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# Religious Schooling and Homeschooling Before and After Hobby Lobby

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## RELIGIOUS SCHOOLING AND HOMESCHOOLING BEFORE AND AFTER *HOBBY LOBBY*

James G. Dwyer\*

*The most serious incursions on religious liberty in America today are being inflicted on children by parents and private school operators through power the State has given them. This Article examines the potential effect of the Court's Hobby Lobby decision on interpreting the Religious Freedom Restoration Act ("RFRA") on both federal and state levels, detailing why the Court's decision is irrelevant to addressing the incursions on liberty experienced by children subject to religious and home schooling.*

*Ultimately, the Article finds that home schools and private schools are unfazed by the Hobby Lobby decision in their capacities as employers and educators because (1) unchanged free-exercise jurisprudence accords stronger constitutional protection to parents against state oversight, (2) religious schools are generally operated by religious entities whose RFRA standing is already well established, (3) Hobby Lobby interpreted a law that imposes restrictions only on the federal government, (4) federal laws governing employers generally exempt religious entities, (5) federal laws pertaining specifically to schooling do not apply to private schools, and (6) state legislatures already voluntarily leave religious schools entirely unregulated, except for some standard, superficial business regulations.*

*Even with RFRA's version of strict scrutiny post-Hobby Lobby, states could nonetheless regulate private and home schooling. The Article concludes that state inaction will continue as a result of a troubling pervasive indifference—stemming from societal attitudes and fundamental misconceptions about childrearing—toward children subject to these types of schooling.*

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## I. INTRODUCTION

Momentous as it is for the history of religious accommodation in the United States, the Supreme Court’s decision in *Burwell v. Hobby Lobby*<sup>1</sup> is irrelevant to the experience of children in religious schools and home schools. As this Article will explain, some of the reasons why that is so are deeply troubling.

Most people asked to think about the impact of *Hobby Lobby* on religious schools or home schools would turn their attention to the concerns of religious school operators and of parents, both of whom presumably wish to be free of state regulation. Some parents might prefer that the schools they patronize be subject to laws regarding health, safety, and background checks,<sup>2</sup> but probably few would want state laws and regulations relating to the content of curriculum or the qualifications of teachers to apply to those schools.

From a child-centered perspective, however, one is likely to have, if one is familiar with the universe of religious and home schooling,<sup>3</sup> the

1. 134 S. Ct. 2751 (2014).

2. See, e.g., U.L. v. N.Y. State Assembly, 592 F. App’x 40, 41 (2d Cir. 2015) (affirming dismissal of complaint by parent of child attending religious school that state law requiring criminal background checks only for public schools violated the equal-protection rights of parents and children attending private schools).

3. For examples of religious and home schools that are, in terms of the State’s aims for children’s education, troubling, see, e.g., JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS 16–44 (1998); ROBERT KUNZMAN, WRITE THESE LAWS ON YOUR CHILDREN: INSIDE THE WORLD OF

opposite wish—that is, to have all schools subject to state oversight to guard against educational deprivation. Whereas from an adult-centered perspective one is likely to wonder whether *Hobby Lobby* improved the situation with respect to religious schools, from a child-centered perspective one should wonder whether *Hobby Lobby* has made things even worse. Things have in fact long been quite bad for children outside the public-school system, from a regulatory standpoint.<sup>4</sup> From either perspective, though, one should conclude that *Hobby Lobby* had no significant effect on the operations of religious or home schools.

The decision potentially affects a school as an employer and as a provider of educational services. Part II considers the employment side, Part III the educational side.

## II. SCHOOLS AS EMPLOYERS

The specific dispute in *Hobby Lobby* arose in an employment law context. The Affordable Care Act of 2010 (“ACA”)<sup>5</sup> requires certain employers to provide their employees with health insurance that covers certain health services. Some of those services are ones that some people, including owners and operators of businesses, from a religious perspective might deem immoral. The case presented the Court with two basic questions: (1) Do the protections of the federal Religious Freedom Restoration Act (“RFRA”) extend at all to secular, for-profit, closely-held corporations; and, (2) if so, does RFRA require an exemption from the ACA’s mandate of coverage for contraceptives that can act as abortifacients, if the corporation’s owners have religious beliefs that prohibit them from facilitating abortion.

These questions are, on the surface, patently irrelevant to home schools, because they are neither corporations nor employers. Yet, how the Court answered the second question has implications even for individuals asserting religious liberty claims, because its answer included general interpretations of particular aspects of RFRA, and Part III, below, discusses that.

The first of these two questions is, on the surface, also patently irrelevant to religious schools. Such schools are uniformly operated by re-

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CONSERVATIVE CHRISTIAN HOMESCHOOLING 43–87 (2009); MITCHELL L. STEVENS, KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT 104–05 (2001); Jessica Huseman, *The Frightening Power of the Home-Schooling Lobby*, SLATE (Aug. 27, 2015), [http://www.slate.com/articles/life/education/2015/08/home\\_school\\_legal\\_defense\\_association\\_how\\_a\\_home\\_schooling\\_group\\_fights.html](http://www.slate.com/articles/life/education/2015/08/home_school_legal_defense_association_how_a_home_schooling_group_fights.html); Frances Patterson, *With God on Their Side*, RETHINKING SCH. (2002), [http://www.rethinkingschools.org/special\\_reports/voucher\\_report/v\\_god162.shtml](http://www.rethinkingschools.org/special_reports/voucher_report/v_god162.shtml) (describing extreme bias in religious schools’ social studies text books). For the view that “faith schools” are inherently indoctrinatory, see generally Michael Hand, *A Philosophical Objection to Faith Schools*, 1 THEORY & RES. EDUC. 89 (2003); Barbara Miner, *School Vouchers: A Threat to the Rights of Women and Gays*, *Rethinking Schools*, RETHINKING SCH. (Feb. 2002), [http://www.rethinkingschools.org/special\\_reports/voucher\\_report/v\\_gay.shtml](http://www.rethinkingschools.org/special_reports/voucher_report/v_gay.shtml).

4. See James G. Dwyer, *No Accounting for School Vouchers*, 48 WAKE FOREST L. REV. 361, 363–64 (2013) [hereinafter *No Accounting*].

5. Pub. L. No. 111-148, 124 Stat. 119 (2010).

ligious organizations or nonprofit corporations, and it is already well established that the federal RFRA extends beyond individuals to protect the religious freedom of those entities.<sup>6</sup> Half of religious schools are Catholic, operated by a local parish, a diocese, or a religious order (e.g., the Jesuits).<sup>7</sup> The next largest fraction of religious schools are conservative Christian schools, typically operated by a single church, though there are also large conservative Christian academies operated by nonprofit corporations.<sup>8</sup> Many other religious denominations claim a small percentage of religious schools each, and their schools are also typically operated by a local worship facility or by a religious organization overseeing many local, religious communities.<sup>9</sup> There is no question that any religious school could invoke RFRA to challenge any federal law that substantially infringed its religiously driven activities. Again, though, what the Court said in applying RFRA, about how to interpret particular aspects of that Act's test for permissibility of burdens on religious freedom, is pertinent for any entity invoking the Act in any context, so discussion of that in Part II is pertinent.

