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## HOME, SCHOOLING, AND STATE: EDUCATION IN, AND FOR, A DIVERSE DEMOCRACY\*

VIVIAN E. HAMILTON\*\*

*Since the late nineteenth century, virtually all school-aged children have attended school; only rarely did children live and learn entirely within their homes. In recent decades, however, the practice of elective homeschooling has emerged, and the number of families opting out of regular schools has surged. Currently, the parents of nearly two million school-aged children annually eschew traditional schooling.*

*A small but well-resourced homeschool lobby has aggressively pressured state legislators to withdraw state oversight of homeschooling. No similarly resourced lobby exists to counterbalance these efforts. As a result, states now impose few—and in some cases, no—obligations on parents who choose to homeschool their children. These parents exercise near-total authority over every aspect of their children's lives. Many parents homeschool to inculcate in their children their own religious beliefs and values and to insulate children from the diverse values, cultures, and identities they would otherwise encounter in the pluralistic society outside their homes.*

*This Article argues that it is past time to consider the principles that ought to guide state decisionmaking affecting the regulation of homeschooling in the democratic state. I show that homeschooling implicates the state's commitments to safeguard the welfare of its young citizens, to guarantee individuals' entitlement to determine the course of their own lives, and to cultivate a citizenry capable of engaging productively in the shared project of democratic governance with fellow citizens who themselves reflect the diversity that is an enduring fact of life in the United States.*

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*I conclude by drawing on the political theory of education and the science of child and adolescent cognitive development to propose a regulatory compromise that is both principled and pragmatic.*

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## INTRODUCTION

*Picture to yourself . . . a society which comprises all the nations of the world . . . people differing from one another in language, in beliefs, in opinions . . . [w]hat is the connecting link between these so different elements? How are they welded into one people?*

—Alexis de Tocqueville<sup>1</sup>

What are the proper goals of education in a multicultural, diverse democracy? I argue that they include cultivating a citizenry that is self-determining, with its members capable of productively participating (should they so choose) in civil society, democratic governance, and meaningful work.<sup>2</sup>

This first question, however, prompts a second: how far should states go to achieve their education goals, particularly with respect to the children of parents who actively reject multiculturalism and diversity altogether and choose to educate their children in relative isolation through homeschooling? Despite the important implications of this question, scholars have only begun to examine the burgeoning practice of homeschooling.

Virtually all children in the United States attended “regular” public or private schools from the late-nineteenth to the late-twentieth centuries.<sup>3</sup> Beginning in the 1980s, however, an increasing number of parents began withdrawing children from schools altogether and educating them at home, with varying degrees of exposure to curriculum comprising a modern comprehensive education.<sup>4</sup> States do little to ensure that homeschooled children receive minimally adequate instruction; indeed, some three-fourths of the states impose no curricular oversight.<sup>5</sup>

1. Quoted in WERNER SOLLORS, *BEYOND ETHNICITY: CONSENT AND DESCENT IN AMERICAN CULTURE* 3 (1986).

2. In a 2010 article, I proposed a framework to guide state decisionmaking affecting the young across a range of law and policy contexts. See Vivian E. Hamilton, *Immature Citizens and the State*, 2010 *BYU L. REV.* 1055, 1121–22 (2010) [hereinafter Hamilton, *Immature Citizens*]. In its concluding section, the article suggested a range of policy changes consistent with the framework. *Id.* at 1128–47. One of those policy changes was obligatory out-of-home (or “regular”) secondary education. *Id.* at 1129–35. This Article squarely analyzes the context of homeschooling and proposes a more nuanced regulatory approach. I have similarly expanded in other work on different policymaking contexts that might flow from the framework developed in *Immature Citizens*. See, e.g., Vivian E. Hamilton, *Liberty Without Capacity: Why States Should Ban Adolescent Driving*, 48 *GA. L. REV.* 1019 (2014) (driving); Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 *BROOK. L. REV.* 1447 (2012) (voting); Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 *B.U. L. REV.* 1817 (2012) (marriage).

3. In this Article, I use the term “regular” school to encompass a broad range of traditional organizational structures, including public, quasi-public, charter, and private schools.

4. See *infra* Section II.A for a discussion of parents’ constitutional right to direct the upbringing of children and the limits of that right.

5. See *infra* notes 201–14 and accompanying text.

This Article extends the scholarship examining the nascent, largely unregulated practice of homeschooling. It does so by examining how the practice implicates core commitments of the democratic state. It then, informed by insights from the science of cognitive development, proposes a regulatory approach aimed at meeting the goals of parents, the interests of children, and the obligations of the state to all its citizenry.

The common school movement of the nineteenth century resulted in state education systems that were both publicly funded and compulsory.<sup>6</sup> It aimed to ensure that all children had access to education and the economic opportunities it provided, to inculcate shared cultural and civic values, and to shield children from the dangers of industrial labor.<sup>7</sup> By the twentieth century, the overwhelming majority of children attended common, or public, schools. Homeschooling, by contrast, was nearly unheard of.<sup>8</sup>

The institutionalization and standardization of public education by the mid-twentieth century led some on the left to criticize what they perceived to be overly regimented, bureaucratic systems that stifled creativity and individuality and encouraged conformity.<sup>9</sup> On the right, parents recoiled against legal decisions that required public schools to become both integrated and secular.<sup>10</sup> Parents began withdrawing their children from public—then private—schools, initiating what has been a four-decades-long rise in the practice of homeschooling.<sup>11</sup>

Some studies have indicated that the number of children homeschooled in the United States now approaches two million.<sup>12</sup> Yet while the practice has grown, state oversight of homeschooling has steadily eroded. When state legislators attempt to enact legislation requiring standardized testing or otherwise increasing regulation, homeschool lobbying and political action organizations aggressively marshal the homeschooling community to overwhelm individual legislators and defeat regulatory efforts.<sup>13</sup>

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6. See *infra* Section I.A.

7. See *infra* Section I.A.

8. See *infra* Sections I.A, I.B.

9. See *infra* Section I.B.

10. See *infra* Section I.B.

11. See *infra* Section I.B.

12. See Sarah Grady, *A Fresh Look at Homeschooling in the U.S.*, NAT'L CTR. FOR EDUC. STAT.: BLOG (Sept. 26, 2017), <https://nces.ed.gov/blogs/nces/post/a-fresh-look-at-homeschooling-in-the-u-s> [<http://perma.cc/5TZ8-WJTV>] (noting that approximately 1.7 million children, or 3.3% of all K-12 students, were homeschooled in the United States in 2016); see also *Table 206.10, Number and Percentage of Homeschooled Students Ages 5 Through 17 with a Grade Equivalent of Kindergarten Through 12th Grade*, NAT'L CTR. FOR EDUC. STAT. (Feb. 2018), [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_206.10.asp](https://nces.ed.gov/programs/digest/d17/tables/dt17_206.10.asp) [<http://perma.cc/2KGS-KWKY>].

13. See *infra* Section II.C.

The dramatic increase in homeschooling has caused growing consternation among educators, academics, and some homeschool graduates. Their concerns are threefold.

First, withdrawing children from school under the pretense of homeschooling can facilitate abusive parents' mistreatment of children by shielding them from the gaze of school personnel and other mandatory reporters (individuals required by law to report suspected mistreatment).<sup>14</sup> Troublingly, some research has found connections between child mistreatment and homeschooling.<sup>15</sup>

Second, evidence suggests that many homeschooled children do not receive minimally adequate educations.<sup>16</sup> Homeschooling advocacy organizations tout studies to the contrary, but these have overwhelmingly been conducted by advocacy researchers who are themselves part of the homeschooling movement.<sup>17</sup> Because these studies often use selective samples of students, reputable academics have largely discredited them.<sup>18</sup> Additionally, because some states do not require homeschooled children to participate in standardized testing, evidence about the numbers of children homeschooled, and the efficacy of the education they receive, is incomplete and unreliable. The more reliable evidence demonstrates that a troubling percentage of homeschooled children fail to receive educations adequate to prepare them to participate in the modern workforce.<sup>19</sup>

Third, an important goal of education in a democracy is to equip children to become self-determining citizens capable of participating in civic and political life. Many parents, however, homeschool their children so that they

14. See Carmen Green, Note, *Educational Empowerment: A Child's Right to Attend Public School*, 103 GEO. L.J. 1089, 1097–98 (2015) (noting that “a substantial amount of anecdotal evidence show[s] that some abusive parents, who have no intention of educating their children, have taken advantage of lax homeschooling laws to hide their children from mandatory reporters in the school system”).

15. See, e.g., COAL. FOR RESPONSIBLE HOME EDUC., AN ISSUE BRIEF: AT-RISK HOMESCHOOLED CHILDREN 1–3 (May 2017), <https://www.responsiblehomeschooling.org/wp-content/uploads/2017/05/CRHE-At-Risk-Children-Brief.pdf> [<https://perma.cc/HLF4-V3T6>] (discussing a 2014 study which found that forty-seven percent of school-aged child torture cases examined involved children who had been enrolled in school and were later removed to be homeschooled); see also Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 14–19 (2020) (summarizing studies as well as anecdotal evidence of child maltreatment among homeschooling families and concluding that although “there is no way . . . to determine the exact scope of the child maltreatment problem in homeschooling,” the unregulated nature of homeschooling in many states “poses serious risks of abuse and neglect”).

16. For a discussion and comparison of reliable and unreliable research see Bartholet, *supra* note 15, at 13 (noting that “[m]any homeschooling parents are simply not capable of educating their children” and that “[m]any homeschooling graduates complain about educational neglect”).

17. See *infra* Section I.C.

18. See *infra* Section I.C.

19. See *infra* Section I.C.

will *not* be exposed to diverse beliefs. Without such exposure, it is parents—not their children—who determine their children’s life courses.

To be sure, many homeschooling parents provide their children with quality education and introduce them to diverse ideas and people. Lax (or nonexistent) state oversight, however, makes it impossible to identify those who do not.

Educators and state officials have, largely in vain, resisted the erosion of the state’s role in overseeing education. A small but growing number of legal scholars have expressed concerns about the rise of homeschooling and simultaneous withdrawal of state oversight.<sup>20</sup> Some have called for significant increase in regulation, while others call for outright prohibition of the practice.<sup>21</sup>

In this Article, I propose a regulatory approach that permits parents to homeschool in the primary years but imposes a presumption against homeschooling in the secondary years, arguing that children’s rights and society’s interest in educating competent citizens should prevent parents’ religious or moral convictions alone from justifying homeschooling after adolescence.

Part I describes the evolution of common schooling and the emergence of homeschooling in the United States that began in earnest only in the 1980s.

Part II describes the constitutional and state laws governing homeschooling, and how—also since the 1980s—small but well-funded interest groups have pressed for the deregulation of homeschooling and succeeded in increasing parents’ ability to choose their preferred educational method.

In Part III, I draw from educational theory to identify the contours of the state’s interest in, and goals for, education. The state’s role in safeguarding children’s welfare justifies it giving parents the presumptive authority to raise and educate their children. Doing so also respects parents’ expressive liberty interests in childrearing. These liberty interests must be constrained, however, to safeguard children’s well-being and ultimate right to self-determination. The state’s role in ensuring an enduring and robust democracy requires it to cultivate a citizenry that, once mature, will have the ability to participate productively in civic life and self-governance with diverse fellow citizens. Finally, the state’s obligation to secure a strong future economy requires it to ensure that young

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20. See, e.g., Bartholet, *supra* note 15, at 3–4; JAMES G. DWYER & SHAWN F. PETERS, HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE 67–68 (2019); Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children’s Interests*, 46 U. BALT. L. REV. 57, 59–60 (2016); Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991, 991 (2010); Kimberly A. Yuracko, *Education Off the Grid: Constitutional Restraints on Homeschooling*, 96 CALIF. L. REV. 123, 124 (2008).

21. See *infra* Section IV.A.

people gain the human capital needed to participate in meaningful work and contribute to that future economy.

Part IV considers possible regulatory responses. Current constitutional doctrine permits the states to require that all students attend *some* school, be it public or private. At the same time, millions of parents have embraced the belief that God requires parents alone to control the education of their children.<sup>22</sup> These parents believe that mere exposure to ideas contrary to their own will confuse and harm their children. Cognitive development research, however, shows that by adolescence, young people have adult-like capacity to comprehend and differentiate discordant ideas.<sup>23</sup>

I thus propose that states give parents broad authority to direct children's primary educations, including the ability to homeschool. During those years, oversight should be limited to ensuring that children are making adequate academic progress. In the secondary years, however, the state's interest in ensuring that its citizenry be self-determining and capable of democratic and workforce participation dictates that it take more affirmative measures with respect to education. Exposure to competing information and values poses no critical threat to homeschooled adolescents and ensures that they gain the capacity to make meaningful choices about the directions their own lives will take. States should thus adopt strong presumptions against home secondary schooling. The burden would rest upon parents wishing to homeschool to demonstrate the capacity and disposition to ensure their children receive educations consistent with the commitments of the liberal democratic state.

#### I. THE EVOLUTION OF U.S. EDUCATION: FROM HOME TO SCHOOL . . . AND BACK AGAIN

In the American colonies and the early states, formal institutional schooling was uncommon.<sup>24</sup> The educations of young people thus lacked the

22. For example, the Home School Legal Defense Association used to describe its mission as “to preserve and advance the fundamental, God-given, constitutional right of parents and others legally responsible for their children to direct their education.” *Our Mission*, HOME SCH. LEGAL DEF. ASS'N, <https://web.archive.org/web/20191220142336/https://hsllda.org/content/about/mission.asp> [https://perma.cc/5L4U-TLWS]. *But see Our Mission*, HOME SCH. LEGAL DEF. ASS'N, <https://hsllda.org/post/our-mission> [https://perma.cc/KK28-GQ3Z] (last updated Sept. 18, 2019) (removing reference to “God-given” right and asserting their mission as founded upon the principle that “[p]arents know their children’s needs and abilities much better than any government official can—and they’re better able to find ways to meet those needs and nurture those abilities”). Similarly, the Home Educator’s Association of Virginia comes “from a biblical worldview” and its philosophy is that “God gives parents the primary responsibility to educate their own children” and that “[p]arental love[,] . . . understanding, patience[,] . . . and . . . awareness of the needs of the whole child are more important than teacher-certification requirements.” *About HEAV*, HOME EDUCATORS ASS'N OF VA., <https://heav.org/about-heav/> [https://perma.cc/DX4H-N4H4].

