power to circumvent parents' beliefs by integrating offensive materials into their education standards. The ECHR's interpretation of this provision provides no remedy for parents who believe that their country's education standards conflict with their religious or philosophical convictions. This outcome conflicts with the plain meaning of Article Two of the Convention Protocol Number One. The provision clearly states that countries are to respect parents' rights to ensure their children are educated in alignment with their convictions when the state performs "any functions" related to education and teaching.<sup>258</sup> The steep fines and forceful treatment faced by the Romeikes demonstrate how Germany through its homeschool ban completely disregarded the Romeikes' attempts to educate their children in accordance with their religious beliefs. This direct contravention of the provision's language should make Germany's homeschool ban outside the margin of appreciation given to countries under the ECHR's jurisdiction.

Furthermore, the second sentence of Article Two of the Convention Protocol Number One is written expansively.<sup>259</sup> Unlike Articles Eight and Nine of the Convention, this provision includes no limiting language that would allow this right to be balanced against other interests.<sup>260</sup> This configuration suggests that this provision was not meant to be relegated to qualifying language that could be easily disregarded when it conflicted with a country's understanding of the Article's first sentence. Instead, these observations illustrate how this provision was meant to be construed as a robust, separate right that cannot be easily outweighed by other interests. Thus, the structure of Article Two of the Convention Protocol Number One also reveals how the ECHR misinterpreted this right and wrongly categorized Germany's homeschooling ban as within the ECHR's margin of appreciation.

In addition to misinterpreting the Convention's text, the ECHR's decision is also problematic on policy grounds. This decision gives countries too much unchecked power to influence younger generations. As indicated, the ECHR found it was permissible for countries to ensure pluralism in education by requiring all children to attend public schools.<sup>261</sup> If a country were to enact this policy, then all children would be taught a government-controlled curriculum. This situation would give a country's government the ability to indoctrinate

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<sup>258</sup> Protocol, *supra* note 80, art 2.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Konrad*, 2006-XIII Eur. Ct. H.R. at 6-7.

children in their crucial stages of development. As noted by German courts, parents would still have the ability to pass on their values and perspectives outside of school. However, these parents' efforts to educate their children according to their own convictions would be hard-pressed to compete with the immersive and powerful influence of public schools where children are normally required to spend the majority of their time.

History, jurisprudence, and academia all warn against granting governments unchecked power in the realm of education.<sup>262</sup> Ironically, Germany's history provides one of the most poignant examples of the dangers implicated by this policy. Hitler himself stressed that public education was essential in creating a willing people who would continue to support the Nazi regime.<sup>263</sup> In furtherance of these plans, the Nazis banned other forms of education like homeschooling and forced all children to attend government-run schools.<sup>264</sup> Well before the rise of the Nazi regime, the U.S. Supreme Court in *Pierce v. Society of Sisters* voiced their concerns about the state having a monopoly on education.<sup>265</sup> The majority opinion said, "[t]he 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."<sup>266</sup> Finally, modern-day academics have also expressed their apprehensions with giving the state unrivaled control over children's education. For example, Professor John Witte, Jr. explains in his book *Church and State and Family: Reconciling Traditional Teachings and Modern Liberties* that granting the state a monopoly on children's education opens the door for governments to commit tyrannical abuses of power.<sup>267</sup> These perspectives all demonstrate the naïve nature of the ECHR's decision in *Konrad v. Germany* to uphold homeschooling and allow countries to safeguard the right to pluralism in education through state-sanctioned schools. With its decision, the ECHR left the door open for countries to abuse power through educating future generations of citizens.

Furthermore, the ECHR's decision in *Konrad v. Germany* fails to respect minority cultures by failing to give proper deference to both parental decisions and religious practices. The German courts repeatedly emphasized that the

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<sup>262</sup> See Martin, *supra* note 31, at 235; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); WITTE, *supra* note 18, at 358.

<sup>263</sup> Martin, *supra* note 31, at 231.

<sup>264</sup> *Id.* at 232.

<sup>265</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 529 (1925).

<sup>266</sup> *Id.* at 535.

<sup>267</sup> See WITTE, *supra* note 18.



children's best interests were served if they attended state-sanctioned schools.<sup>268</sup> Their main justification for this determination was that state-sanctioned schools represented society-at-large and that it was necessary for all children to be extensively exposed to this microcosm of German society.<sup>269</sup> The ECHR did not explicitly agree with the German courts' factual findings, but nonetheless the ECHR held that these viewpoints were valid by categorizing them in the margin of appreciation allowed to member states under the Convention.<sup>270</sup> By requiring extensive contact with mainstream society, Germany's education policies force children from religious groups to endure pressures from society's secular mainstream against the wishes of their parents. As a result, these groups must choose between fleeing like the Romeikes or allowing their children to be exposed to beliefs they consider offensive. Either outcome underscores the inhumane impact of Germany's homeschool ban on the country's religious groups.