With respect to the ACA, on the whole, it applies only to employers with fifty or more full-time employees, which the Court indicated excluded thirty-four million workers nationwide.<sup>10</sup> A substantial portion of religious schools in the U.S. are operated by religious organizations that have only a small number of employees, perhaps even just one congregation pastor. Whether schools affiliated with a large denomination—in particular, Catholic schools, which account for roughly half of all children attending religious schools<sup>11</sup>—are subject to the ACA depends in part on whom the Department of Health and Human Services deems the “employer,” specifically, whether it is a local church community or a regional authority or the umbrella religious institution encompassing all local and regional subdivisions. Further, the ACA also exempts employers who had a health plan for their employees before the ACA's enactment and continue to maintain essentially the same plan. The exemption encompassed roughly fifty million workers in 2013, and likely included many religious organizations.<sup>12</sup> Moreover, the regulations implementing the specific ACA provision concerning coverage for contraceptives exempt religious employers, including “churches, their integrated auxiliaries, and conventions or associations of churches.”<sup>13</sup> As noted above, operators of religious schools are uniformly religious organizations, not secular, for-

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6. See *Hobby Lobby*, 134 S. Ct. at 2768–69.

7. See *Facts and Studies*, CAPENET.ORG, <http://www.capenet.org/facts.html> (last visited Mar. 9, 2016).

8. *Id.*

9. *Id.*

10. *Hobby Lobby*, 134 S. Ct. at 2764.

11. See *Facts and Studies*, *supra* note 7.

12. *Hobby Lobby*, 134 S. Ct. at 2763–64.

13. 45 C.F.R. § 147.131(a) (2015); *What Churches Should Know About IRS Form 990-N*, CHRISTIANITY TODAY (May 13, 2010), <http://www.churchlawandtax.com/blog/2010/may/what-churches-should-know-about-irs-form-990-n.html>.

profit corporations. On the whole, then, the specific issue before the Court—namely, must employers religiously opposed to facilitating abortion nevertheless provide health insurance to employees that includes coverage for medicines that can act as abortifacients—was a non-issue for religious schools.

Other types of laws regulating employment that could conflict with religious beliefs include anti-discrimination laws, health and safety regulations, and credentialing requirements. Some such other federal laws, though, likewise exempt religious entities—for example, the Americans with Disabilities Act (“ADA”) and Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of religion.<sup>14</sup> More generally, with respect to hiring and firing, there is a well established “ministerial exception” within free-exercise jurisprudence, exempting religious organizations from anti-discrimination laws in connection with their hiring and firing of employees who serve in a “ministerial” role, a concept not yet well defined but likely to include any teacher in a religious school.<sup>15</sup> Any remaining laws without a religious exemption could potentially provoke a RFRA demand for exemption, but apart from credentialing, any such laws (1) do not directly impact the experience of children in religious schools, (2) are exceedingly unlikely to conflict with anyone’s religious beliefs (e.g., building safety regulations), or (3) are exceedingly unlikely to be successfully challenged under RFRA (e.g., anything relating to health and safety). And importantly, as discussed further below, as it happens neither the federal nor state governments impose any teacher-credential requirement on religious schools.

### III. SCHOOLS AS EDUCATORS

The most important question relating to religious schools or homeschooling is whether *Hobby Lobby* could affect the content of instruction students receive or the way school administrators and teachers treat young people in their custody. Whether an employer will be forced to comply with a law that conflicts with its religious beliefs and whether an employee must change employers in order to have coverage for certain contraceptives (or pay for contraceptives out of pocket) are both important issues. Both, however, are far less important to human well-being than the quality of education children receive, and whether children are

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14. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (upholding the exemption in Title VII); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (holding that the National Labor Relations Act does not authorize NLRB jurisdiction over lay faculty at church schools because it aims to avoid the constitutional issues such jurisdiction would raise); *Korte v. Sebelius*, 735 F.3d 654, 675, 678 (7th Cir. 2013).

15. Cf. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 701 (2012) (finding a religious organization immune from an unlawful termination suit under the ADA by a teacher who fell within the free exercise “ministerial exception”); *Herx v. Diocese of Fort Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1181–82 (N.D. Ind. 2014) (finding a Roman Catholic diocese can lawfully decline to renew the contract of a pregnant teacher in a religious school if it relied on a sincere belief regarding the morality of in vitro fertilization).

protected from abusive treatment. The amount of attention paid to the former two issues is perverse in light of the widespread public indifference to the damage done to many children as a result of attending religious schools or home schools, an indifference I attempt to explain in the final part of this Article.

One part of the explanation merits acknowledgement up front. The image people generally have of religious schools is positive, because the only awareness of religious schools people typically have is of schools that either are operated by their own ideological community or are sufficiently unconcerned about incurring criticism that they are highly visible in the community. Similarly, the home schoolers that one is likely to be aware of are either within one's circle of friends and family or actively involved in community activities. But there is a less visible world of religious and homeschooling that the vast majority of Americans would, I have no doubt, find quite disturbing if they knew about it. It has become increasingly difficult to know about it because the religious schools and home schoolers whose practices are most divergent from the norm have been quite reclusive for the past few decades, in part because ethnographic work done on them in the 1970s and '80s painted a quite negative picture.<sup>16</sup> In addition, there have been almost no court battles over regulation of such schools in recent decades because, as discussed further below,<sup>17</sup> states gave up on trying to regulate them.

There are three basic types of regulations that one might think ought to exist for all schools: (1) regulation of content, such as a mandatory curriculum or requirement of special services for disabled students; (2) performance assessment requirements, such as standardized testing, review of student portfolios, or observation of instruction; and (3) norms for treatment of students, such as gender equality and freedom of expression. U.S. public schools are subject to all three types of regulations.<sup>18</sup>

There is plenty of criticism of the particular form regulations of the second sort take, but no reasonable person maintains that public schools should be freed from all regulations of any of the three types. Even a strong defender of public schools in general, or of the local public schools, would balk at the notion of leaving each school's administration or individual teachers entirely free to choose the content of the curriculum they provide; this would inject a high degree of arbitrariness into the nature of each child's schooling, would make comparative assessment extremely difficult, and would contradict the aim of ensuring shared knowledge among citizens. Likewise, the idea of leaving public school

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16. I summarized the ethnographic work on religious schools in DWYER, *supra* note 3, at 7–44. For observations of home schools, see KUNZMAN, *supra* note 3.