23. *See infra* notes 265–71 and accompanying text.

24. MILTON GAITHER, HOMESCHOOL: AN AMERICAN HISTORY 3 (rev. 2d ed. 2017).



uniformity created by such institutional systems. Instead, the timing, location, and content of children's education varied across communities. Most children received a basic education in literacy and numeracy through some combination of parental and hired tutoring, small in-home schools, and private academies.<sup>25</sup> Enslaved children (usually those who worked in plantation owners' homes rather than in fields) sometimes received basic education.<sup>26</sup>

In the nineteenth century, reformers pushed for the establishment of free "common" schools funded by communities.<sup>27</sup> By the mid-twentieth century, common and private regular schooling was firmly entrenched, and the overwhelming majority of U.S. children attended publicly accredited regular schools.<sup>28</sup> Homeschooling was almost nonexistent.

Cultural, political, and legal changes then prompted some families to withdraw their children from regular schooling altogether, initiating a trend that has continued into this century.

The following sections of this Article place the current practice of homeschool into historical context. They outline the emergence of common schools and the developments that have led a significant portion of the population to eventually reject them.

A. *Nineteenth Century: Common Schools, Compulsory Education, and the Assimilationist Project*

The colonists prized literacy, largely due to the importance of biblical reading in Protestant theology.<sup>29</sup> There was little official involvement in education. Across the colonies, scattered ordinances required parents to provide their children a basic education.<sup>30</sup> Some colonies required townships of a certain size to fund a "common" school.<sup>31</sup> There is scant evidence that the ordinances were enforced, however, and noncompliance was the norm.<sup>32</sup>

25. JOSEPH F. KETT, *rites of passage: adolescence in America 1790 to the present 18–22* (1977). As early as the mid-seventeenth century, the New England colonies and Virginia enacted compulsory education requirements requiring parents to ensure that children became literate. GAITHER, *supra* note 24, at 6. Some colonies required towns of a certain size to provide some form of common, or public, schooling. Connecticut, Massachusetts, Pennsylvania, and New York enacted early statutes requiring towns of fifty or more families to hire a schoolmaster to teach reading and writing. Historian Milton Gaither notes, however, that noncompliance with these requirements was the norm. *Id.* at 13.

26. GAITHER, *supra* note 24, at 18–19. After Nat Turner's 1831 rebellion, however, Southern states enacted laws that prohibited teaching black people—enslaved or free—to read. *Id.*

27. *Id.* at 26.

28. See DWYER & PETERS, *supra* note 20, at 22.

29. GAITHER, *supra* note 24, at 6.

30. *Id.*

31. *Id.* at 13.

32. *Id.*

A number of factors spurred increased state interest in, and control over, education beginning in the mid-nineteenth century:

First, there was an influx of immigrants into the United States, including Irish Catholics and other groups whose home languages and cultures differed from those of the Protestant majority.<sup>33</sup> The settled citizens saw common schooling as an effective means of assimilating the newly arrived groups into the (superior) majority culture.<sup>34</sup> As historian David Tyack concluded, “Much of the drive for compulsory education reflected an animus against parents considered incompetent to train their children.”<sup>35</sup>

Second, common-school reformers like Horace Mann, chair of the Massachusetts State Board of Education, saw state-funded common schools as social equalizers.<sup>36</sup> Not only would all children, rich and poor alike, have the opportunity to learn, but common schools would also instill in them discipline, strong moral character, and citizenship training.<sup>37</sup>

Finally, compulsory education measures helped children escape the dangers of industrial labor.<sup>38</sup> The proliferation of factories had created demand for laborers, and children frequently worked long hours in poor conditions for low pay.<sup>39</sup>

In the Northeast and settled parts of the Midwest, free common schools were well established by the mid-nineteenth century.<sup>40</sup> The South lacked the long tradition of local schools; common schools became standard only after the Civil War, when the North required Southern states to enact common school laws as a condition for readmission to the Union.<sup>41</sup> By the end of the nineteenth

33. DWYER & PETERS, *supra* note 20, at 10; GAITHER, *supra* note 24, at 36; ELLWOOD P. CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY* 335 (1919). Cubberley, an educator and dean of Stanford Graduate School of Education, wrote that Irish immigrants “had a high degree of illiteracy . . . and the coming of such large numbers of people, poor and uneducated, who would ultimately become citizens and voters, awakened a solicitude for our political future . . . which materially aided in the establishment . . . of public education and the development of state oversight and control.” *Id.*

34. DWYER & PETERS, *supra* note 20, at 10; *see also* CUBBERLEY, *supra* note 33, at 341 (“The problem which has faced and still faces the United States is that of assimilating these thousands of foreigners into our national life and citizenship. We must do this or lose our national character.”).

35. David B. Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 *HARV. EDUC. REV.* 355, 363 (1976); *see also* CUBBERLEY, *supra* note 33, at 341–43.

36. CUBBERLEY, *supra* note 33, at 167 (“No one did more than [Mann] to establish in the minds of the American people the conception that education should be universal, non-sectarian, and free[.]”).

37. DWYER & PETERS, *supra* note 20, at 10–11.

38. *Id.* at 13.

39. *Id.*

40. CUBBERLEY, *supra* note 33, at 65–67, 72–74.

41. GAITHER, *supra* note 24, at 39.

century, virtually all states had established common schools and enacted compulsory school attendance laws.<sup>42</sup>

Americans readily accepted common schools and compulsory education requirements because most people still lived in close-knit small towns or rural communities.<sup>43</sup> Thus, the early public schools enrolled the children of familiar neighbors who typically shared race, class, and religious identities.<sup>44</sup>

Early public schools were also decidedly nonsecular, and uncontroversially so, as Bible reading and teaching were regular features of public school curricula.<sup>45</sup> The Protestant orientation of Bible teaching, however, led Catholic bishops to create an alternative system of parochial schools.<sup>46</sup>

By the late nineteenth century both public schools and compulsory education laws were well established, and the state—not parents—largely controlled the education of children.<sup>47</sup>

B. *Twentieth Century: Standardization, Secularization, Integration, and the Retreat from Regular Schools*

Schools remained relatively homogenous and largely reinforced majoritarian cultural norms into the early twentieth century.<sup>48</sup> As the century progressed, rates of school attendance, particularly in the higher grades, rose steadily. In 1930, slightly less than fifty percent of children between the ages of fourteen and sixteen attended school.<sup>49</sup> By 1950, the percentage had increased to over seventy-seven percent.<sup>50</sup> In 1970, eighty percent of children were graduating from high school.<sup>51</sup>

Schools themselves became larger and education become more standardized: the school year lengthened, smaller local districts consolidated into larger units, and school buildings became uniform.<sup>52</sup> Professional educators' organizations proliferated.<sup>53</sup> The federal government attached conditions to the receipt of federal monies, leading to national testing, standardized textbooks, and uniform curricula.<sup>54</sup>

42. DWYER & PETERS, *supra* note 20, at 12. In 1918, Mississippi became the last state to enact a compulsory school attendance law. *Id.*

43. GAITHER, *supra* note 24, at 38.

44. *Id.*

45. CUBBERLEY, *supra* note 33, at 171 (noting that “the right of the Church to dictate the teaching in the schools was clearly recognized by the State”).

46. DWYER & PETERS, *supra* note 20, at 16; GAITHER, *supra* note 24, at 41.

47. DWYER & PETERS, *supra* note 20, at 18.

48. GAITHER, *supra* note 24, at 71.

49. *Id.* at 93.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

Historian Milton Gaither has chronicled these developments and argued that the contemporary homeschooling movement evolved in direct response to them. He writes:

This profound expansion and standardization is the fundamental fact without which the homeschooling phenomenon makes no sense. Homeschooling . . . was very largely a reaction against the mass culture of the modern liberal state, a culture realized perhaps most perfectly in the consolidated public schools located on metropolitan outskirts amidst the rapidly expanding suburbs.<sup>55</sup>

Midcentury saw social and political turmoil, as the nation grappled with the Vietnam War, fears about the spread of communism, and the civil rights movement. The U.S. Supreme Court decided *Brown v. Board of Education*<sup>56</sup> in 1954, declaring the segregation of public schools unconstitutional.<sup>57</sup> Subsequent decisions mandated additional measures, such as busing, to effectuate integration.<sup>58</sup>

The Court then handed down decisions signaling it would no longer tolerate religious exercise in public schools. In decisions handed down in 1962 and 1963, the Court held that both school-sponsored prayers and Bible readings violated the Establishment Clause of the First Amendment.<sup>59</sup> Many white and religiously conservative Americans were appalled by the decisions and railed against the Court that, in the words of one Alabama Congressman, had “put the Negroes in the schools—now they put God out of the schools.”<sup>60</sup>

Criticism of the public education system emerged from both the left and the right. On the left, parents began to criticize what they perceived to be an overemphasis on standardization, believing that it stifled individual expression

55. *Id.*

56. 347 U.S. 483 (1954).

57. *Id.* at 495.

58. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22, 29–32 (1971) (authorizing busing of students to achieve racial desegregation); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438–42 (1968) (finding that county’s “freedom of choice” plan, which allowed families to choose their school, was ineffective at desegregating the school system and holding that the plan violated the U.S. Constitution).

59. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421, 433–36 (1962) (finding that New York State violated the Constitution’s Establishment Clause by creating and requiring a school prayer); *Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (holding that no school district can require passages from the Bible to be read).

60. GAITHER, *supra* note 24, at 116 (quoting Alabama Representative George Andrews in 1962). The popular backlash against the Court’s religious exercise decisions stretched to some degree across racial lines. *See* Heidi L. Matiyow, *Mothers Battle Busing and Nontraditional Education in 1970s Detroit*, in *THE HISTORY OF DISCRIMINATION IN U.S. EDUCATION: MARGINALITY, AGENCY, AND POWER* 193, 195 (Eileen H. Tamura ed., 2008) (“[T]hese Supreme Court decisions aroused a great deal of dismay among average Americans—both white and black—who felt that the ‘majority’ of the public still wanted the inclusion of religious exercises in the public schools.”).

and led to uncritical conformity.<sup>61</sup> From the right, conservatives worried that public school values were deviating from their own.<sup>62</sup>

Parents' initial response to the various perceived failings of public education was not to homeschool, however. Instead, parents sought alternatives in nonpublic schools that began to proliferate. Some parents enrolled their children in liberal experimental schools that followed less formal curricula and embraced countercultural values.<sup>63</sup> A much larger number of conservative Protestants left for private schools that reflected their religious (and in some cases, racial) values.<sup>64</sup> These private Christian day schools allowed families to escape the increasing secularization of the public schools and avoid exposure to sex education, evolution, and other teaching that conflicted with their beliefs.<sup>65</sup>

The Christian schools founded during this period were typically sponsored by local churches or even small groups of individuals, frequently relying on curricular materials designed specifically for Christian schools.<sup>66</sup> While many of them affiliated with Christian school associations like the Association of Christian Schools International, which was formed in 1978, many more remained unaffiliated with any group and lacked state accreditation.<sup>67</sup> Antipathy toward accreditation or state oversight was rooted in religious belief. As one pastor explained, "We believe the head of the Church is Jesus Christ, and if I let the State become the head of the church, then I will be removing the Lord from His position[.]"<sup>68</sup> Christian schools thus proliferated in these decades, but the resistance to registration prevents knowing precisely how many were formed. Estimates thus vary widely, ranging from 6000 to more than 20,000 in the mid-1980s.<sup>69</sup>

Over time, some conservative Christians became dissatisfied with private schooling for various reasons. For many families, paying tuition was a challenge.<sup>70</sup> A growing number of parents came to believe that the Bible demanded that parents alone bear responsibility for educating their children and required them to directly provide the entirety of children's educational experiences.<sup>71</sup> Others simply wanted more time with their children.<sup>72</sup> Parents

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61. See GAITHER, *supra* note 24, at 109.

62. See *id.* at 115–16.

63. DWYER & PETERS, *supra* note 20, at 43.

64. See GAITHER, *supra* note 24, at 116; see also *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 227 (1964) (declaring unconstitutional a Virginia county's attempt to avoid integration by closing public schools from 1959 to 1963 and providing private school scholarships to white children).

65. GAITHER, *supra* note 24, at 116.

66. See DWYER & PETERS, *supra* note 20, at 36.

67. GAITHER, *supra* note 24, at 118.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 119.

72. *Id.*

began pulling their children out of Christian day schools to begin homeschooling in growing numbers.<sup>73</sup>

Since the 1980s, the number of families choosing to educate their children exclusively at home has risen dramatically.<sup>74</sup> The next section discusses the contemporary practice of homeschooling.

### C. *Twenty-First Century: The Current Practice of Homeschooling*

Today, most school-aged children continue to attend some regular public or private school—state-accredited institutions staffed by formally trained educators.<sup>75</sup> The number of families choosing to homeschool has grown dramatically since the 1980s, however. In 1980, some 60,000 children were homeschooled. By 2017, that number had grown to some 1.7 million.<sup>76</sup> The actual number of children being homeschooled is likely higher<sup>77</sup>: because many states have no provisions that require parents to notify of their intent to homeschool, it is currently impossible to know the exact number of children being homeschooled.<sup>78</sup>

#### 1. Motivations for Homeschooling

Parents choose to homeschool for a range of secular reasons. Some parents homeschool because their children are heavily involved in nonacademic activities such as competitive sports, and homeschooling allows for flexibility in training and competition.<sup>79</sup> Some parents believe that schools cannot adequately meet their children's specific academic needs—either because the schools are insufficient for typical students or because their children have special educational needs or are academically gifted.<sup>80</sup> Some parents fear that their children may face discrimination, endure bullying, or run the risk of physical harm.<sup>81</sup>

73. *Id.* at 121.