The ECHR's failure to consider the impact of Germany's policy on religious groups differs greatly from the U.S. Supreme Court's approach in *Wisconsin v. Yoder*. In *Yoder*, the majority opinion called attention to the severe impact Wisconsin's compulsory high school attendance laws could have on the Amish—one of the state's minority groups.<sup>271</sup> The Court observed that America's increasingly modernized majority posed a threat to the continued existence of the Amish, and that Amish children were particularly prone to the majority's influence during their impressionable years of adolescence.<sup>272</sup> The U.S. Supreme Court took this threat seriously, holding that this was "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."<sup>273</sup>

In addition, unlike the German courts and the ECHR, the U.S. Supreme Court refused to express their opinions on Amish parents' decisions and what was the best outcome for the children.<sup>274</sup> Instead, the Court dismissed the Wisconsin school authorities' claims that compelling the attendance of Amish children served their best interests.<sup>275</sup> The Court explained that these conclusions, if affirmed, would give the state a controlling influence in the

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<sup>268</sup> Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 355, at 3.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 362.

<sup>271</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 211–12 (1972).

<sup>272</sup> *Id.* at 217–18.

<sup>273</sup> *Id.* at 218.

<sup>274</sup> *See id.* at 230–32.

<sup>275</sup> *Id.* at 232.

religious future of the child.<sup>276</sup> The U.S. Supreme Court's approach treats religious populations much more humanely than Germany's approach, affirmed by the ECHR, because the U.S. Supreme Court sympathizes with the plight of religious groups with differing viewpoints instead of ignoring their struggles. Also, the Supreme Court's decision refuses to pass judgement on the parents' choice to homeschool their children according to their religious beliefs and doesn't find that the children's best interests are served when they are forced to attend public school with society's majority. Accordingly, the approach outlined by the U.S. Supreme Court respectfully defers to the wishes of parents to educate their children in accordance with their religious and philosophical convictions, thereby providing support to religious communities instead of pressuring and judging them like the ECHR's decision does.

In light of the plain meaning of the Convention and significant policy concerns, the ECHR should revisit its decision in *Konrad v. Germany*. Some German families continue to risk everything to homeschool their children according to their religious and philosophical convictions.<sup>277</sup> Unfortunately, this doesn't seem likely in the near future. In 2019, the ECHR largely affirmed *Konrad v. Germany* when the Wunderlich family brought a challenge against Germany's homeschool ban.<sup>278</sup> Despite these two adverse rulings, the COVID-19 pandemic has heightened interest in homeschooling within Germany as many children were forced to learn from home for the first time.<sup>279</sup>

In this changing environment, a German family with religious or philosophical concerns pertaining to the country's schools might have the political momentum needed to successfully launch a third challenge to Germany's homeschool ban. If this case were to reach the ECHR, the court should undertake a rigorous textual analysis of the Convention and adopt the interpretation of Articles Eight and Nine, and Article Two of the Convention Protocol Number One outlined in this Comment because this interpretation more closely aligns with the plain meaning of these provisions.<sup>280</sup> From this finding, the court can hold that Germany's homeschooling ban unnecessarily infringes on parental choice and the religious exercise rights of German citizens. Also, the court can hold that Germany's policy clearly infringes Article Two of Protocol

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<sup>276</sup> *Id.*

<sup>277</sup> Deuchtse Well, *European Court Rules Against German Homeschooling Family*, <https://www.dw.com/en/european-court-rules-against-german-homeschooling-family/a-47021333> (last visited Jan. 15, 2020).

<sup>278</sup> *Id.*

<sup>279</sup> Trudi Miller, *COVID-19 Causes German Families to Rethink Homeschooling*, HOME SCH. LEGAL DEF. ASSOC. (May 21, 2020), <https://hslida.org/post/covid-19-causes-german-families-to-rethink-homeschooling>.

<sup>280</sup> See *supra* text accompanying notes 248–61.

Number One because Germany's homeschool ban disregards parents' rights to teach their children in alignment with their religious and philosophical convictions. In reliance on these conclusions, the court can hold that Germany's homeschooling ban contravenes the Convention and strike down the offending law.

To bolster its conclusion, the ECHR can note the existence of other democratic societies like the United States, the United Kingdom, and France, where homeschooling is legal, to demonstrate that a ban on homeschooling is not necessary for a democratic society to protect the public's interest in educating children. The ECHR can also look to history and academia to emphasize the danger inherent in giving a country's government a monopoly over educating future generations. Finally, the ECHR can look to international jurisprudence like *Wisconsin v. Yoder* to support the conclusion that Germany's compulsory school attendance laws place an impermissible burden on the country's religious populations. In conjunction with this point, the ECHR can also refrain from passing judgement on the parents' decisions to homeschool their children and instead emphasize that states should defer to parents' choices in an effort to keep countries from impacting the religious lives of its citizens.

In deference to its member states, the Court need not adopt a specific homeschooling policy that Germany and the rest of the European Union needs to follow. Countries should be able to decide for themselves how much regulation to place on homeschooling in their respective jurisdictions. With this goal in mind, the ECHR should establish a minimum standard on the basis of the Convention's text that requires countries like Germany to allow parents some avenue of homeschooling their children. Accordingly, in meeting this burden, Germany could adopt a policy that resembles the narrow approach of its neighbor, the Netherlands, the varied approaches employed in the United States, or even the expansive approach utilized by the United Kingdom. Any of these paths would allow parents with religious or philosophical concerns to educate their children at home in alignment with their values. This provides a check on the government's influence over future generations of citizens and respects

religious groups by not forcing them to expose their children to the countervailing force of the majority's perspective.

LUKE JULIAN\*

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