17. See discussion *infra* Part III.C.

18. See *Know Your Rights: A Guide for Public School Students in Washington*, ACLU (2007), [https://aclu-wa.org/library\\_files/Guide%20for%20Public%20School%20Students.pdf](https://aclu-wa.org/library_files/Guide%20for%20Public%20School%20Students.pdf); *State Regulation of Private Schools*, U.S. DEP'T OF EDUC. (July 2009), <http://www2.ed.gov/admins/comm/choice/regpr ivschl/index.html?exp=5>; *What is Performance-Based Assessment*, STANFORD SRN (2008), <https://ed policy.stanford.edu/sites/default/files/events/materials/2011-06-linked-learning-performance-based-assessment.pdf>.

teachers entirely unaccountable for their performance, by eliminating comparative assessments of student progress, would receive little or no public support. Many Americans, including Supreme Court Justice Clarence Thomas,<sup>19</sup> might be more comfortable with the idea that restrictions on how school employees treat children are unnecessary, given the presumed ability of parents to object and exit a school.<sup>20</sup> That presumption is inaccurate, however, as to a large percentage of children.<sup>21</sup> And even when it is accurate, it is inadequate to protect another large percentage of children—namely, those who might share a particular school administration’s illiberal values, such as gender subordination, or hold no respect for the physical integrity of children or of children’s interest in becoming autonomous. There is certainly room for improvement in states’ regulatory schemes for public schools, but no reasonable person would endorse complete deregulation of them.

The pertinent question here, then, is whether the *Hobby Lobby* decision has any implications for any of these types of regulation for religious schools or home schools. In answering that question, it is important first to clarify who would likely be the plaintiffs in any RFRA or constitutional challenge to regulation of religious schools or home schools as educators (rather than as employers). Although religious organizations operating schools could themselves assert a religious-freedom claim against such regulation, in this context (as opposed to employment issues) the legal system also accords rights to parents of students, the nominal “customers” of the businesses.<sup>22</sup> In fact, parents have more often been the plaintiffs in litigation challenging state regulation of private schools because their rights regarding children’s education are generally regarded as stronger than, or at least as strong as, the rights of religious school operators.<sup>23</sup> The commercial substantive due-process rights at the heart of the Supreme Court’s *Lochner*-era decisions relating to schooling, *Pierce*<sup>24</sup> and *Meyer*,<sup>25</sup> died with *West Coast Hotel Co. v. Parrish*,<sup>26</sup> but the parents’ rights doctrine that the Court gratuitously initiated in those

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19. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 400 (2009) (Thomas, J., dissenting) (“If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move.”).

20. *Id.*

21. See *Transfer Policies*, NYC DEP’T. OF EDUC., [http://schools.nyc.gov/Academics/Special Education/enrolling/transfer/default.htm](http://schools.nyc.gov/Academics/Special%20Education/enrolling/transfer/default.htm) (last visited Mar. 10, 2016) (noting children may only be removed from school for certain hardships).

22. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (“Thus, a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . .”).

23. See Joy Pullmann, *School Choice Fights Will Shift to Regulation*, FEDERALIST (June 17, 2014), <http://thefederalist.com/2014/06/17/school-choice-fights-will-shift-to-regulation/>.

24. *Pierce v. Soc’y of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510 (1925).

25. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

26. 300 U.S. 379 (1937).



cases survived the demise of *Lochner*.<sup>27</sup> In fact, in two post-*Lochner*-era cases, *Prince*<sup>28</sup> and *Yoder*,<sup>29</sup> the Court established that when parents assert both a parental right under the Fourteenth Amendment's guarantee of substantive due process and a religious-freedom right under the First Amendment, to challenge a law that thwarts their child-rearing preferences, courts should subject the law to strict scrutiny.<sup>30</sup> The analysis here will therefore focus on what effect, if any, *Hobby Lobby* had on parental rights over children's schooling.

#### A. Do Parents Need a RFRA?

*Hobby Lobby* interprets a law adopted to, in effect, restore to free-exercise law what *Employment Division v. Smith*<sup>31</sup> had taken away—namely, strict scrutiny of laws that, although on their face religiously neutral and of general applicability, conflicted with some persons' religious beliefs.<sup>32</sup> Yet, some lower courts have concluded that *Smith* did not take anything away from *parental*, free exercise constitutional rights. They infer from Justice Scalia's *Smith* dictum about hybrid rights that *Yoder* survived *Smith*—that is, that strict scrutiny would still apply to cases in which parents assert both a free-exercise claim and a substantive due process, parental-rights claim.<sup>33</sup> If that view is correct, then both federal and state RFRA's are superfluous for parents seeking to resist legal restrictions on their child-rearing decisions and actions.

It would be ironic and troubling if *Smith* did in fact leave *Yoder* intact. It would mean that the Supreme Court has effectively accorded stronger constitutional protection against state oversight to adults exercising power over the lives of other, dependent beings than to adults engaged in self-determination. Constitutional protection of one's control over one's own life ought to be far stronger than protection of one's desire to control someone else's life. And in fact, outside the parenting context, that is uniformly true. For example, pro-lifers have no constitutional right to control the choices of pregnant women, and offspring in a guardianship position with respect to their elderly parents have no constitutional right in relation to their surrogate decisionmaking for the parents.<sup>34</sup>

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27. See *Pierce*, 268 U.S. at 510; *Meyer*, 262 U.S. 390.

28. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

29. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

30. See *id.* at 215; see generally *Prince*, 321 U.S. at 168–69.

31. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 485 U.S. 660 (1988).

32. See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2760 (2014).

33. See, e.g., *Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 881 (S.D. Tex. 2009) (finding hair style regulations at an elementary school unnecessary to meet the school's stated goals of maintaining order, discipline, and hygiene); *Hicks v. Halifax Cnty. Bd. of Educ.*, 93 F. Supp. 2d 649, 653–54, 663 (E.D.N.C. 1999) (involving challenge to mandatory uniform policy at an elementary school that was not a response to any particular problem with student dress).

34. See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1405–23 (1994) (documenting pervasive rejection in the law of the notion of rights to control the life of another person) [hereinafter *Parents' Religion*].

*Smith* had the potential to give states greater freedom and confidence in acting to protect the developmental interests of children whose parents, for religious reasons, reject for their children basic liberal values such as autonomy, gender equality, and preparation for a broad range of careers in mainstream society.<sup>35</sup> Legislation like RFRA can itself constrain states in this regard, taking back from legislators and local governments freedom that *Smith* gave them. But such legislation expanding individual rights against government is susceptible to legislative revision at any time, whereas getting the Supreme Court to reverse itself is in most contexts a quite long and difficult process. In addition, whereas the Court had unthinkingly treated legal restrictions on parenting as a substantial burden on adults' exercise of religion (more on this below), courts interpreting a religious-freedom statute could in theory conclude that having one's power over other persons' lives limited is never a substantial burden on one's own religious freedom.

Other lower courts, however, have held that the *Smith* dictum is to be ignored, some echoing the near consensus among academic commentators that the hybrid-rights notion is incoherent and illogical.<sup>36</sup> On the assumption, then, that *Smith* might have done away with strict scrutiny for parenting cases, as well as other types of cases, assessing the potential effects of *Hobby Lobby* for private-sector schooling requires delving further into its specific holdings.