74. Grady, *supra* note 12 (noting that approximately 1.7 million children, or 3.3% of all K-12 students, were homeschooled in the United States in 2016); *see also* NAT'L CTR. FOR EDUC. STAT., *supra* note 12.

75. DWYER & PETERS, *supra* note 20, at 32.

76. NAT'L CTR. FOR EDUC. STAT., *supra* note 12.

77. Dwyer & Peters estimate that the number of homeschooled children likely reached two million by 2018. DWYER & PETERS, *supra* note 20, at 1.

78. Cheryl Fields-Smith, *Homeschooling Among Ethnic-Minority Populations*, in THE WILEY HANDBOOK OF HOME EDUCATION 207 (Milton Gaither ed., 2017) [hereinafter THE WILEY HANDBOOK].

79. Joseph Murphy, Milton Gaither & Christine E. Gleim, *The Calculus of Departure: Parent Motivations for Homeschooling*, in THE WILEY HANDBOOK, *supra* note 78, at 109.

80. DWYER & PETERS, *supra* note 20, at 92–93.

81. *Id.* at 94–95; *see also* Fields-Smith, *supra* note 78, at 208–09; Murphy et al., *supra* note 79, at 104–05; Karen Hurlbutt-Eastman, *Teaching the Child with Exceptional Needs at Home*, in THE WILEY HANDBOOK, *supra* note 78, at 222.

The largest group of homeschoolers, however, are conservative Christians who reject what they perceive to be liberal secularism and moral relativism, which explicitly omit religious teaching from the typical curricula of regular schools.<sup>82</sup> These parents wish to instill in their children certain beliefs and values while shielding them from other views presented in schools.

## 2. Academic Attainment

There is little reliable data on the academic attainment of homeschooled students.<sup>83</sup> As Professor Elizabeth Bartholet has observed, it is “almost impossible” to conduct reliable, quality research into the efficacy of homeschooling education.<sup>84</sup> The reason is simple: researchers are unable to identify or locate all homeschooled students.<sup>85</sup> Lax state regulations mean that homeschoolers can effectively “live off the grid.”<sup>86</sup> Many states do not require homeschoolers to register, and many families simply fail to register even if technically required to do so.<sup>87</sup> Without the ability to locate the entire population of homeschoolers, it is impossible to study a representative sample to evaluate how these students perform on average.<sup>88</sup>

Overwhelmingly, states do not require homeschooled children to participate in standardized testing.<sup>89</sup> Thus, only a subset of the homeschooling population takes the standardized tests required of students attending regular schools.<sup>90</sup> Moreover, states do not require parents to report the test results of homeschooled students who do take the standardized tests.<sup>91</sup> Therefore, data compiled using results of the subset of homeschooled students who both took

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82. Here again, available information is imprecise, but estimates range from two-thirds to ninety percent. See Bartholet, *supra* note 15, at 9 n.33 (gathering studies). The 2016 National Center on Education Statistics reported that sixteen percent of homeschooling parents survey indicated that religion was their “most important” reason for homeschooling, and fifty-one percent indicated that it was an “important” reason. See MEGHAN MCQUIGGAN & MAHI MEGRON, PARENT AND FAMILY INVOLVEMENT IN EDUCATION: RESULTS FROM THE NATIONAL HOUSEHOLD EDUCATION SURVEYS PROGRAM OF 2016: FIRST LOOK 19 (Sept. 2017).

83. See Bartholet, *supra* note 15, at 20.

84. *Id.*

85. See *id.*

86. *Id.*; see also *infra* Part II (summarizing state regulation of homeschooling).

87. Bartholet, *supra* note 15, at 20.

88. *Id.*

89. *Id.* at 39–40. New York, for example, requires students in grades four through eight to take a standardized test at least every other year and every year in high school. *How to Comply with New York’s Homeschool Law*, HSLDA, <https://hsllda.org/post/how-to-comply-with-new-york-s-homeschool-law> [<https://perma.cc/55YL-REGJ>]. Pennsylvania requires that children in grades three, five, and eight take a standardized test. *How To Comply with Pennsylvania’s Homeschool Law*, HSLDA, <https://hsllda.org/post/how-to-comply-with-pennsylvania-s-homeschool-law> [<https://perma.cc/V5XA-WTHW>].

90. Bartholet, *supra* note 15, at 38–40.

91. *Id.*

the standardized tests and reported the results is incomplete and provides little reliable information.<sup>92</sup>

Homeschooling advocacy organizations point to anecdotal evidence of homeschooled children successfully attending postsecondary institutions<sup>93</sup> and studies finding that homeschoolers' academic performance exceeds that of their public school peers.<sup>94</sup> The studies, however, have generally been conducted by advocacy researchers who are themselves part of the homeschooling movement.<sup>95</sup> They select subsets of the homeschooling student population—for example, those who elect to take standardized tests (which are generally not required of homeschooled students) or those who enter college. Indeed, reputable academics have assessed and largely discredited the studies.<sup>96</sup>

92. See, e.g., Brian D. Ray, *Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study*, 8 ACAD. LEADERSHIP: ONLINE J. 1 (2010). In this study, Brian Ray enlisted homeschooling organizations to solicit parents who had paid “fee-for-service” testing organizations to administer standardized tests to report results to the study’s author. *Id.* at 5. Ray obtained test results for 11,739 students. *Id.* at 6. He stated that “[i]t was very challenging to calculate the response rate[,]” but the response rates ranged from “a minimum of nineteen percent for the four main testing services” to an estimated eleven percent “[f]or the other testing services and sources of data[.]” *Id.* at 7. He concluded that “[t]he response rate for this study [was] comparable to what many experience in this type of social science research. On the other hand, the response rate in this study is lower than in many social science studies.” *Id.*

93. See Wilkens et al., *Are Homeschoolers Prepared for College Calculus?*, 9 J. SCH. CHOICE 30, 31 (2015).

94. See, e.g., Ray, *supra* note 92, at 2. Ray stated that “[h]omeschool student achievement test scores are exceptionally high. The mean scores for every subtest (which are at least the 80th percentile) are well above those of public school students.” *Id.* at 27. He conceded, however, that “it was not possible within the constraints of this study to confirm whether this sample is representative of the population of home-educated students.” *Id.* at 28. It is possible that the families that voluntarily opt in to standardized testing are a subset whose more rigorous programs make them confident that their children will perform well on such tests.

95. Sandra Martin-Chang & Kyle Levesque, *Academic Achievement: Making an Informed Choice About Homeschooling*, in THE WILEY HANDBOOK, *supra* note 78, at 122 (“[T]he majority of the work investigating the academic impact of homeschooling has been commissioned by the homeschooling groups themselves.”). The National Home Education Research Institute (NHERI), founded by Brian D. Ray as the research arm of HSLDA, has published multiple such studies. NHERI publishes an online journal called *Homeschool Researcher* that contains both peer-reviewed and non-peer-reviewed articles. Milton Gaither critically assesses Brian Ray’s studies in Milton Gaither, *Brian D. Ray and NHERI, Part 1*, HOMESCHOOLING RESEARCH NOTES (Sept. 30, 2008), <https://gaither.wordpress.com/2008/09/30/brian-d-ray-and-nheri-part-1/> [<https://perma.cc/99RQ-EJ2H>].

96. See, e.g., Milton Gaither, *Introduction to the Wiley Handbook of Home Education*, in THE WILEY HANDBOOK, *supra* note 78, at 2 (“It is unfortunately the case that for decades a good bit of what has passed for homeschooling research has been little more than thinly veiled advocacy or opposition.”); Robert Kunzman & Milton Gaither, *Homeschooling: A Comprehensive Survey of the Research*, 2 OTHER EDUC. 4, 5–6 (2013); Christopher Lubienski, Tiffany Puckett & T. Jameson Brewer, *Does Homeschooling “Work”? A Critique of the Empirical Claims and Agenda of Advocacy Organizations*, 88 PEABODY J. EDUC. 378, 379, 390 (2013) (“[T]here is essentially no scientific evidence on the effectiveness of homeschooling.”); Wilkens et al., *supra* note 93, at 31 (“Work on the performance of homeschoolers . . . has remained largely anecdotal, subject to bias, and highly politicized[.]”).



Homeschooling advocates counter that regular schools, and particularly public schools, succeed unevenly at best in educating students and preparing them for the workforce.<sup>97</sup> It is beyond dispute that many state-funded schools do not serve all children well.<sup>98</sup> At the same time, however, standardized assessments and transparency provide both educators and legislators with critical information about the quality of instruction, thus informing them of the nature of needed reform.<sup>99</sup> No comparable level of transparency exists with respect to the educations received by children educated exclusively within the home. Indeed, states do not collect data that would allow for systematic assessment of homeschooled students' academic progress. Available evidence suggests, however, that many homeschooled children do not receive educations adequate to prepare them for postsecondary study.<sup>100</sup> In one case, Josh Powell, a child whose parents homeschooled him in southern Virginia, petitioned his local school board to admit him to a public school.<sup>101</sup> Powell insisted that he did not share his parents' religious objections to public education and was receiving an inadequate education at home.<sup>102</sup> The school board denied his request, but Powell eventually enrolled in a local community college with financial aid and spent three years taking remedial and other courses.<sup>103</sup>

97. See, e.g., Brian D. Ray, *A Brief Review of "Taking Children's Interests Seriously" by Fineman*, NAT'L HOME EDUC. RES. INST. (Jan. 10, 2012), <https://www.nheri.org/home-school-researcher-a-brief-review-of-taking-childrens-interests-seriously-by-fineman/> [<https://perma.cc/8BGG-7RLX>] (observing that "Fineman did not bother to mention the drop-out, illiteracy, or incarceration rates amongst graduates of State K-12 schools in America").

98. See, e.g., Tawnell D. Hobbs, *Students Show Declines in Nation's Report Card*, WALL STREET J. (Oct. 30, 2019), <https://www.wsj.com/articles/students-show-declines-in-nations-report-card-11572433205> [<https://perma.cc/GRG2-NCD6>].

99. To give just one example, in 2017, pursuant to a 2004 decision, a North Carolina trial court appointed a third-party consultant to evaluate the state's public schools and prepare a comprehensive action plan aimed at redressing the school system's shortcomings. See Consent Order Regarding Need for Remedial Systemic Actions for the Achievement of *Leandro* Compliance at 9–10, Hoke Cty. Bd. of Educ. v. State, 358 N.C. 605, 599 S.E.2d 365 (2004) (No. 95-CVS-1158), [https://wwwcache.wral.com/asset/opinion/2020/01/22/18903814/File-stamped\\_Order\\_dated\\_1-21-2019\\_2\\_2-DMID1-51l9qshro.PDF](https://wwwcache.wral.com/asset/opinion/2020/01/22/18903814/File-stamped_Order_dated_1-21-2019_2_2-DMID1-51l9qshro.PDF) [<https://perma.cc/Q4GB-HN8X>]. The commission found that the state's "current education system fails to meet the educational needs of many of its children." *Id.* The consultant and two independent organizations enlisted research teams who produced thirteen research reports, then prepared and published a comprehensive action plan. See WESTED, LEARNING POLICY INST. & THE WILLIAM & IDA FRIDAY INST. FOR EDUC. INNOVATION, SOUND BASIC EDUCATION FOR ALL: AN ACTION PLAN FOR NORTH CAROLINA 1–2 (2019), <http://www.ncpolicywatch.com/wp-content/uploads/2019/12/Sound-Basic-Education-for-All-An-Action-Plan-for-North-Carolina.pdf> [<https://perma.cc/T9T7-NSNX>].

100. For a discussion and comparison of reliable and unreliable research see Barthelet, *supra* note 15, at 5, 20–26.

101. See Susan Svrluga, *Student's Home-Schooling Highlights Debate Over Va. Religious Exemption Law*, WASH. POST (July 28, 2013), [https://www.washingtonpost.com/local/students-home-schooling-highlights-debate-over-va-religious-exemption-law/2013/07/28/ee2dbb1a-efbc-11e2-bed3-b9b6fe264871\\_story.html](https://www.washingtonpost.com/local/students-home-schooling-highlights-debate-over-va-religious-exemption-law/2013/07/28/ee2dbb1a-efbc-11e2-bed3-b9b6fe264871_story.html) [<https://perma.cc/5L3K-DJAH> (dark archive)].

102. *Id.*

103. *Id.*

In some conservative fundamentalist families, boys may receive higher levels of education than girls, as parents provide lesser levels of education for their daughters than for their sons.<sup>104</sup> This unequal treatment is grounded in the belief that the only proper role for a woman is as a mother and wife.<sup>105</sup> Although data is lacking, the existing evidence is troubling and suggests that girls educated in these families are left ill-prepared to embark on any life course other than the domestic roles determined by their parents.<sup>106</sup>

We therefore have no reliable means of knowing how many homeschooled children fail to receive adequate schooling.

### 3. Children's Welfare

It is currently impossible to know whether rates of maltreatment are higher in homeschooling families than in families with children who attend public schools. In the absence of state-imposed reporting requirements, homeschooling families may live in relative—or total— isolation.

This isolation results in homeschooled children having little or no contact with teachers and other officials who are required by law to report suspected abuse or neglect.<sup>107</sup> These officials are trained to observe whether children are adequately clothed and fed, injured, or possess behaviors that may signal trauma at home. There is evidence that some abusive parents have taken advantage of lax homeschooling regulations, effectively hiding their children from these mandatory reporters.<sup>108</sup>

Evidence also suggests that homeschooling carries increased risk of abuse and neglect. One study compared the rate of child abuse fatalities among homeschooling families to the rate of child abuse fatalities overall.<sup>109</sup> It found a higher rate of death due to maltreatment among homeschooled children than among children of the same age overall.<sup>110</sup> Milton Gaither has voiced concerns about the risk of maltreatment, noting that “[p]rofessionals responsible for child

104. The Quiverfull movement, for example, teaches homeschooled girls to be submissive and to aspire only to marry and procreate. See Katherine Stewart, *The Dark Side of Home Schooling: Creating Soldiers for the Culture War*, GUARDIAN (May 8, 2013), <https://www.theguardian.com/commentisfree/2013/may/08/christian-home-schooling-dark-side> [<https://perma.cc/P56V-X8YQ>].