*B. Does the Federal Government Play Any Role in Religious or Homeschooling?*

An additional reason why *Hobby Lobby* is irrelevant to religious and home schooling of children is that it interprets the federal RFRA, which is applicable only to the federal government following *City of Boerne v. Flores*.<sup>37</sup> Apart from employment discrimination laws and the ACA, the federal government simply does not attempt to regulate private schooling; it leaves this to state government.<sup>38</sup> Certainly, there are no federal laws constraining in any way the curriculum that religious schools provide. The federal laws that most greatly impact public schooling—the Individuals with Disabilities Education Act and the No Child Left Behind Act (“NCLBA”)—apply only to public schools.<sup>39</sup>

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35. *Id.* at 1447.

36. See *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 246–47 (3d Cir. 2008); *Leebaert v. Harrington*, 332 F.3d 134, 143–44 (2d Cir. 2003); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Stratton*, 240 F.3d 553, 561 (6th Cir. 2001); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993).

37. 521 U.S. 507, 519 (1997).

38. See U.S. DEP’T OF EDUC., *State Regulation of Private Schools*, ED.GOV, <http://www2.ed.gov/admins/comm/choice/regprivschl/index.html?exp=5> (last updated Oct. 10, 2012).

39. See 20 U.S.C. § 7886(b) (2012) (“Nothing in this chapter shall be construed to affect a home school, whether or not a home school is treated as a home school or a private school under State law, nor shall any student schooled at home be required to participate in any assessment referenced in this chapter.”).

Indeed, there does not seem to be much of a constitutional basis for Congress to assert itself into the content of private schooling. If the federal government provided financial assistance to private schools, it might be able to condition that assistance on recipients' compliance with requirements for curriculum, assessment, and treatment of students, but currently there are no federal spending programs that extend to private schools.<sup>40</sup> A federal voucher program could create a hook for Congress to influence the content of education in religious schools, but proposals for federal vouchers have yet to succeed and would be extremely unlikely to include any meaningful regulatory strings.<sup>41</sup>

Arguably, it is also troubling that the federal government leaves the private sector of schooling untouched. To the extent that federal laws applicable to public schools, such as the NCLBA, have benefited any children, pupils in private schools might be missing out as a result of their parents' enrolling them in a non-public school. The assessment and accountability aspects of NCLBA,<sup>42</sup> in particular, could be effective in exposing some of the worst religious and home schools. If the federal government went further in the future in trying to promote more rigorous education for children—for example, with a national testing regime—it would almost certainly again limit itself to public schools. It has established a pattern of doing so, and whereas public schools have become a favorite whipping post for some conservatives,<sup>43</sup> no political faction manifests any interest in the fate of children whose parents make them attend a religious school. Yet, if any government could overcome resistance from illiberal religious communities in order to exert oversight over religious and home schools, it might be that the federal government is more likely to be able to do so than many state governments, simply because it is a far larger fish for any religious group to capture.

Although *Hobby Lobby* is not directly relevant to regulation of religious and home schools, because it affects only federal government action, it could nevertheless have an indirect effect in some states on state law governing religious schools, because (1) nearly half of the states have

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40. The IDEA authorizes funding for provision of special education services to children in private schools, but it directs money to local public school districts, which themselves provide the services, and federal regulations stipulate that federal funds given to local public school districts for this purpose may not benefit the private school or help special needs pupils beyond providing the special education services. See 34 C.F.R. § 300.141 (2016); U.S. DEP'T OF EDUC., INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): PROVISIONS RELATED TO CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS 3 (2008), available at <http://www2.ed.gov/admins/lead/spced/privateschools/idea.pdf>. Federal law does exempt religious organizations from income tax and makes donations to such organizations deductible for donors, so those benefits might provide a route to regulation.

41. See Valerie Strauss, *The New Push for School Vouchers at State, Federal Levels*, WASH. POST (Feb. 12, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/02/12/the-new-push-for-school-vouchers-at-state-federal-levels>. Cf. Dwyer, *No Accounting*, *supra* note 4, at 383–94 (describing the lack of regulatory strings in state voucher programs).

42. See 20 U.S.C. § 7885 (2012).

43. Strauss, *supra* note 41.

adopted their own religious-freedom act since the *Smith* decision;<sup>44</sup> and (2) some state courts have followed federal-court interpretation of the federal RFRA in interpreting their state's RFRA.<sup>45</sup> We should therefore consider whether the Supreme Court's interpretation of the federal RFRA in *Hobby Lobby* could indirectly and incidentally alter the posture of religious schools relative to state regulation.

*C. Religious Schools Have Nothing to Seek Exemption From*

Yet, another, and perhaps the most troubling, reason why *Hobby Lobby* is irrelevant to religious schooling and home schooling is that states, too, leave these schools unregulated.<sup>46</sup> This is an important reality about which, my experience suggests, the vast majority of Americans are unaware. All U.S. states leave private schools alone to do pretty much whatever they want with the children who attend them rather than a public school. For the most part, this is not accomplished by explicit exemptions to otherwise universally applicable school regulations, but rather by enacting education laws—and, in particular, anything having to do with curriculum, assessment, and teacher qualifications—that apply in the first instance only to public schools.<sup>47</sup> These laws simply do not contemplate applying restrictions to any private schools, religious or secular. Many states also offer some sort of state accreditation to private schools, conditional upon accepting certain requirements and oversight, but that is voluntary on the part of the schools.<sup>48</sup> Some seek state accreditation, or accreditation by a private school organization approved by the state, because it enhances their reputation in the market they serve.<sup>49</sup> But, of course, the schools the state should most worry about are the ones who categorically reject state authority over their child-rearing, who might actually suffer in reputation among the parent population they aim to serve if they acquiesce to state-education officials.

The only types of regulations that states do apply universally to private (including religious) schools, whether they want them or not, are those that apply also to secular and non-educational businesses, such as

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44. See NAT'L CONFERENCE OF STATE LEGISLATURES, *State Religious Freedom Restoration Acts*, NCSL.ORG (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> (identifying twenty-one states).

45. See Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 72 n.68 (2015) (citing lower court decisions in three states); see also *id.* at 72 & n.69 (citing state supreme court decisions treating their interpretation of a state RFRA as independent of federal court interpretation of the federal RFRA and stating that "states are not required to follow federal case law in interpreting state statutes; state courts are free to construe their own statutes independently.").

46. See James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Educational Law as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1338 (1996) [hereinafter *Children We Abandon*].

47. See, e.g., ALA. CODE §§ 16-23-1, 16-23-8 (2016); N.Y. EDUC. L. § 3001 (McKinney 2016); see also Dwyer, *supra* note 46, at 1338 n.60.

48. See Dwyer, *Children We Abandon*, *supra* note 46, 1338–39.

49. See generally *id.* at 1339.

building-safety codes.<sup>50</sup> This is typically true even when states offer vouchers or other schemes of overt financial state support for religious schooling; the financial support is typically offered with no meaningful regulatory strings, even though these funding schemes could constitute an excellent mechanism for attempting to eliminate bad private schools.<sup>51</sup> At most, voucher laws have imposed as a condition for participation a requirement that schools receiving state money not discriminate on the basis of race in admissions, a rather meaningless provision that nevertheless made the Supreme Court think the state actually demands something in return for subsidizing private schools.<sup>52</sup> Some states make modest efforts to check the educational progress of home-schooled students, but most leave home schools likewise unsupervised—at least those claimed to be religious home schools.<sup>53</sup>

Thus, the most important features of a school from a child-centered perspective—that is, what qualifications teachers have, the content of the curriculum, whether a school has incentives to provide a good education, and how teachers and administrators treat students—are already entirely unregulated in the private-school sector. Why? Because legislators tend to harbor a mistaken and grossly exaggerated understanding of parents' constitutional rights, and because state officials have nothing to lose by exempting private schools and only headaches to gain by trying to impose regulations on belligerent, fundamentalist religious groups prepared to take up arms to defend their view of parental sovereignty over children's upbringing.<sup>54</sup>

In sum, *Hobby Lobby* is irrelevant to the experience of children in religious schools, because (1) *Smith* might not have overturned *Yoder*, (2) religious schools are generally operated by religious entities whose RFRA standing was already well-established, (3) *Hobby Lobby* interpreted a law that imposes restrictions only on the federal government, (4) federal laws governing employers generally exempt religious entities, (5) federal laws pertaining specifically to schooling do not apply to private schools, and (6) state legislatures already voluntarily leave religious schools entirely unregulated, except for some standard, superficial business regulations. For someone who worries about religious schools that

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50. See Dwyer, *No Accounting*, *supra* note 4, at 383.

51. *Id.* at 383–94.

52. See James G. Dwyer, *Funding Religion in a Post-Zelman World*, 5 GOV'T L. & POL'Y J. 11, 13 (2003) [hereinafter *Funding Religion*].

53. See Huseman, *supra* note 3; Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 130 (2008). In Virginia, state law establishes as a general rule for home schooling: a parent must get approval from the local public-school officials based on demonstration of an adequate curriculum and capacity to teach, and must show adequate academic progress after each year of home schooling. But then the rule pronounces that any children whose parents are “by reason of bona fide religious training or belief is conscientiously opposed to attendance at school” are entirely exempted from any educational requirements whatsoever. VA. STAT. ANN. § 22.1-254(B)(1) (2016).

54. See DWYER, *supra* note 3, at 8–13, 45–61; Huseman, *supra* note 3; Motoko Rich, *Home Schooling: More Pupils, Less Regulation*, N.Y. TIMES (Jan. 4, 2015), [http://www.nytimes.com/2015/01/05/education/home-schooling-more-pupils-less-regulation.html?\\_r=0](http://www.nytimes.com/2015/01/05/education/home-schooling-more-pupils-less-regulation.html?_r=0).

fail to provide an adequate secular education and/or that mistreat students (e.g., by oppressively sexist practices), things could not be worse than they already were before *Hobby Lobby*. Some children in America were already being denied equal opportunity and basic liberties because of the religious beliefs of parents and school operators, and this is still so.<sup>55</sup>

*D. Things Also Cannot Get Any Better*

What *Hobby Lobby* might have done, though, is to make it more difficult for things to get any better if the federal government or any state government (in a jurisdiction where courts interpret their state RFRA in accordance with federal court interpretation of the federal RFRA) ever attempted to extend any substantive requirements or oversight to private schools.<sup>56</sup> A government might do this in a deliberate effort to reign in rogue religious schools, perhaps after media disclosure of some especially troubling phenomenon like jihadist training in a religious academy, or simply because of teacher union or public complaints about the unfairness of imposing burdensome regulations only on public schools. Perhaps one day feminists will take a serious interest in the subordinating indoctrination to which girls are subjected in many religious schools and home schools. *Hobby Lobby* not only decided who is a person for RFRA purposes, and who therefore can legitimately invoke RFRA against such government action, but also applied the federal RFRA to a particular law and in the process signaled how stringent the federal RFRA test is, regardless of to whom it is applied.<sup>57</sup> Specifically, the Court appeared to adopt a minimalist conception of burden on religious freedom and a maximalist conception of least restrictive means.<sup>58</sup>

How could protection of a child's education interests burden someone else's religious freedom? Prior to *Hobby Lobby*, some lower federal courts had interpreted the substantial burden threshold test of RFRA to require showing that federal government action seriously impedes carrying out a core aspect of one's religion.<sup>59</sup> On that understanding of substantial burden, parents should be deemed to have no standing to object to laws requiring that children attend either a state-provided school or a private school that satisfies robust requirements for curriculum, assessment, and treatment of pupils. Such laws would not interfere with par-

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55. See Dwyer, *Children We Abandon*, *supra* note 46, at 1388–89; Michael Stone, *In Memoriam: Leelah Alcorn, Victim of Christian Homeschooling*, PATHEOS (Dec. 30, 2015), <http://www.patheos.com/blogs/progressivesecularhumanist/2015/12/in-memoriam-leelah-alcorn-victim-of-christian-homeschooling/> (describing the suicide of a transgender teen homeschooled by Christian parents who subjected the teen to conversion therapy).

56. See Luchenitser, *supra* note 45, at 85; Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA's*, 55 S.D. L. REV., 466, 478 (2010).

57. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2769–70, 2778 (2014) (including for-profit corporations within RFRA's definition of "person" while proscribing state action making it "more expensive" to practice religious beliefs).

58. *Id.* at 2770, 2780.

59. See Luchenitser, *supra* note 45, at 67.

ents' self-determination or liberty at all; rather, what they would limit is the legal power that the state bestows on persons whom the state has made legal parents.<sup>60</sup> They would interfere with school operators' and teachers' liberty, by prohibiting certain practices (e.g., sex discrimination in approving students for leadership positions, moral exhortation that rises to the level of psychological abuse) and mandating others (e.g., teaching scientific methods, administering tests, and reporting results); but how one treats and instructs children outside one's own family is generally not regarded as a core aspect of anyone's religion.

Of course, anything under the sun could be a core aspect of religion subjectively for someone; a pro-lifer might deem it a core aspect of his or her religion to possess the legal power to prevent all women from having an abortion. For that requirement to mean anything, courts would have to apply some objective notion of the concept of "core aspect." Objectively, core aspects of one's religious freedom would include such things as participating in worship services, reading religious texts, and refraining from acts inherently contrary to one's religious doctrines—in other words, matters within the realm of self-determination, essentially concerning one's sovereignty over oneself rather than how other people live their lives. In *Hobby Lobby*, though, the Court extended the concept to include merely being required to provide other persons with something (insurance coverage) that they could (without one knowing it) use to engage in conduct one believes, as a matter of religious conviction, to be immoral.<sup>61</sup> So it was an objection to being required (or financially coerced) to do something that one does not want to do, and in that sense, it infringed upon self-determination, but the thing to be done was so far removed from religious observance and study that the employers involved in the *Hobby Lobby* litigation were for a substantial period of time unaware of the phenomenon about which they complained (provision of insurance coverage that could facilitate use of abortifacients).<sup>62</sup>

The Court rejected the government's argument that the plaintiff employers' exercise of religion is not burdened by someone else's independently engaging in conduct the employers deem immoral.<sup>63</sup> Presumably, there must be some conceptual connection between what the religious objector is required to do and the immoral conduct, so one could not claim, for example, that minimum wage laws burden one's religion because some employees might use the extra wages to purchase alcohol or sexual services. The Court, however, left unclear how strong that connection must be. It required nothing more than that conduct required of someone conflict with that person's sincere religious belief,<sup>64</sup> which effec-

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60. Dwyer, *Parents' Religion*, *supra* note 34, at 1377.