105. GAITHER, *supra* note 24, at 255; Bartholet, *supra* note 15, at 10–12.

106. In Section III.A, I discuss how these educational practices constitute a form of “other-determining” conduct that contravenes core commitments of the liberal state. See *infra* Section III.A.

107. Bartholet, *supra* note 15, at 14.

108. See Green, *supra* note 14, at 1097–98.

109. *Some Preliminary Data on Homeschool Child Fatalities*, HOMESCHOOLING'S INVISIBLE CHILDREN, <http://hsinvisiblechildren.org/commentary/some-preliminary-data-on-homeschool-child-fatalities/> [<https://perma.cc/M78H-UX5L>].

110. *Id.*

services have long been wary of the potential for unregulated homeschooling to serve as a cloak for child abuse.”<sup>111</sup>

Child abuse pediatricians from five U.S. medical centers studied the most severe cases of child abuse (those involving child torture) and found that over three-fourths of the school-aged children were not attending any regular school.<sup>112</sup> Nearly half had attended some school, but their parents removed them for homeschooling. The authors noted that the parents’ decision to remove the children “typically occurred after closure of a previously opened CPS case,” and their review “found no true educational efforts were provided to the homeschooled children.”<sup>113</sup> Instead, “[t]heir isolation was accompanied by an escalation of physically abusive events.”<sup>114</sup>

The cases studied by the child abuse pediatricians are extreme cases and not typical of homeschooling families. What these cases do illustrate, however, is that homeschooling can provide effective cover for abusive or neglectful parents.

## II. THE LAW OF HOMESCHOOLING

*It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.*<sup>115</sup>

The U.S. Supreme Court has addressed a number of cases involving the extent of state authority over children’s education. In those cases, the Court has acknowledged state authority to “reasonably . . . regulate all schools” and “to require that all children of proper age attend some school.”<sup>116</sup> State power is not unlimited, however, and the Court has struck down regulations it deemed overly far reaching.<sup>117</sup>

111. Milton Gaither, *Two Brief Articles on Homeschooling and Child Abuse*, INT’L CTR. FOR HOME EDUC. RES. REV. (Mar. 29, 2013), <http://icher.org/blog/?p=638> [<https://perma.cc/P7WM-ET3X>].

112. Barbara L. Knox et al., *Child Torture as a Form of Child Abuse*, 7 J. CHILD & ADOLESCENT TRAUMA 37, 38–39 (2014) (stating that pediatricians specializing in child abuse and working at medical centers in Texas, Utah, Virginia, Washington, and Wisconsin identified and conducted case studies of twenty-eight cases of extreme child abuse).

113. *Id.* at 39.

114. *Id.*

115. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

116. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

117. *See, e.g., Pierce*, 268 U.S. at 510 (striking down a state law that required all children to attend public rather than private schools); *Meyer v. Nebraska*, 262 U.S. 390, 390–91 (1923) (striking down a state law that prohibited the teaching of foreign languages in the elementary grades).

Lower federal courts and state courts, under both the federal and state constitutions, have overwhelmingly upheld state regulations of education broadly and homeschooling in particular.<sup>118</sup>

Although homeschooling advocates have foundered in the courts, they have achieved significant gains at the state legislative level. The Home School Legal Defense Association (“HSLDA”) has mounted aggressive lobbying campaigns, and with no similarly committed (or similarly resourced) constituencies challenging its efforts, has achieved gains in the legislatures that it has failed to achieve through the courts.<sup>119</sup>

This part discusses both the scope of parents’ constitutional right to direct their children’s educations and the extent to which state law governs homeschooling.

A. *The Constitutionally Derived Parental Right To Direct the Education of Children, and Its Limits*

The Supreme Court has implicitly held that the U.S. Constitution does not protect a parental right to homeschool one’s children.<sup>120</sup> In *People v. Turner*,<sup>121</sup> the State of California prosecuted homeschooling parents for violating a state compulsory school attendance statute that required parents to enroll their children in either public or private school.<sup>122</sup> The parents challenged the law on two grounds. First, they argued that “private schools” should be

118. See *infra* Section II.B.; see also, e.g., *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 231 (3d Cir. 2008), cert. denied, 555 U.S. 1138 (2009) (holding that a state law requiring parents of homeschooled children to comply with reporting and superintendent review requirements was not unconstitutional); *Murphy v. Arkansas*, 852 F.2d 1039, 1039–40 (8th Cir. 1988) (upholding against constitutional challenge a state law requiring parents of homeschooled children to notify the state, provide curriculum information, and submit children to annual standardized tests); *Null v. Bd. of Educ.*, 815 F. Supp. 937, 937 (S.D. W.Va. 1993) (upholding a state statute imposing testing requirement and denying parents’ right to homeschool if test scores fall below certain percentile); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 106, 113 (N.D.N.Y. 1988) (upholding regulations that included home visits and required homeschooling parents to submit plan of instruction and description of instructor qualifications); *In re Charles*, 504 N.E.2d 592, 592 (Mass. 1987) (upholding against constitutional challenge a state statute establishing process for approval of home school that required parents to outline curriculum and provide qualifications of instructors). But see *People v. DeJonge*, 501 N.W.2d 127, 127, 144 (Mich. 1993) (subjecting teaching certification requirement for homeschooling to strict scrutiny under state constitution and holding that the requirement violated the Free Exercise Clause). A later decision by the Sixth Circuit found that rational basis was the appropriate standard of review in such cases, however, which undermines the legal foundation of *DeJonge*. *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180–81 (6th Cir. 1993); see also *Bartholet*, *supra* note 15, at 34 n.196.

119. See *infra* Section II.C.

120. See *Turner v. California*, 347 U.S. 972, 972 (1954) (dismissing homeschooling parents’ appeal for lack of a substantial federal question).

121. 263 P.2d 685 (Cal. App. Dep’t Super. Ct. 2d 1953).

122. *Id.* at 686.

interpreted to include homeschooling.<sup>123</sup> Second, they argued that if the statute did prohibit homeschooling, it unconstitutionally “deprive[d] parents of the right to determine how and where their children may be educated.”<sup>124</sup> The California appellate court rejected both arguments. It relied on U.S. Supreme Court precedent to find that the state regulation fell within the state’s power “reasonably to regulate” education and to require school attendance.<sup>125</sup> The parents appealed to the U.S. Supreme Court.

The U.S. Supreme Court granted certiorari, but then issued a summary dismissal of the appeal due to the absence of a “substantial federal question.”<sup>126</sup> The Court thus determined that the issues presented by the case turned on neither a federal statute nor a constitutional provision—such as the Fourteenth Amendment right to direct the education of one’s children. In other words, the state’s prohibition of homeschooling substantially implicated no constitutionally protected parental right. Without a written opinion that explicitly articulates the Court’s reasoning, however, *Turner* has been largely overlooked.<sup>127</sup>

The Court has decided numerous cases that have not squarely addressed homeschooling but that have considered other limits to states’ authority to regulate education. It has located a parental right to direct the upbringing and education of children in the Due Process Clause of the Fourteenth Amendment, which states in part that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>128</sup> The Court has also interpreted the Clause to provide not only procedural protections, but also to protect certain substantive liberties—including family autonomy—from state interference.<sup>129</sup>

In a well-known trio of cases in the early twentieth century, the Court announced that parents have a fundamental right to direct the upbringing and education of their children, but that the state retains “a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.”<sup>130</sup>

In *Meyer v. Nebraska*,<sup>131</sup> a German language teacher challenged a state law limiting the teaching of foreign languages to children in later grades.<sup>132</sup> The

123. *Id.*

124. *Id.* at 686–87.

125. *Id.* at 687.

126. *Turner v. California*, 347 U.S. 972, 972 (containing Justices Black and Reed’s disagreement with the dismissal based on their belief that there was “probable jurisdiction”).

127. DWYER & PETERS, *supra* note 20, at 57–58 (characterizing *Turner* as a “lost artifact in American constitutional history”).

128. U.S. CONST. amend. XIV, § 1.

129. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 70–72 (2006).

130. *Prince v. Massachusetts*, 321 U.S. 158, 165–67 (1944).

131. 262 U.S. 390 (1923).

132. *Id.* at 396–97.

Court held this effort to prevent teachers from engaging in certain instruction to be unreasonable. The Court emphasized the relatively narrow scope of its holding and did not suggest a broader limitation on the state's power to regulate education and compel school attendance, noting that

education of the young is only possible in schools conducted by especially qualified persons . . . . The power of the State to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum.<sup>133</sup>

Two years later, in *Pierce v. Society of Sisters*,<sup>134</sup> the Court sided with a group of private schools and struck down a state statute that required all children to attend public school.<sup>135</sup> In doing so, the Court again remarked on the expansive state power to regulate schools, and to compel student attendance at some regular school, be it public or private.<sup>136</sup> The Court explained that its decision did not limit these state powers, noting that

[n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.<sup>137</sup>

*Meyer* and *Pierce* involved challenges to state efforts to regulate aspects of children's education. Schools and teachers affected by the regulations brought the challenges in each of the cases (rather than parents), but the Court's opinion in each case addressed the relative balance of authority.

Finally, in *Prince v. Massachusetts*,<sup>138</sup> the Court upheld the enforcement of state laws restricting child labor against a child's guardian who asserted that the restrictions violated her parental, religious freedom, and equal protection rights guaranteed by the First and Fourteenth Amendments.<sup>139</sup> As in its earlier cases, the *Prince* Court acknowledged that "the custody, care and nurture of the child reside first in the parents."<sup>140</sup> It went on to hold, however, that the state's obligation to protect children's welfare entitled it to supersede parental authority.<sup>141</sup>

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133. *Id.* at 400–02.

134. 268 U.S. 510 (1925).

135. *Id.* at 534–35.

136. *Id.* at 534.

137. *Id.*

138. 321 U.S. 158 (1943).

139. *Id.* at 158–59, 168–70.

140. *Id.* at 166.

141. *Id.* at 166–69.

This trio of cases—*Meyer*, *Pierce*, and *Prince*—demonstrates the delicate balance between a state’s interest in regulating education and the individual right to raise one’s children. As the subsequent cases illustrate, this balance becomes even more complicated with the added element of religious liberty rights.

In *Wisconsin v. Yoder*<sup>142</sup>—a 1972 decision relied on by homeschooling advocates in subsequent claims—the Court exempted adolescents in Old Order Amish communities from compulsory education requirements beyond the eighth grade.<sup>143</sup> The Amish claimed the requirements violated their rights to free exercise of religious beliefs protected by the Free Exercise Clause of the First Amendment.<sup>144</sup> The Amish religion teaches that salvation requires life in a church community entirely separate from worldly influences and in harmony with nature.<sup>145</sup> Because the Amish faith and way of life requires separation from modern society and culture, the Court found that “compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community.”<sup>146</sup> Given that the Amish community had existed with relative success and self-sufficiency while separate from the broader society for centuries, the Court held that “accommodating the religious objections . . . will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship.”<sup>147</sup>

The *Yoder* Court noted that the state’s compulsory education requirement implicated not only the right to religious exercise but also “the fundamental interest of parents” to direct their children’s upbringing.<sup>148</sup> It thus grounded its holding in both the First and Fourteenth Amendments.<sup>149</sup>

Additionally, the Court’s opinion emphasized the distinctiveness of sects like the Amish and Mennonites, which have lived separate from mainstream society for centuries.<sup>150</sup> The Court thus hinted that *Yoder* presented an exceptional situation, and that its holding resulted from the sect’s “convincing showing, *one that probably few other religious groups or sects could make.*”<sup>151</sup>

142. 406 U.S. 205 (1972).

143. *Id.* at 205–06, 219, 234.

144. *Id.* at 208–09, 209 n.4.

145. *Id.* at 210.

146. *Id.* at 218.

147. *Id.* at 234.

148. *Id.* at 232.

149. *Id.* at 234 (“[W]e hold . . . that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.”). The Court has held that the Fourteenth Amendment’s Due Process Clause guarantees not only fair process but “also provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997).

150. *Yoder*, 406 U.S. at 235.

151. *Id.* at 235–36 (emphasis added).

Some two decades later, the Court held in *Employment Division v. Smith*<sup>152</sup> that free exercise challenges to neutral, generally-applicable laws would not trigger heightened judicial review.<sup>153</sup> The *Smith* Court suggested, however, that challenges involving free exercise in conjunction with other constitutional protections—like the right of parents to direct the education of children—present “hybrid” situations that warranted heightened scrutiny of state action.<sup>154</sup>

Homeschooling proponents have accordingly sought heightened constitutional protection for parents’ religiously grounded education decisions.<sup>155</sup> But while the Supreme Court’s “hybrid-rights” theory has spawned a circuit split and considerable commentary, it has not led to substantial expansion of such protections.<sup>156</sup> In sum, *Yoder* and *Smith* have not led to the extension of heightened protection for homeschooling parents.<sup>157</sup>

Since *Yoder*, the Supreme Court has not decided another case implicating both free exercise and parental rights. A decade after *Smith*, however, the Court did have occasion to further explain the contours of the fundamental right to parent. In *Troxel v. Granville*,<sup>158</sup> a parent challenged a state statute that permitted courts to grant grandparents visitation with their grandchildren without any deference to parents’ preferences.<sup>159</sup> The Court found that, in ordering visitation over the objection of a fit custodial parent, the trial judge

152. 494 U.S. 872 (1990).

153. *Id.* at 882–86. Instead, such challenges would be subject only to rational basis review—a deferential standard in which state legislation is upheld against constitutional challenge so long as it is rationally related to some legitimate state objective. *See id.* at 882–90.

154. *Id.* at 881–82.

155. *See, e.g.*, *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 249–50 (3d Cir. 2008) (describing Christian homeschooling parents’ argument that “parents claiming a religious-parental exemption to a neutral law of general applicability” should receive the same heightened scrutiny as was applied in *Yoder*).

156. *See, e.g.*, *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004) (recognizing hybrid rights when plaintiffs raise a “colorable claim that a companion right has been violated”); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004) (permitting a hybrid-rights claim for a Mormon student who refused to use expletives in an acting class exercise). *But see Combs*, 540 F.3d at 246–47 (declining to recognize a hybrid-rights claim and explaining that “[u]ntil the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta”); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (declining to subject “hybrid” claim to heightened standard of review “at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether [a free-exercise claim is coupled with other constitutional rights].”). For an example of scholarly analyses of the Court’s hybrid-rights theory see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) (“[A] legal realist would tell us . . . that the *Smith* Court’s notion of ‘hybrid’ claims was not intended to be taken seriously.”).

157. *See, e.g.*, *Combs*, 540 F.3d at 251 (rejecting parents’ requested exemption from reporting and review requirements and concluding that “the claim raised by the Amish parents in *Yoder* can be distinguished from the claim raised by Parents here. [The challenged regulation] does not threaten Parents’ or their community’s entire mode of life.”).

158. 530 U.S. 57 (2000).

159. *Id.* at 60–61.



erroneously placed the burden on the parent to *disprove* that visitation would be in the children's best interests.<sup>160</sup> The Court emphasized that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>161</sup> But rather than explicitly subjecting the state statute to strict scrutiny—the standard to which state action that interferes with fundamental rights is typically subjected—the Court applied a murky standard that stopped short of its highest standard of review.<sup>162</sup> Moreover, the Court directed lower courts reviewing a fit parent's decision regarding visitation in these circumstances to give only an "unspecified 'special weight' to the parent's interest."<sup>163</sup>

#### B. *Challenges to States' Regulation of Homeschooling: State and Lower Federal Courts*

Since the 1980s, homeschooling parents have challenged a range of states' efforts to oversee and regulate in-home education, including outright bans on the practice.<sup>164</sup> The parents—particularly those holding fundamentalist views—argue that the state has no proper role in overseeing the education of their children. These challenges have typically failed, with courts generally subjecting regulations to the deferential rational basis standard of review.<sup>165</sup>

In some challenges, parents have claimed that state regulations violate their First Amendment rights to free exercise of religion.<sup>166</sup> Courts have subjected these state regulations to heightened review or strict scrutiny (although not consistently, and not always explicitly).<sup>167</sup> Under strict scrutiny, states must show that the regulation is narrowly tailored to achieve a compelling

160. *Id.* at 69.

161. *Id.* at 65.

162. See Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941, 946 (2019) (casting the *Troxel* standard as "extremely vague" and describing resulting confusion among lower courts regarding application of the resulting quasi-parent doctrine).

163. David D. Meyer, *Family Law Equality at a Crossroads*, 2013 MICH. ST. L. REV. 1231, 1245 (2013).

164. For discussion of various challenges to state regulation see JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 400–04 (2018), and Bartholet, *supra* note 15, at 27–32.

165. See Terri Dobbins Baxter, *Private Oppression: How Laws That Protect Privacy Can Lead to Oppression*, 58 U. KAN. L. REV. 415, 458–61 (2010); see also *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) (applying rational basis review and upholding state regulations of homeschooling).

166. See, e.g., *Duro v. Dist. Attorney*, 712 F.2d 96, 96–97 (4th Cir. 1983).

167. See *State v. Patzer*, 382 N.W.2d 631, 636, 639 (N.D. 1986) (upholding teaching certification requirement under strict scrutiny); *Duro*, 712 F.2d at 97–99 (applying strict scrutiny to parent's free exercise challenge and holding that the state's compelling interest in education justified its compulsory school attendance law). *But see Crites v. Smith*, 826 S.W.2d 459, 466–67 (Tenn. Ct. App. 1991) (appearing to apply rational basis review to parents' claim that degree requirement violated their free exercise and parental rights).

government interest—a difficult standard to satisfy.<sup>168</sup> But even under strict scrutiny, courts have typically found state regulations of homeschooling justified in light of states' compelling interest in children's education.<sup>169</sup>

Applying both federal and state constitutional standards, courts reject claims to absolute parental authority and, with few exceptions, regularly uphold state regulation of homeschooling. Courts have upheld outright state bans on homeschooling,<sup>170</sup> as well as a range of other regulations, including curriculum standards and annual reporting requirements,<sup>171</sup> minimum parent qualification requirements,<sup>172</sup> instructional time requirements,<sup>173</sup> required submission of student portfolios for review,<sup>174</sup> home visits,<sup>175</sup> and standardized testing.<sup>176</sup>

On the other hand, courts have only rarely overturned state regulations in these areas.<sup>177</sup> *Brunelle v. Lynn Public Schools*<sup>178</sup> is one of the few cases where a court invalidated a state regulation in favor of a homeschooling parent. In *Brunelle*, homeschooling parents in Massachusetts challenged the state's requirement of home visits by a state official as a condition to approval of parents' homeschooling plan.<sup>179</sup> The parents' home education plans satisfied

168. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that a state's burden under a strict scrutiny standard is "subjected to the most rigid scrutiny" and mandates a showing that the law is "necessary to the accomplishment of some permissible state objective") (internal quotations omitted).

169. See, e.g., *Blount v. Dep't of Educ. & Cultural Servs.*, 551 A.2d 1377, 1383, 1385–86 (Me. 1988) (upholding against First Amendment challenge a state requirement that parents intending to homeschool receive prior approval and meet certain instructor requirements); *Patzner*, 382 N.W.2d at 636, 639 (holding that teacher certification requirement survives strict scrutiny review).

170. See, e.g., *Duro*, 712 F.2d at 98–99.

171. See *State v. Rivera*, 497 N.W. 2d 878, 880–81 (Iowa 1993) (holding that upon "setting minimum educational standards[,] the state is also empowered to adopt reasonable requirements to assure that those standards are honored").

172. See, e.g., *Crites*, 826 S.W.2d at 466–67 (rejecting challenge to state requirement that parents hold baccalaureate degree or equivalent); *Blount*, 551 A.2d at 1383, 1385 (upholding instructor requirements).

173. See *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 237, 252 (3d Cir. 2008).

174. See *id.* at 238, 252; see also *In re Ivan*, 717 N.E.2d 1020, 1022–23 (Mass. App. Ct. 1999); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 113 (N.D.N.Y. 1988).

175. See *Blackwelder*, 689 F. Supp. at 113, 135, 137; *In re Kilroy*, 121 Misc. 2d 98, 102 (N.Y. Fam. Ct. 1983).

176. See *Murphy v. Arkansas*, 852 F.2d 1039, 1042–43 (8th Cir. 1988); *In re Ivan*, 717 N.E.2d at 1022–23.

177. See, e.g., *People v. DeJonge*, 501 N.W.2d 127, 140–44 (Mich. 1993) (invalidating a teacher certification requirement as applied to homeschooling parents who raised a free exercise challenge and were otherwise providing an adequate education); *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, 590 (Cal. Ct. App. 2008) (finding homeschools to be included in the statutory definition of 'private full-time day schools' and thus entitled to exemption from compulsory attendance law); *Perchemlides v. Frizzle*, No. 16641, 27–28 (Mass. Super. Ct. 1978), <http://www.mhla.org/information/massdocuments/perchemlidesdecision.pdf> [<https://perma.cc/6DEN-ASAS>] (holding school superintendent could not require that homeschoolers have a social experience equivalent to that of students in public schools).

178. 702 N.E.2d 1182 (Mass. 1998).

179. *Id.* at 1183–84.

other state-imposed criteria—submission of curriculum, demonstrated competence of parents as instructors, minimum hours of instructions, and periodic evaluation of students.<sup>180</sup>

The court explained that Massachusetts courts had interpreted state law to provide that “approval of a home school proposal must not be conditioned on requirements that are not *essential* to the State interest in ensuring that ‘all the children shall be educated,’” and that state officials may enforce only “*reasonable* educational requirements similar to those required for public and private schools.”<sup>181</sup> The court surveyed the laws of other states and found that only one state routinely subjected homeschoolers to home visits.<sup>182</sup> The court therefore held that, consistent with the approaches of an overwhelming majority of states, home visits were not essential to Massachusetts’ interest in ensuring that children were receiving an education and that parents were implementing the home instruction plan.<sup>183</sup> The court also noted its concern that requiring such “visits may call into play issues of family privacy in seeking to keep the home free of unwarranted intrusion.”<sup>184</sup>

### C. *Deregulation of Homeschooling*

Homeschooling advocates have thus found little success in the courts when challenging state regulations. Conversely, they have been extremely successful in state legislatures.<sup>185</sup> Their success is largely due to the efforts of homeschool advocacy organizations, led by HSLDA since its founding in 1983. In the past, HSLDA has stated that its mission was “to preserve and advance the fundamental, God-given, constitutional right of parents and others legally responsible for their children to direct their education.”<sup>186</sup> HSLDA tracks proposed state legislation and mobilizes its members to overwhelm legislative offices to express their opposition.

The specific experiences of one state legislator demonstrate HSLDA’s effectiveness: New Jersey Senate Majority Leader Loretta Weinberg introduced legislation in response to a 2003 report that local police discovered four severely malnourished children when a neighbor reported the eldest (at age nineteen, he stood four feet tall and weighed forty-five pounds) rummaging

180. *Id.* at 1183.

181. *Id.* at 1184 (quoting *In re Charles*, 504 N.E.2d 592, 600 (Mass. 1987)).

182. *Id.* at 1185. The court noted that the Nebraska law that was interpreted to require home visits had originally been designed to regulate traditional private schools and required evaluation of the safety of building and grounds. *Id.* at 1185.

183. *Id.* at 1186–87.

184. *Id.* at 1186.

185. See Bartholet, *supra* note 15, at 37–38 (explaining that homeschooling advocates have “managed to legitim[ize] homeschooling in all states and to eliminate almost all meaningful restrictions,” as well as successfully blocking proposed regulations).

186. See HOME SCH. LEGAL DEF. ASS’N, *supra* note 22.

through garbage.<sup>187</sup> The children were being homeschooled, so they had escaped regular observation by anyone but family members.<sup>188</sup> Senator Weinberg's proposed 2004 bill would have required parents to notify the state of their intent to homeschool, submit proof of annual physicals, and complete the same annual testing as public school students.<sup>189</sup> HSLDA sent multiple emails urging members to take action to oppose the bill, claiming that it would "devastate homeschooling in New Jersey."<sup>190</sup> Weinberg reported that soon after the bill's introduction, homeschooling parents began following her around the capitol. "Hundreds and hundreds" of phone calls from homeschool advocates overwhelmed her office phone lines, requiring her staff to use their private cell phones to conduct business. Feeling "besieged," Weinberg withdrew the bill.<sup>191</sup>

After the 2011 death of a homeschooled New Jersey child,<sup>192</sup> other legislators joined Weinberg in reintroducing bills in 2011,<sup>193</sup> 2012,<sup>194</sup> and 2014,<sup>195</sup> making changes intended to minimize the opposition from homeschool advocates.<sup>196</sup> Despite the changes, which included replacing a testing requirement with simple mandatory review of students' portfolios, the bills failed in the face of ongoing HSLDA resistance.<sup>197</sup>

As of 2019, New Jersey law only required parents to enroll their children in a regular school or otherwise ensure that they "receive equivalent instruction elsewhere than at school."<sup>198</sup> Parents have no obligation to inform the local or state board of education of their intent to homeschool, nor are they required to meet any requirements with respect to curriculum or testing. Instead, the State Department of Education advises that parents "are responsible for the educational outcomes of the child . . . [and t]he local board of education is not required or authorized to monitor the outcomes of the child."<sup>199</sup>

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187. Jessica Huseman, *Small Group Goes to Great Lengths To Block Homeschooling Regulation*, PROPUBLICA (Aug. 27, 2015, 6:00 AM), <https://www.propublica.org/article/small-group-goes-great-lengths-to-block-homeschooling-regulation> [<https://perma.cc/22UJ-C97Y>].

188. *Id.*

189. *Id.*

190. HSLDA sent electronic messages to its members urging action on May 13, 14, 18, 21, 26 and 28. *Id.*

191. *Id.*

192. See generally Susan K. Livio & James Queally, *Reports of Neglect Made Against Mother of Irvington Girl Who Died, but Charges Not Substantiated*, NJ.COM (May 25, 2011), [https://www.nj.com/news/2011/05/five\\_reports\\_of\\_abuse\\_and\\_negl.html](https://www.nj.com/news/2011/05/five_reports_of_abuse_and_negl.html) [<https://perma.cc/8L7U-C76C>].

193. S. 3105, 214th Leg. (N.J. 2011).

194. Assemb. 2881, 215th Leg. (N.J. 2012).

195. Assemb. 2700, 216th Leg. (N.J. 2014).

196. The 2014 bill, for example, only required notification of intent to homeschool, medical examination, and submission of student work portfolio. *Id.*

197. See Huseman, *supra* note 187.

198. N.J. STAT. ANN. § 18A:38-25 (Westlaw through 2020 legislation).

199. *Frequently Asked Questions: Homeschooling*, N.J. DEP'T EDUC., [https://www.state.nj.us/education/genfo/faq/faq\\_homeschool.htm](https://www.state.nj.us/education/genfo/faq/faq_homeschool.htm) [<https://perma.cc/7A7J-U3N3>].

The experience of New Jersey legislators is typical. HSLDA and other organizations' grassroots mobilization of energetic and persistent homeschoolers regularly pressures legislators to withdraw proposed legislation and deters others from supporting such regulations. Dwyer and Peters observe that

at the state level, the best explanation for HSLDA legislative success might not be any superior knowledge of the law but rather the organization's ability to foment outrage among homeschoolers in any state contemplating a regulation, causing any legislator who supported the regulation to become the victim of a relentless barrage of hostile communications—occasionally including death threats—by mail, email, and office visits.<sup>200</sup>

Thus, despite judicial decisions confirming that robust regulation of homeschooling will withstand legal challenges in the courts, state legislatures have instead steadily withdrawn their oversight of the educations of homeschooled children. As a result, parents have near-absolute authority over their children's educations and experiences.