61. *Hobby Lobby*, 134 S. Ct. at 2777–78.

62. See, e.g., Katie Sanders, *Did Hobby Lobby Once Provide the Birth Control Coverage it Sued the Obama Administration Over?*, POLITIFACT (July 1, 2014), <http://www.politifact.com/punditfact/statements/2014/jul/01/sally-kohn/did-hobby-lobby-once-provide-birth-control-coverage/>.

63. *Hobby Lobby*, 134 S. Ct. at 2777–78.

64. *Id.* at 2779.

tively makes the notion of “core aspect” subjective. It could therefore encompass a belief that one’s religion requires one to dictate what sort of schooling another person receives. An interesting question is on what basis the Court would say that such a belief regarding one’s legal child is different in kind from such a belief regarding one’s spouse, one’s neighbor, or one’s neighbor’s child.

Moreover, the Court also suggested a capacious understanding of substantiality. Merely that government action makes one’s “practice of . . . religious beliefs more expensive,” even though it does not prevent such practice, amounts to a burden that suffices to launch a RFRA objection.<sup>65</sup> The ACA did not, in fact, force employers like Hobby Lobby to provide insurance coverage for contraceptives, but it imposed a financial penalty if they refused to do so.<sup>66</sup> Almost any meaningful curricular mandate or reporting requirement would make the operation of a religious school somewhat more costly, unless perhaps the government provided payments to cover those costs, and schools presumably would pass on those costs to the parents who patronize them.

Of course, in *Yoder*, the Court treated as a substantial burden something even farther removed from a person’s practice of their religion than having to facilitate objectionable behavior by someone else.<sup>67</sup> In the special case of parents, merely being disempowered from preventing another person from being exposed to certain ideas constitutes a burden on exercise of religion that triggers judicial review of state action. It certainly would not have satisfied the Amish parents, or obviated the Constitutional challenge, if the State of Wisconsin had said that the parents need not undertake any action themselves, that the state would send someone to their homes to transport their adolescent children to a school, and that the parents need only refrain from interfering. Ultimately, it was an “other-determining power,” not a liberty, at stake for the Amish parents, yet the Court found limitation of that power a substantial burden on religious exercise.<sup>68</sup> This notion would seem bizarre in any other context, even though there are certainly many other contexts—some involving family relations, some not—in which some people wish quite intensely, and motivated by religious belief, to control what other people hear, think, and do.

But suppose that courts interpreting federal or state RFRAs would not read into that legislation the same anomalous view of burden in child-rearing contexts, but rather would require as much in those contexts as they would in other contexts in which institutions are providing services to dependent persons at the request of family members, or as they would in a context involving only autonomous adults, such as the

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65. *Id.* at 2770 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

66. *Id.* at 2776.

67. *Wisconsin v. Yoder*, 406 U.S. 205, 209–11, 234 (1972) (holding compulsory attendance in public high schools for Amish students a substantial burden on the student’s religious beliefs).

68. *Id.* at 234.



employment context of *Hobby Lobby*.<sup>69</sup> Still, religious schools and parents could claim, after *Hobby Lobby*, to be substantially burdened by any new law that made the schools' operations more expensive or required the schools, as a condition for remaining in operation, to provide something to students (e.g., secular knowledge, equal treatment) that the students could later use to do something the religious school operators would view as immoral (e.g., rejecting their parents' faith, pursuing a career other than housewife). Thus, courts applying a RFRA to a new set of legal mandates applicable to religious schools would have to apply strict scrutiny.

*E. The State Should Win Anyway*

In applying strict scrutiny, *Hobby Lobby* also signaled a stance highly protective of religious claimants. To establish a compelling government interest, the state must show that “the *marginal interest* in enforcing” its law *as to* “the *particular claimant* whose sincere exercise of religion is being substantially burdened” is a compelling one.<sup>70</sup> Thus, it is not sufficient to show a government program or legal mandate on the whole serves a compelling state interest; the government must show that exempting any particular individual or business would undermine a compelling state interest.<sup>71</sup> Moreover, even if the state establishes that a compelling interest is at stake in every individual case, it must meet a “least restrictive means” test for serving that interest that is “exceptionally demanding.”<sup>72</sup>

The Court expressed serious doubts that the government had a compelling interest in “guaranteeing cost-free access to the four challenged contraceptive methods,” and it might have rejected the federal government’s position on that ground except that it found it easier to do so on the basis of the least-restrictive-means requirement.<sup>73</sup> Concretely, the Court decided that RFRA can require the government to spend money and create a new program to accomplish by other means the aims it is pursuing through the challenged law.

Though the Court adopted a quite rigorous approach to RFRA’s version of strict scrutiny, a hypothetical state law imposing on private schools and home schools meaningful curricular requirements, assessments to enforce those requirements, and norms of gender equality and intellectual freedom should survive it. The state aim would be to ensure that all children receive an education that fosters their autonomy and

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69. *Cf. In re L.H.*, No. 1–13–3252, 2014 IL App (1st) 133252-U, ¶ 48 (Ill. App. Ct. July 23, 2014) (holding that a trial court order against a parent that she must “help ‘establish a support system outside of the church ministry’ for her children . . . did not substantially burden [the mother]’s free exercise of religion.”).

70. *Hobby Lobby*, 134 S. Ct. at 2779 (emphasis added) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430–31 (2006)).

71. *Id.*

72. *Id.* at 2780.

73. *Id.*

prepares them for a wide range of careers consistent with their native abilities. State and federal courts, including the U.S. Supreme Court, have consistently held that furthering children's welfare and cognitive development is a compelling state interest.<sup>74</sup> And it is difficult to imagine what less restrictive means there could be to accomplish that aim. It is not as if offering remedial education to adults can make up for their having endured a grossly deficient or subordinating elementary and secondary education. If schools and parents object to standardized testing, it seems unlikely any would consent to some other form of government assessment of student progress, such as interviews and portfolio reviews. Perhaps only if the objection is to particular curricular material or test questions that are not really essential to students' intellectual growth, then schools and parents might demand accommodation in the form of exemption just from those specific aspects. The kinds of teachings to which religious objections are most commonly raised, however, are generally not inconsequential from a secular, child-welfare perspective—for example, sex education (without which young people might make life-altering mistakes) and evolution (without which it might be difficult to pursue higher education in some scientific fields).

But suppose a mandated critical thinking curriculum or a question on standardized tests incorporated a same-sex relationship into the situation to be analyzed. The Court's strong rendering of "least restrictive means" might mean the state must devise alternatives for religious schools who deem such a relationship unfit for any discussion other than condemnation.<sup>75</sup> From a child-centered perspective, that is not so troubling. Of course, a young person who is gay and who is attending a religious school could benefit from curriculum or testing that presents same-sex relationships as normal or in a positive light, but in that environment the presentation is likely to trigger from teachers negative comments, and on the whole it might be better for all students if the school is accommodated, especially if that makes the school willing to accept a new mandate that improves the education it provides.