For example, nearly half of all states allow parents to homeschool children without having any meaningful contact with education officials.<sup>201</sup> A dozen of these states do not require parents to notify the state of their intent to homeschool. Another ten require a one-time notification, after which they may avoid any ongoing outside contact.<sup>202</sup> At least fourteen states impose no curricular requirements.<sup>203</sup> Nine states do impose some assessment requirement (typically maintaining some record of progress or submitting to standardized testing), but these are frequently not enforced or state officials grant parents exemptions from compliance.<sup>204</sup> Only ten states require parents to have some academic qualifications—typically to have completed high school or obtained a GED.<sup>205</sup> However, some provide religious exemptions or permit parents who lack a high school degree or its equivalent to demonstrate in some other way their capacity to teach.<sup>206</sup>

Four states exempt families whose decision to homeschool is religiously motivated from complying with otherwise applicable regulations.<sup>207</sup> Virginia law, for example, requires “compulsory school attendance,” a requirement that

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200. DWYER & PETERS, *supra* note 20, at 64.

201. *See* Bartholet, *supra* note 15, at 38 (citing Jeffrey Shulman, 50-State Survey: Home School Regulations: Notification, Certification, Curriculum and Assessment Requirements (unpublished manuscript) (on file with author)).

202. *Id.*

203. *Id.* at 39.

204. *Id.*; *see also* DWYER & PETERS, *supra* note 20, at 67–69.

205. DWYER & PETERS, *supra* note 20, at 68.

206. *Id.*; Bartholet, *supra* note 15, at 33.

207. *See infra* notes 208, 213 and accompanying text.

can be satisfied by homeschool instruction if the child's parents have at least a high school degree, enroll the child in a distance learning program, or submit evidence that they can provide an adequate education.<sup>208</sup> Parents must annually notify their local school board of their intent to homeschool and provide a description of the curriculum.<sup>209</sup> And parents must demonstrate their children's educational progress by submitting the scores from a standardized test or some other assessment demonstrating "an adequate level of educational growth and progress."<sup>210</sup> However, if parents receive a religious exemption, the Commonwealth exempts them from even these minimal requirements.<sup>211</sup> Parents seeking an exemption may submit to their local superintendent a statement that, together with their child, they are "by reason of bona fide religious training or belief . . . conscientiously opposed to attendance at school."<sup>212</sup> After providing this one-time notice, the Commonwealth imposes no further educational requirement at all.<sup>213</sup> Three additional states (Iowa, Kansas, and South Dakota) also allow religious exemptions but require ongoing "learning activities" or grant officials authority to require proof of educational progress.<sup>214</sup>

Thus, across virtually all of the United States, state laws permit parents to keep their children away from school altogether, allowing these parents to provide whatever instruction they choose without accountability measures in place to ensure that their children are making educational progress.

### III. THE STATE'S INTERESTS IN EDUCATION

Part I explained the evolution of the contemporary practice of homeschooling in the United States and described the motives that have led many parents to remove their children from regular schools. Part II described the law of homeschooling as it currently stands, showing that there is no

208. VA. CODE ANN. § 22.1-254.1(A) (2019).

209. *Id.* § 22.1-254.1(B).

210. *Id.* § 22.1-254.1(C).

211. *Id.* § 22.1-254.

212. *Id.* § 22.1-254(B)(1). Templates for such statements are readily available online. See, e.g., *Religious Exemption Sample Letter*, AN OLD-FASHIONED EDUC., <https://www.oldfashionededucation.com/religiousexemptionletter.htm> [<https://perma.cc/2H99-EKF8>].

213. § 22.1-254; see also CHRISTINE TSCHIDERER ET AL., 7,000 CHILDREN AND COUNTING: AN ANALYSIS OF RELIGIOUS EXEMPTIONS FROM COMPULSORY SCHOOL ATTENDANCE IN VIRGINIA 13–14 (2012).

214. IOWA CODE § 299.24 (2020) (exempting members of religious groups from educational standards but permitting director and school board to condition renewal of exemption on proof of achievement in "basic skills" including arithmetic, reading, writing, grammar, spelling, and history and government); KAN. STAT. ANN. § 72-3120(g) (2020) (providing for religious exemption from compulsory attendance requirements but requiring minimum hours of "learning activities" and recordkeeping); S.D. CODIFIED LAWS § 13-27-1.1 (2020) (allowing religious exemption after eighth grade, so long as "child participates in learning activities appropriate to the adult occupation that the child is likely to assume in later years").

fundamental right to homeschool under the U.S. Constitution and that states thus have broad authority to regulate—and arguably, prohibit—the practice.<sup>215</sup> Part II also showed, however, that when pressured by aggressive lobbying efforts, state legislatures have abandoned all meaningful effort to supervise the educations of children kept away from schools by their parents.

Some lawmakers may, like many homeschoolers, genuinely believe that parents should have power, unfettered by state oversight, to control all aspects of their children's education. But there is evidence that many legislators instead seem to have determined that devoting political, financial, and human capital to the task of overseeing the education of children whose parents vehemently resist any oversight is an unwise use of (already stretched) public resources.<sup>216</sup> While the calculus that has resulted in the current state of legislative affairs may be understandable as a matter of politics for any given legislator (recall the experience of New Jersey legislators), it is hardly defensible as a matter of legislative principle. Stated differently, the current regulatory regime is the result of political expedience and obeying one's constituents rather than engaging in considered, principled lawmaking aimed at advancing the public's—which of course includes children's—welfare.

This part argues that it is past time to consider the principles that ought to drive regulatory decisionmaking affecting homeschooling. It moves from the descriptive to confront the normative question: what *should* be the state's role with respect to children whose parents wish to educate them entirely within the home?

To address this question, we must first consider prior, broader normative questions: What are the state's goals with respect to the education of its citizenry? And what role should the state play in bringing those goals about?

These are central questions in the political theory of education. The following section approaches this question by identifying three of the most significant of the state's commitments: safeguarding its citizenry's welfare and liberty interests, ensuring that its citizenry will have the capacity to engage in the self-governance that is the core of democratic government, and providing a future workforce to occupy and power the private and public institutions that are necessary in a flourishing civil society. The section that follows it addresses implications for reforming the law of homeschooling so that it advances the state's core commitments.

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215. See *supra* Section II.A; see also DRIVER, *supra* note 164, at 400; DWYER & PETERS, *supra* note 20, at 59.

216. See *supra* notes 185–214 and accompanying text.

A. *The Liberal State*

Ours is a liberal state, used here not in the partisan-political sense of the term “liberal,” but in the theoretical sense. Political theorist William Galston argues that “[l]iberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value.”<sup>217</sup>

For purposes of this inquiry, I adopt the “standard liberal view” that liberalism prioritizes both *autonomy* (or self-determination) and the legitimate *diversity* of commitments.<sup>218</sup> Autonomy might be summarized as the ability to chart the course of one’s own life and to choose and pursue one’s own conception of the good.<sup>219</sup> Political theorist Rob Reich posits that autonomy “has a civic justification in that the respect for and the exercise of autonomy are connected to an understanding of freedom in a liberal society and are necessary to establish the legitimacy of principles of justice and their stability over generations.”<sup>220</sup>

Diversity can result from individuals exercising autonomy and making different choices about their values, beliefs, et cetera. Additionally, while the United States is a single *political* community (or state), it (like most countries of the world) comprises a multitude of diverse *cultural* communities.<sup>221</sup> People of various nations and ethnicities, including voluntary immigrants and those incorporated by conquest, agreement, or slavery, such as American Indians and African Americans, constitute its citizenry.<sup>222</sup>

Diversity itself is generally to the good, as multicultural exposure “mak[es] vivid to the student a diversity of cultural practices and values, which themselves may come to represent real and meaningful options that the student could choose and seek to adopt or pursue.”<sup>223</sup> In this way, diversity contributes to autonomy; only through exposure to alternative beliefs, conceptions of the good life, et cetera, can individuals make meaningful choices of their own.

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217. WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 3 (2004).

218. *Id.* at 21.

219. ROB REICH, BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION 93 (2002).

220. *Id.* at 152.

221. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 11 (1996).

222. *Id.*

223. REICH, *supra* note 219, at 132. The desired diversity in U.S. education is both multicultural and multiracial—the Supreme Court considers integrating public schools a compelling state interest to remedy past segregation, pursue diversity of ideas in higher education, and equalize educational opportunities between white and non-white children. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–23 (2007) (plurality opinion); *id.* at 791, 797–98 (Kennedy, J., concurring).



Liberalism's commitments to autonomy and diversity ideally coexist, but they can also come into tension. For example, not all individuals and groups value individual autonomy; some may instead prize faith and obedience. If the state presses autonomy, it may undermine these central aspects of that group's identity and some diversity will be lost.

The following sections identify the implications of the liberal state's foundational commitments for the provision of education to its citizenry.

### 1. Respecting Parents' Liberty Interests

Surely most parents view their childrearing choices as important expressions of their own deeply held beliefs. As discussed above, current law validates parents' desires to shape their children's experiences by declaring a parental right to direct the upbringing and education of children.<sup>224</sup>

Some scholars have criticized the very concept of parental "rights," but they disagree as to appropriate alternative formulations of the relationship between parents and children. Dwyer and Peters have convincingly argued that to conceive of parental authority over children as a "right" or entitlement is profoundly misguided.<sup>225</sup> While parents may ardently desire to direct their children's upbringing, they ought not be given an "entitlement" to do so. Such an entitlement vests in parents control not only over their own but also over other persons' (their children's) lives. Thus, parental "rights" transform the (acceptable) liberal value of self-determination into the (unacceptable) practice of "other-determination."<sup>226</sup>

Dwyer and Peters suggest that "[i]f parental authority over education is important to children's welfare, then we should say that *children* have a right to their parents' holding such authority."<sup>227</sup> Political philosopher Eamonn Callan articulates the tension differently. He argues that parents' entitlement to control their children's lives would "make individual children no more than instruments of their parents' good [which] would be open to damning moral objections."<sup>228</sup> He argues, however, that the converse is equally objectionable. Callan reasons:

[P]arallel objections must be decisive against any theory that interprets the parent's role in ways that make individual parents no more than instruments of their children's good. We should want a conception of

224. See *supra* Section II.A.

225. See DWYER & PETERS, *supra* note 20, at 134–40 (arguing against conception of parental authority as a "right" to control because children are distinct persons and rights granting individuals determinative power over another's life are anathema to our society).

226. *Id.* at 136.

227. *Id.* at 137 (emphasis in original).

228. EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 145 (1997).

parents' rights in education that will not license the oppression of children. But we should also want a conception that will do justice to the hopes that parents have and the sacrifices they make in rearing their children.<sup>229</sup>

In other words, even though a fiduciary model of parenting allows for parental responsibilities to promote their children's interests rather than entitlement to direct their lives, this model too is incomplete. Such a model fails to account for the more complex, reciprocal nature of the parent-child relationship.

For our purposes, it is sufficient to reject parents' entitlement to determine their children's lives but also to respect parental interests in raising their children consistent with their deepest values and commitments. Children have an interest in being cared for and nurtured during their dependency. The state, as guardian of its citizenry, thus has an interest in ensuring that care is provided. Parents are most likely to be deeply invested in the well-being of their offspring. It is thus in the interest of all—parents, children, and the state—that parents be given presumptive authority to determine their children's education.

Placing presumptive authority over their children's educations with parents countenances what Galston terms "expressive liberty"—the freedom of "individuals or groups to live their lives in ways that express their deepest beliefs about what gives meaning and value to life."<sup>230</sup> He conceives of expressive liberty as constituting "the portion of negative liberty that bears directly on questions of identity."<sup>231</sup> By allowing individuals' lived experiences to reflect their inner convictions, expressive liberty permits the aligning of "conviction and deed" and "protects the ability of individuals and groups to live in ways that others would regard as unfree."<sup>232</sup>

Galston would not oppose states imposing basic requirements on parents for their children's educational attainments. But he urges states to otherwise avoid imposing educational uniformity through broad mandates.<sup>233</sup> In the next section, I argue for somewhat broader limits to parental "expressive liberty" as it relates to children's educations.

In light of the troubling aspect of parental authority as "other-determining," limits on its exercise are appropriate to secure for children themselves the ability to be self-determining. Thus, the better principled and more robust justification for respecting parents' childrearing and education choices as an aspect of their liberty is that presumptively respecting those choices serves the instrumental purpose of safeguarding children's well-being.

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229. *Id.*

230. GALSTON, *supra* note 217, at 101.

231. *Id.* at 28 n.1.

232. *Id.* at 29.

233. *Id.* at 109.

## 2. Children's Welfare, Agency, and Eventual Right to Self-Determination

Children are distinct persons and deserve consideration as such—even during the prolonged period where they remain dependent on others for their care. As discussed above, the state rightly delegates to parents the presumptive obligation to safeguard children's well-being. Doing so places children with those most likely to be deeply invested in their welfare.

Children do not transition abruptly from total dependency to complete autonomy. Legal scholars Anne C. Dailey and Laura A. Rosenbury have argued that the existing legal regime elides children's interests in the here and now.<sup>234</sup> They explain that even during dependency, children have interests in maintaining relationships, receiving education, and exercising the agency of which they are capable.<sup>235</sup> They thus suggest that emphasizing children's "agency" rather than "autonomy" can more accurately reflect "that children often have the capacity to make decisions for themselves at the same time that they are dependent upon adults."<sup>236</sup>

Finally, children are also future adults and citizens. As Reich has argued, the state has an obligation to ensure that they reach adulthood having at least attained what he calls "minimal autonomy," which he defines as "the minimal degree of autonomy necessary to provide them with options other than that into which they have been born; they must have an effective right of exit."<sup>237</sup>

Political theorist Meira Levinson has developed a less minimal ideal of autonomy as a "substantive notion of higher-order preference formation within a context of cultural coherence, plural constitutive personal values and beliefs, openness to others' valuations of oneself, and a sufficiently developed moral, spiritual or aesthetic, intellectual, and emotional personality."<sup>238</sup> In order for children to reliably develop the capacity to exercise autonomy, Levinson argues that formal, state-regulated schooling is indispensable.<sup>239</sup>

Galston agrees with Reich in that he would empower the state to set basic standards of educational attainment. Galston is troubled, however, by the notion that the state ought to promote autonomy for all citizens.<sup>240</sup> In doing so, he argues that the state itself would be taking (and enforcing) a position on what

234. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1453–54 (2018).