This hypothetical scenario of new state regulations governing private schooling, though, is quite unrealistic. Unless and until religious schooling visibly threatens state interests or the wellbeing of outsiders (e.g., by fomenting violent rebellion), state and federal legislators will undoubtedly remain heedless of what affect religious schooling is having on the wellbeing of children in them. At most, some Americans object to use of public money, through some form of voucher scheme, for illiberal or grossly inadequate schooling, but even when their own pocketbooks are affected, not enough people show concern about what goes on in religious schools or home schools to induce legislators to attempt to regu-

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74. Dwyer, *Parents' Religion*, *supra* note 34, at 1403.

75. *Hobby Lobby*, 134 S. Ct. at 2780 (finding least-restrictive means test unsatisfied where government failed to show it "lacks other means of achieving its desired goal").

late or oversee those schools. The final Part of this Article offers speculations about why that is so.

#### IV. WHY DO WE EMPOWER PARENTS TO EDUCATIONALLY NEGLECT AND ABUSE CHILDREN?

Given that states could—despite the Free Exercise Clause, parental-control rights under the Fourteenth Amendment, and federal and state RFRAs—impose meaningful regulations on the content of education in all non-public forms of schooling (with mandatory assessments to ensure compliance) and could prohibit harmful schooling practices in the “private” realm, why do they not do so? Why are parents and schools throughout the country legally free to deprive their children of an education that, from the states perspective, is adequate and instead to force children to experience intellectually stifling, psychologically abusive, and subordinating treatment?

To be clear, I am by no means alleging that all, or even most, religious schools or home schools have these negative attributes; we can stipulate that most private schooling is at least adequate and that much of it is superior to the education provided in public schools in the same locale. But there is no denying that a significant portion of religious schools and home schools in the U.S. are grossly inadequate academically, from the state’s perspective, and aim to stifle children’s intellectual curiosity and to channel girls into conventional and severely limited social roles.<sup>76</sup> We simply do not know how prevalent this phenomenon is, precisely because states have eschewed oversight and abandoned millions of children to whatever ideological inclinations their parents might have.

This can only happen because of pervasive indifference. If a large number of voters wrote a simple letter to their state representatives urging them to begin overseeing the education of children in private schools and home schools, it would happen. Religious groups would protest vehemently and perhaps even violently, but politicians are prepared to take on far more dangerous groups if necessary to avoid being voted out of office, especially given that they themselves do not have to enforce the laws they pass. So, why is no one writing to their state representatives about the lack of oversight of religious schools and home schools? The many reasons can be divided into two categories: (1) those that are attitudinal, and (2) those that stem from fundamentally mistaken ways of thinking about child-rearing.

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76. E.g., James Dwyer, *Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1343–44 (1996) (noting studies finding some fundamentalist Christian and Orthodox schools instructed, *inter alia*, that students’ “sexual equality denies God’s word”).

A. *Attitudinal Obstacles to Legal Protection of Children's Well-being*

A reality that affects all aspects of child-welfare law is that people are generally not concerned about the wellbeing of “other people’s children,” just as they are generally unconcerned about other people in general.<sup>77</sup> Unless and until children subjected to illiberal, indoctrinatory, or subordinating schooling threaten our own interests in immediate and evident ways, we do not care. And people generally do not think about the long term consequence of a segment of the youth population receiving illiberal indoctrination—namely, that it breeds future intolerant and unreasonable adult citizens.

At the extreme of selfishness, adults whose own children or grandchildren are receiving a high quality education that prepares them to succeed in mainstream society might actually, perhaps subconsciously, be happy that other people’s children are being disabled by educational deprivation. That only improves the ability of the children they do care about to enjoy greater comparative success. Perhaps there is even a darker disposition in the hearts and subconscious of many people, an affirmative animosity toward groups viewed, because of difference in religion or class or race, as “The Other,” and especially toward their unformed, unruly children. Perhaps most Americans do not want children of parents who are fundamentalist Christian or Muslim integrating into mainstream society; they might prefer that these children remain intellectually hobbled and cloistered.

In addition, and relatedly, there is a pervasive attitude of avoiding confrontation with ideological extremists unless absolutely necessary. Religious groups that absolutely reject any state authority to oversee the way they raise “their” children are frightening to the rest of us. Many view themselves as perpetually at war with mainstream society and the state, and some are prepared to take up arms in order to win that war.<sup>78</sup> Or at least we are sufficiently worried that they might do so that we cower in the face of their angry protests.<sup>79</sup>

Further, there is an attitude at work toward children, one that views them not as persons in their own right but as appendages or property of their parents. The prevailing orthodoxy in academia and in the legal system is that children are distinct persons with rights of their own, but even highly educated liberals tend to view child-rearing legal issues through an adult-focused lens, perceiving conflicts over regulation of child-rearing as pitting the state against “the family” as a unitary entity represented solely and fully by the expressed wishes of the adults.<sup>80</sup>

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77. Dwyer, *Children We Abandon*, *supra* note 46, at 1353.

78. See KUNZMAN, *supra* note 3, at 32.

79. Cf. Huseman, *supra* note 3.

80. See James G. Dwyer, *Changing the Conversation About Children's Education*, in NOMO XLIII MORAL AND POLITICAL EDUCATION 314, 316 (Stephen Macedo & Yael Tamir eds., 2002).

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*B. Fundamental Misconceptions*

Also at work are some very basic misunderstandings about the state's posture relative to children, and about the duties each of us owes to children.

*1. The Myth of State Inaction*

There is a widespread belief that when parents are legally free to do whatever they want to children, this is a situation of state inaction; the State is choosing to leave private citizens alone, something that in a liberal society is presumptively proper for the State to do. This belief is absolutely false. People become legal parents as to a child in the first instance because the state makes them such.<sup>81</sup> The fact that states everywhere choose to confer initial legal parent status automatically to biological parents of newborn children<sup>82</sup> makes it seem so natural that the state's role becomes invisible. But, it is in fact only because a state statute dictates that a child's first legal mother is the birth mother and a child's first legal father is the man presumed to be the biological father that pro-creators come into legal possession of the children they create.<sup>83</sup> The State is just as responsible for formation of this legal relationship as it is in the case of adoption, where we have no trouble seeing the state's crucial role and are more inclined to hold the State accountable for bad choices among parental parents. Further, the role of legal parent is a meaningless one except insofar as the state acts further to invest it with various liberties and powers as to the child in the legal relationship, liberties and powers that no other persons possess.