235. *Id.*

236. *Id.* at 1453.

237. REICH, *supra* note 219, at 163.

238. MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* 35 (1999).

239. *Id.* at 36.

240. GALSTON, *supra* note 217, at 106–07. Galston posits as an example the Old Order Amish, whose educational commitments discourage active participation in civic and political life as well as critical reasoning. He acknowledges that "[t]hey may not be the best of citizens, but may we not say that they are good enough? At least they fulfill the political version of the Hippocratic oath—to do no harm." *Id.* at 107.

constitutes a good life, rather than simply creating conditions that allow its citizenry to reach their own determinations about what constitutes the good life.<sup>241</sup> Galston argues that the state would thus be constricting the liberty of its citizenry.<sup>242</sup> Moreover, by rejecting systems of belief that embrace faith and obedience, the state—rather than respecting diversity—suppresses it in favor of universalized autonomy.<sup>243</sup> In other words, the value of autonomy in a plural society itself must be contested.

Other political theorists have argued for more robust conceptions of autonomy.<sup>244</sup> Stephen Macedo is among them, and he emphasizes the importance of exposing children to belief systems other than those of their parents:

What is crucial from a liberal standpoint is that no one educational authority should totally dominate: that children acquire a measure of distance on all claims to truth in order to be able to think critically about our inclusive political ideals and detect conflicts between those inclusive ideals and their more particular moral and religious convictions.<sup>245</sup>

Macedo suggests that parents themselves need not embrace liberal ideals, but that exposure to multiple viewpoints is essential. “The point is not,” he writes, “to promote a comprehensive philosophical doctrine of autonomy or individuality, but to make sure that no authority imposes an intellectual tyranny on children, which would thwart their right to freedom.”<sup>246</sup>

Along similar lines is the somewhat broader concept of children’s “right to an open future.”<sup>247</sup> Coined by legal and political philosopher Joel Feinberg in 1980, the right to an open future encompasses a set of moral rights that protects children from having important life choices determined by others before the child has the ability to make the choices for themselves. The right to an open future therefore restricts what parents may do to their children, but also imposes obligations on what parents ought to provide them.

241. *Id.* at 107.

242. *Id.*

243. *Id.*

244. See, e.g., Christian F. Rostbøll, *Kantian Autonomy and Political Liberalism*, 37 *SOC. THEORY & PRAC.* 341, 341 (2011) (questioning the concept that “one can draw a wedge between respect for persons and autonomy”).

245. STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 238 (2003).

246. *Id.*

247. Joel Feinberg, *The Child’s Right to an Open Future*, in *WHOSE CHILD?: CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 124 (William Aiken & Hugh LaFollette eds., 1980); see also MICHAEL A. REBELL, *FLUNKING DEMOCRACY* 86–90 (2018) (surveying a range of political scientists who argue the importance of providing students sufficient exposure to information and ideas to enable them to make their own decisions about their future lives).

At the very least, then, the liberal state has an obligation during children's dependency to ensure their welfare, taking account of and safeguarding their distinct personhood and agency.<sup>248</sup> In addition, Macedo and Reich persuasively argue that the state also has an obligation to ensure they are educated such that they are able to, as adults, exercise meaningful choices about the course of their lives ("minimal autonomy," to use Reich's formulation).

Conversely, while Galston's warning that the state risks overstepping by promoting the value of universal autonomy is well taken, the alternative is for the state to enable only some parents to determine the life course of their children—an outcome fundamentally at odds with the core commitments of a liberal state.

B. *The Democratic State: Cultivating a Citizenry Capable of Self-Government*

As noted above, the diverse individuals and groups in the United States together form a single political democratic community. In order to function, democracies require some level of public participation in governance. At its most basic level, a democracy requires elected officials qualified to govern and an informed public who will elect them.

In 1842, a Pennsylvania superintendent declared the centrality of education to the preservation of democratic institutions: "The foundations of our political institutions rest upon man's capacity for self-government; not the capacity of one, of a hundred, of a thousand, but of *all* . . . . Enlightened public opinion will be a wall of fire around our free institutions, and preserve them inviolate forever."<sup>249</sup>

To be sure, the above statement articulates an idealistic vision of universal capacity and participation to which democratic states may realistically only aspire. Even citizens capable of political participation, for example, routinely decline to participate, or face barriers or outright prohibitions to participation.

While not all of a democracy's members need to choose to participate, those who do not must accept the results reached by those who have participated. By opting out of participating, they have chosen to accept the governance decisions of others. The "better" democracies are those with high

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248. To reiterate, individualism and liberalism are not central values in all states or cultures. More collectivist cultures prioritize the group over the individual, a commitment captured by the well-known Russian proverb that "the tallest blade of grass will be the first to be cut." Manfred F.R. Kets de Vries, *The Anarchist Within: Clinical Reflections on Russian Character and Leadership Style*, 54 HUM. REL. 585, 599–600 (2001) (discussing the traditional "Russian character" as including an "orientation that subordinates individual interests to those of the group" and observing "the degree to which individualism and personal achievement as known in other societies are frowned upon in Russia . . . [and instead] associated with selfishness").

249. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* 97 (1983).

levels of participation, which results in a truer reflection of the collective will of the governed.

For political philosopher Amy Gutmann, the democratic ideal is a deliberative democracy in which there is “reciprocity among free and equal individuals [and c]itizens and their accountable representatives offer one another morally defensible reasons for mutually binding laws in an ongoing process of mutual justification.”<sup>250</sup> Education must prepare citizens both to engage in deliberative decisionmaking and “to evaluate the results of the deliberations of their representatives.”<sup>251</sup> The deliberation required of competent citizens is not a single skill, but instead comprises a set of skills and virtues. Deliberation in democracy “calls upon skills of literacy, numeracy, and critical thinking, as well as contextual knowledge, understanding, and appreciation of other people’s perspectives.”<sup>252</sup> Gutmann argues that deliberation also encompasses certain virtues, including “veracity, nonviolence, practical judgment, civic integrity and magnanimity.”<sup>253</sup>

A multicultural liberal education “plays an instrumental role in cultivation of minimalist autonomy and certain political virtues, including mutual respect and the capacity for public reason and democratic deliberation.”<sup>254</sup>

### C. *The Economic State: Raising a Modern Workforce*

For Horace Mann and the other founders of publicly funded common schools, the overarching goal of schools was to create citizens, not workers.<sup>255</sup> At the time, of course, the economy of vast swaths of the nation continued to be based in agriculture. The industrial revolution was well under way, creating a demand for large numbers of laborers. Farmers, factory laborers, and other workers possessing relatively rudimentary levels of education could thus perform much of the available work in the United States.

Today, the economic landscape has changed dramatically. Globalization and technological advances have transformed the U.S. economy. Agricultural and industrial production are increasingly mechanized. Service and technology sectors require workers with higher degrees of education than in the past. A secondary education today is typically a minimum requirement for employment (at the lowest levels of earnings), but postsecondary education or vocational skills have become increasingly necessary to obtain well-paying work.

The role of schools in educating for the workplace has thus supplemented—if not supplanted—their role in educating for citizenship. As a

250. AMY GUTMANN, *DEMOCRATIC EDUCATION* xii (rev. ed. 1999).

251. *Id.* at xiii.

252. *Id.*

253. *Id.*

254. REICH, *supra* note 219, at 152.

255. *Id.* at 5.

result, the curricular requirements for a basic education—one that prepares individuals to participate in the economic sphere—have increased. Basic literacy, numeracy, and civics are no longer sufficient.<sup>256</sup>

Today's technological environment requires some level of computer literacy, and the increasingly service-focused nature of work requires the ability to communicate and work with individuals from a range of cultural and national backgrounds. To be clear, not everyone will participate in the workplace; many, including parents of young children, will choose not to do so. The state's obligation, however, is to ensure that those of its citizens who opt out of workplace participation are exercising a meaningful choice, rather than taking the only path open to them.

#### IV. BRIDGING HOME AND SCHOOL

The previous part argues that the state has, at a minimum, the following commitments with respect to children:

- (1) Ensure that children receive care and nurturing during their dependency that respects their rights as distinct persons, even prior to reaching maturity.
- (2) Recognize that parents have an abiding interest in childrearing and are likely to be the persons most invested in children's well-being. For that reason, the state should presumptively place children in the care, and under the authority, of their parents.
- (3) Ensure that children receive an upbringing and education that enables them to be aware of the range of life choices and be reasonably able to direct the course of lives.
- (4) Ensure that children also receive an education pursuant to a curriculum that prepares them to be competent democratic citizens and workers.

How would these requirements shape state regulation of homeschooling?

As discussed above, parents choose to homeschool for various reasons. Some parents seek to tailor curricula for their academically gifted, or perhaps developmentally challenged, children. Some parents seek the flexibility that homeschooling provides, enabling their children talented in athletics, music, or other activities to spend significant time specializing their skills.<sup>257</sup> Some parents may simply believe they can provide a better education for their children than they might receive in regular schools.

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256. *See, e.g., Leandro v. State*, 346 N.C. 336, 354, 488 S.E.2d 249, 254 (1997) (pronouncing "sound basic education" as a minimum qualitative standard for constitutionally required primary and secondary education in North Carolina).

257. *See supra* Section I.C.

Evidence suggests that most parents, particularly those with fundamentalist religious views, keep their children from schools because they wish to imbue in their children their own religious beliefs and cultural values. These parents tend to fear that exposure to certain information and values antithetical to their beliefs will harm their children.<sup>258</sup> They believe that their children might be confused by the exposure to views and values that contradict those in which they have been raised—or enticed to accept different values.<sup>259</sup> For these parents, the risks posed by exposure are high—children who stray may risk suffering eternal damnation.<sup>260</sup>

Amy Gutmann has expressed concern, however, that “[t]o save their children from future pain, especially the pain of eternal damnation, parents have historically shielded their children from diverse associations, convinced them that all other ways of life are sinful, and implicitly fostered (if not explicitly taught them) disrespect for people who are different.”<sup>261</sup>

The following sections address how homeschooling—particularly religiously motivated homeschooling—advances, or fails to advance, the state’s interests in developing self-determining citizens capable of meaningful participation in both democratic government and economic life.

#### A. *Homeschooling and Autonomy*

Many parents deny their children the educational experiences required to exercise the minimal autonomy due individuals in the liberal democratic state. Without meaningful exposure to a variety of ideas, values, and life alternatives, children are deprived of meaningful life choices—they will lack knowledge of alternatives available to them, as well as the ability to avail themselves of various alternatives.

Reich argues against the inadequacy of monolithic educational approaches, reasoning that cultivating minimal “autonomy requires a multicultural education that exposes children to and engages them with cultural values and beliefs other than those of their parents.”<sup>262</sup> This type of education can occur, Reich notes, either through curricular content (readers, other educational

258. *See id.* A specific example comes from *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), where the Sixth Circuit reject[ed] Christian parents’ request to exempt their children—students at public school—from having to read textbooks that exposed them to various philosophies and religious backgrounds. *Id.* at 1065. The Sixth Circuit found that the books were neutral on the subject of religion and held that a “requirement that students read the assigned materials . . . in the absence of a showing that this participation entailed affirmation or denial of a religious belief . . . does not place an unconstitutional burden on the students’ free exercise of religion.” *Id.* Subsequently, the parents withdrew their children from the school altogether. *Id.*

259. *See Ross, supra* note 20, at 996.

260. *Id.* at 998.

261. GUTMANN, *supra* note 250, at 31.

262. REICH, *supra* note 219, at 161.



methods in which children learn about history, cultures, religions, et cetera) or by being educated with children who themselves identify with various multicultural groups.<sup>263</sup> The latter, immersive approach seems more likely to be effective. It is also surely more difficult to engineer given the highly segregated nature of communities today.

It is possible for states to mandate that homeschooling parents provide curricular content aimed at exposing children to a variety of values and cultures. It is not likely, however, that such a mandate would succeed. Indeed, such a regulation would likely run afoul of constitutional restrictions on compelled speech.

B. *Homeschooling and Democratic Citizenship*

The state should prepare its citizens for democratic participation, which includes the capacity to participate in public discourse (which involves some level of engagement with fellow citizens, some of whom have different cultural, racial, and other identities) and deliberation.<sup>264</sup>

The parents of many homeschooled children, however, seek to keep their children out of schools for the purpose of avoiding exposure to different cultures and ideas. By depriving their children of experiences with people of different cultures, races, and ethnicities, they increase the likelihood that their adult children will be unable to appreciate the shared humanity of their fellow citizens, unlikely to embrace the mutual respect needed for peaceful coexistence, and incapable of engaging in productive political (or other) dialogue.

C. *Homeschooling for the Modern Workforce*

The state should ensure its citizens will have the capacity to choose to participate in the modern workforce. As noted above, some families believe in providing meaningful academic experience only for their male children, depriving girls of education and potentially rendering them unable to choose to engage in work they might find meaningful.<sup>265</sup> Many homeschooling families do not teach children accepted science, or scientific methods, instead teaching the Bible as literal “scientific” truth.<sup>266</sup>

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263. *Id.* at 131.

264. GUTMANN, *supra* note 250, at xiii.

265. *See supra* notes 104–06 and accompanying text.