It is necessary that the State create legal parent-child relationships and that it invest legal parents with some liberties and powers, so that children can receive the care the State thinks necessary. But the necessity of investing liberties and powers does not excuse the State from doing so with the wrong persons or to an inappropriate degree (too little or too much). When parents demand that they be able to decide what sort of schooling children receive, what they are asking is not at all to be left alone by the State, but rather for the State to give them even greater legal power over children than the State is otherwise inclined to give. This would be obvious to us if the State conferred similar powers on husbands over wives or guardians over incompetent adults, and we would demand justification from the State for its doing this. We would not say the State is simply leaving married couples alone if there were a law (as there used

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81. See, e.g., Dwyer, *No Accounting*, *supra* note 4, at 378; Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562–585 (2000) (discussing history and modern permutations of the marital presumption of parenthood).

82. June Carbone & Naomi Cahn, *Marriage, Parentage and Child Support*, 45 FAM. L.Q. 219, 223 (2012).

83. *Id.* at 223–28 (discussing various state statutes and cases).

to be in Anglo-American society and still is in some Muslim societies)<sup>84</sup> stating that husbands shall decide whether, when, and where wives receive any formal education. We would say the State is intervening in private life in an extraordinary way that requires justification. There is justification for the state investing legal parents with substantial decision-making power regarding children's upbringing, but the power that states currently accord legal parents with respect to children's education—that is, effectively to completely deny them a secular education and to subject them to subordination-promoting indoctrination<sup>85</sup>—cannot possibly be justified on child welfare grounds. It is therefore essential for people to recognize that this is what the state is doing and to insist on either a legitimate justification or a withdrawal of any modicum of parental power that is inconsistent with what the state views as children's best interests.

Relatedly, there is a widespread misconception about the responsibility each of us bears as citizens for the fate of children whose parents, under current law, act to deny them the sort of education that promotes the children's autonomy, gives them an open future, and treats them with equal respect. We are responsible because we are the electorate that legislators are representing when they pass laws. Our acquiescence plays a causal role in the fate of these children, just as the acquiescence of most whites in the face of Jim Crow laws made them complicit. Anyone who is aware of what is happening to some children and of the role that the laws in their state play in that, yet who does not object to their state representatives, is complicit in the denial of equal educational opportunity to children of illiberal religious adherents. It is especially troubling, perverse even, that scholars of religious liberty would devote so much attention to relatively effete concerns like the desire of a closely held corporation's owners to be exempt from a law requiring them to provide certain sorts of health-care coverage to employees,<sup>86</sup> yet remain utterly indifferent to the much greater threat to religious liberty that certain forms of religious schooling and homeschooling represent.<sup>87</sup> This is itself evidence that adults in general, and academics at least as much as anyone else, are adult-centered in their moral outlook and insufficiently attentive to the moral claims of children. The point here is not that the concerns of Hobby Lobby's owners are insubstantial; any conscientious person would be very upset to discover they were facilitating what they regard as murder. The point is rather that what we are collectively doing to some children,

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84. See, e.g., Amani Hamdan, *Arab Women's Education and Gender Perceptions: An Insider Analysis*, 8 J. INT'L WOMEN STUD. 52, 55 (2006).

85. See Dwyer, *Children We Abandon*, *supra* note 46, at 1373; Jessica Huseman, *Homeschooling Regulations by State*, PROPUBLICA (Aug. 27, 2015), <https://projects.propublica.org/graphics/home-school> (listing state regulations).

86. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (finding a closely held, for-profit corporation protected by RFRA and therefore requirements to insure certain forms of birth control were a "substantial burden" on the corporation's religious beliefs).

87. Marci A. Hamilton, "The Missing Children in Law and Religion Scholarship," in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY AND EQUALITY* (Suzanna Mancini & Michel Rosenfeld eds., Cambridge Univ. Press) (forthcoming 2017).

by empowering their parents to prevent them from receiving an adequate education and to subject them instead to autonomy-thwarting and potentially psychologically abusive indoctrination, is profoundly wrong.

## 2. *The Misunderstanding of Nonphysical Abuse*

An additional reason why most people are indifferent to religiously-motivated educational neglect is more innocent. It is simply a false belief that nonphysical forms of abuse or neglect are less consequential for children. The reality is that what parents do to children's minds generally has the greatest impact on their life prospects.<sup>88</sup> Even when parents inflict physical or sexual abuse, the greatest harm in the long run in most cases is not the physical impact but rather the psychological impact. Broken bones and cigarette burns heal, but children's perceptions of how they are viewed by their parents remains in their minds at some level long after. And the kinds of schooling of concern here can undermine children's self respect and intellectual development to such an extent that they will never be able to have the sort of flourishing lives as adults that would otherwise have been possible for them.

## 3. *The Limits of "Parents Know Best"*

A final obstacle to popular demand for greater state supervision of private schooling that I will mention is the blinkered invocation of the "parents know best" mantra.<sup>89</sup> This assertion is not only entirely lacking empirical support regarding aspects of children's lives such as education and medical care, which require an extensive amount of knowledge and training that cannot be derived simply from daily interactions with a child. It is also completely beside the point. The disparity between what certain parents want in terms of schooling for children in their custody and what the state wants has nothing to do with knowledge; it arises from a conflict of values and of aims for the children's lives. It is not as if parents who want their children subjected to fundamentalist indoctrination are saying "I know my daughter well, and I know that she's just the sort of person for whom gender subordination is right." Or "Sure, critical thinking is good for some kids, but my Johnny's personality is such that this is not good for him; he really thrives when we punish him for independent thinking." They are saying: "We reject the values of autonomy and gender equality that the liberal state endorses, and we think all children would be better off if they received the type of schooling we are seeking for our children."

A misconception closely related to the "parents know best" mantra is that studies have shown all private schools to be better than public schools. Defenders of unregulated religious schooling or homeschooling

88. See Dwyer, *Children We Abandon*, *supra* note 46, at 1453.

89. See, e.g., KUNZMAN, *supra* note 3, at 123; Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940 (1996).

commonly cite studies showing that the average test score for children attending religious schools or being home schooled are higher than those for public school students.<sup>90</sup> Even highly educated people will allude to such studies as explanation for not urging regulation of the private school sector. Perhaps they can be forgiven for being unaware that neither private schools nor home schools are required to administer standardized tests, so the studies report results only for those who voluntarily choose to, creating a selection bias problem that should be obvious to anyone with basic understanding of empirical research. But they can still be faulted for not giving the matter sufficient thought to realize that, even if the studies showed an average for all private or homeschools, an average can mask wide disparities within a population and therefore instances of grossly deficient performance. Averages for a sector are, in fact, useless to policy reasoning.<sup>91</sup> Nothing can turn on average figures. Imagine a state education department director announcing that there are no problems in public schools in that state (imagine Michigan, New York, Illinois, for example) because the average test scores for students in the state are at the national average on a nationally-normed test. No one would take such a claim seriously. It is astonishing how quick people are to rest content with the condition of private and home schooling when comparative studies of average test score results are cited.

## V. CONCLUSION

The most serious incursions on religious liberty in America today are being inflicted on children, by parents and private school operators, using power the State has given them. It is long past time to hold the State, which is simply an agent for us who vote, accountable for tolerating this.

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90. See, e.g., KUNZMAN, *supra* note 3, at 97, 126; STEVENS, *supra* note 3, at 13.

91. Dwyer, *No Accounting*, *supra* note 4, at 364.