266. Then-President of Stanford University Donald Kennedy reviewed textbooks sold by Christian publishers and used by homeschooling families in a lawsuit challenging the state university system’s rejection of courses using these texts as sufficient preparation for entrance. *Ass’n of Christian Sch. Int’l v. Stearns*, 679 F. Supp. 2d 1083, 1114 (C.D. Cal. 2008), *aff’d*, 362 F. App’x 640 (9th Cir. 2010). Kennedy concluded that the books taught students “to reject scientific evidence and methodology whenever they might be inconsistent with the Bible” and failed to “encourage critical thinking and the skills required for careful scientific analysis.” *Id.*

Some parents lack the academic capacity to provide their children with the equivalent of a secondary education. More than thirty percent of homeschooling parents have at most a high school degree or its equivalent; fifteen percent of those have not completed high school.<sup>267</sup>

In theory, the availability of online programs and other commercially available materials for homeschoolers can help committed parents ensure their children receive meaningful academic instruction, even if the parents themselves are unable to provide it. As discussed above, however, the absence of data leaves states ignorant of the quality of academic instruction that the overwhelming number of homeschoolers receive.

Evidence (or lack of evidence) respecting academic attainment, particularly at the secondary level, is cause for concern. Certainly, early childhood is an important period of experience-dependent neurological development. As I discuss below, however, the sorts of experiences that enrich young children's intellectual development are well within the abilities of typical parents.

Early adolescence, however, “also provides educational and social experiences that are critical for developmental outcomes.”<sup>268</sup> And during the early teen years, neurological changes result in the strengthening of neuronal connections activated by the activities in which young teens engage—hence the importance of intellectual experiences and engagement.<sup>269</sup> This developmental period largely ends by late adolescence or early adulthood. It is possible, then, that delaying or failing to provide experiences may result in adolescents' failing to develop their full cognitive potential.<sup>270</sup>

Moreover, researchers have discovered that supporting adolescents' continued cognitive development requires encouraging their disposition to engage in, and thus develop competencies in, desired activities. In other words, “the valuing of intellectual engagement is a critical dimension to be supported by people who work with young adolescents.”<sup>271</sup> It likely goes without saying, however, that parents who do not value intellectual engagement or critical thinking are unlikely to support their adolescent children's disposition to develop these capacities.

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267. See *Homeschool Demographics*, COAL. FOR RESPONSIBLE HOME EDUC., <https://www.responsiblehomeschooling.org/homeschooling-101/homeschool-demographics/> [https://perma.cc/Q39E-M8W9].

268. Leon Feinstein & John Bynner, *The Importance of Cognitive Development in Middle Childhood for Adulthood Socioeconomic Status, Mental Health, and Problem Behavior*, 75 CHILD DEV. 1329, 1329 (2004).

269. See Beatriz Luna et al., *Maturation of Cognitive Processes from Late Childhood to Adulthood*, 75 CHILD DEV. 1357, 1357–58 (2004).

270. See Hamilton, *Immature Citizens*, *supra* note 2, at 1130.

271. Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 PERSP. ON PSYCHOL. SCI. 59, 65 (2006).

*D. Existing Proposals*

Some scholars have suggested that homeschooling be altogether foreclosed. Meira Levinson, for example, argues that the ideal of personal autonomy “not merely permits but *requires* the intrusion of the state into the child’s life, specifically in the form of compulsory liberal schooling.”<sup>272</sup> For education to reliably facilitate children’s eventual development of autonomy, it must take place in an environment other than the home.<sup>273</sup> Levinson concludes that it is difficult for children to achieve autonomy “solely within the bounds of their families and home communities—or even within the bounds of schools whose norms are constituted by those held by the child’s home community.”<sup>274</sup>

Elizabeth Bartholet argues that the existing homeschooling regime raises both academic and democratic concerns. The isolation of many homeschooling families, moreover, exposes children to risk of maltreatment in families isolated from broader society and school personnel required to report suspected child maltreatment.<sup>275</sup> Bartholet proposes a regime that would “deny the right to homeschool, subject to carefully delineated exceptions in which homeschooling is needed and appropriate.” Parents would shoulder a “significant” burden to justify an exception. Examples of situations that might merit exceptions would include children whose artistic or athletic talents required flexibility inconsistent with normal schooling, children with disabilities, or seriously inadequate local schools.<sup>276</sup> Even in those cases where families receive exceptions, Bartholet would require children to attend some courses and programming at school, such as civic education and physical education.<sup>277</sup>

Dwyer and Peters argue that states instead should bear the burden of justifying compulsory regular-school attendance.<sup>278</sup> They argue for the primacy of children’s, rather than parents’, rights. And children, they argue, have a “right presumptively to stay at home.”<sup>279</sup> Thus, in order to force them to leave for schooling, “the state would need to show that compulsory schooling outside the home is *necessary* to secure certain important goods for a child.”<sup>280</sup> Dwyer and Peters reason that homeschools can provide adequate education to children, and that this education can in some cases be superior to regular schooling. They acknowledge, however, that the lack of oversight and data currently deprives states of the ability to determine whether homeschooling is even minimally

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272. LEVINSON, *supra* note 238, at 58.

273. *Id.*

274. *Id.*; *see also* Bartholet, *supra* note 15, at 57; Fineman & Shepherd, *supra* note 20, at 60.

275. *See* Bartholet, *supra* note 15, at 4.

276. *Id.* at 72–73.

277. *Id.*

278. DWYER & PETERS, *supra* note 20, at 195.

279. *Id.* at 195.

280. *Id.* at 197.

adequate.<sup>281</sup> Thus, to ensure academic achievement and child well-being, they would have states implement significantly more robust regulatory regimes that would include “a meaningful initial qualification process, subsequent periodic review, and remedial action when homeschooling proves deficient.”<sup>282</sup>

Dwyer and Peters join other scholars and organizations that have proposed that homeschooling be permitted, but that states increase their oversight.<sup>283</sup> They have proposed, for example, that children be required to take regular standardized tests, taught a broad range of subjects, et cetera.<sup>284</sup>

Indeed, the American Law Institute’s draft Restatement of Children and the Law, which aims to both “restate” a body of law but also identify themes and emerging reform trends, embraces this approach.<sup>285</sup> The reporters note that “the approach of the small minority of states that authorize homeschooling subject to substantial regulation” can promote child well-being, because parents can be in the best position to determine the educational needs of their particular child.<sup>286</sup>

Dailey and Rosenbury have suggested that homeschooling be tolerated in the primary years, but prohibited in the secondary years, “to ensure that children are afforded a meaningful educational experience, one that fosters children’s present well-being as well as their development over time.”<sup>287</sup>

281. *Id.* at 203–04.

282. *Id.* at 206; *see also* MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 136–37 (2010) (arguing that if homeschooling parents fail to provide their children “adequate opportunity to develop liberal democratic dispositions,” then the state ought to impose minimal intervention, such as requiring attendance at afterschool programs; Eichner supports prohibiting homeschooling altogether only if the less intrusive interventions fail).

283. *See, e.g.*, DWYER & PETERS, *supra* note 20, at 226; Ross, *supra* note 20, at 992. The Coalition for Responsible Home Education, an organization formed by critical homeschool graduates, developed reform recommendations aimed at preventing child maltreatment and ensuring adequate academic content. *See Policy Recommendations*, COAL. FOR RESPONSIBLE HOME EDUC. (Jan. 15, 2014), <http://www.responsiblehomeschooling.org/wp-content/uploads/2013/09/Policy-Recommendations.pdf> [<https://perma.cc/JTJ7-2MY6>].

284. *See, e.g.*, Robin L. West, *The Harms of Homeschooling*, 29 PHIL. & PUB. POL’Y Q., Summer/Fall 2009, at 7, 9–12. Gutmann too suggests that homeschooling, within certain acceptable liberal bounds (and thus presumably subject to state oversight), could be consistent with democratic citizenship. GUTMANN, *supra* note 250, at xiv. She observes that “citizens could legitimately cede more comprehensive educational authority to parents, as long as parents did not thereby infringe upon the basic liberty or opportunity of their children as future free and equal citizens or upon anybody else’s basic liberties or opportunities.” *Id.*

285. *See* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1378–79 (discussing the promotion of child well-being as a framework that the new ALI restatement will embrace for homeschooling regulations).

286. *Id.* at 47–48 (discussing the promotion of child well-being as a framework unifying laws involving children and situating homeschooling regulations within that framework).

287. Dailey & Rosenbury, *supra* note 234, at 1521. They would allow for exemptions in special cases, such as gifted athletes or children with special education requirements. *Id.* at 1522–23.

E. *A Proposal for Both Compromise and Principle*

I propose an approach that presumptively allows parents the ability to educate younger children at home with minimal state oversight. Once children reach adolescence and the secondary grades, however, the educational, democratic, and developmental considerations require that the presumption be flipped. Thus, parents will bear the burden of overcoming a presumption *against* homeschooling and in favor of regular school, be it public or private, for their child's secondary education. The following sections provide further justification for this bifurcated approach.

1. Presumptively Permitting Homeschooling in the Primary Years

Allowing parents to homeschool young children through the primary years is consistent with state educational aims. Research demonstrates that experiences during the early childhood years can be critical to long-term development. Early experiences that offer intellectual stimulation can enhance neurological development and increase academic success.<sup>288</sup> At the same time, the sorts of experiences likely to benefit early development comprise activities well within the abilities of the typical parent—talking and reading to children, counting, singing, et cetera. Whereas states might undertake efforts to educate parents about the importance of early childhood learning (perhaps by widely disseminating and promoting educational materials), no advanced education or special skills are required. Instead, the vast majority of parents have the capacity to provide appropriate learning environments in children's early years without possessing advanced qualifications or even a commitment to their children's eventual development of autonomy, civic participation, et cetera.

Noninterference during this period can allow parents to share their values and conception of what the "good life" means with children during their formative years.<sup>289</sup> In granting parents presumptive authority over childrearing and education, the state countenances parents' liberty interests in raising their children, acknowledges the extent to which parents invest in childrearing as central to their own life meaning, and also respects diversity.

Notwithstanding presumptive deference to parental authority, the state must both safeguard its obligation to children's welfare and later autonomy and withhold from parents absolute authority over their children. Parents should not be permitted to interfere with their children in such a way as to conclusively decide the course of their lives—a fact recognized in existing laws limiting parental authority in ways such as preventing the withholding of medical treatment from a critically ill child.

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288. See LAWRENCE J. SCHWEINHART, THE HIGH/SCOPE PERRY PRESCHOOL STUDY THROUGH AGE 40: SUMMARY, CONCLUSIONS, AND FREQUENTLY ASKED QUESTIONS 1, 5 (2004).

289. See Hamilton, *Immature Citizens*, *supra* note 2, at 1061.

The state should also require parents to provide an education appropriate to children's age and grade levels, sufficient to prepare them for secondary education. At the elementary levels, parents may decide the great majority of the content of their children's educations. The state should ensure, however, that children achieve literacy and numeracy skills consistent with their grade-level peers. Thus, homeschooled children should submit to regular standardized testing administered and supervised by school (or school-designated) officials.

Regular testing may serve another important state goal: ensuring the welfare of homeschooled children. Administering tests would provide officials an opportunity to assess the apparent health of children—including whether their height and weight appear consistent with adequate nourishment and whether they are clean and adequately clothed. Given that many cases of maltreatment involve severe abuse and neglect, semi-annual testing and observation may be an effective instrument to monitor academic attainment and physical well-being. Even annual official observation may help identify and address issues.

Professor Barholet proposes that, in the exceptional cases where homeschooling should be permitted, states should still require that children regularly attend at least some courses and programs at school.<sup>290</sup> Barholet reasons that such a requirement ensures regular oversight by mandatory reporters and can thus safeguard children's well-being.<sup>291</sup> While more frequent contact with school officials may very well be preferable, my proposal stops short of required school attendance for pragmatic reasons: First, parents will surely resist more frequent oversight and testing as overly intrusive. Second, education officials may also object to partial attendance requirements as administratively burdensome and costly.

## 2. Presumption Against Home Secondary-Schooling

To better ensure that the state meets its obligations to its school-aged citizenry, I propose a return (of sorts) to the pre-1980s status quo. Such a return would contemplate that all children would presumptively attend some regular school, be it public or private, that is subject to state oversight and regulation.<sup>292</sup>

Instead of what has today become a presumption in favor of unregulated homeschooling, states would reimpose a presumption against homeschooling in the secondary grades. Families wishing to homeschool would bear the burden of making the case to designated state officials that they would provide their

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290. Barholet, *supra* note 15, at 73.

291. *Id.* at 76.

292. To be clear, compulsory attendance is distinct from state monopoly on the provision of education. John Stuart Mill, for example, opposed a state-dominated system of education as a "mere contrivance for molding people to be exactly like one another." JOHN STUART MILL, ON LIBERTY 158 (Michael B. Mathias ed., 2007).

children an education that satisfies state criteria with respect to children's welfare and future autonomy interests, citizenship, and workplace and postsecondary education preparation.

Importantly, parents' own religious convictions would not be sufficient to merit an exemption from compulsory attendance of their children. Permitting otherwise unqualified parents to direct their children's educations as an aspect of the parents' own exercise of religion treats children as instruments of their parents' wills and contravenes the state's commitment to self-determination and against other-determination.

Homeschool advocates may, as discussed above, argue that their adolescent children will be confused and potentially traumatized by exposure to information and beliefs that contradict the values their parents have sought to impart. Such concerns about the psychological harms threatened by exposure to different cultures and values may be sincerely held, but they are unfounded. Instead, by the time they reach high school age, children's cognitive ability to comprehend and manage dissonance between their home education and externally provided education are substantially the same as that of their parents.<sup>293</sup> They are no more likely to be confused by such exposure than adults might be, whereas younger children might well be confused. Indeed, "[m]any adults cease to show any development beyond levels achieved by typical early adolescents."<sup>294</sup>

For those parents who overcome the presumption against home secondary schooling, state oversight—including regular standardized testing—should continue. States should, moreover, not just tolerate but encourage partial attendance at regular school, including participation in extracurricular activities, to the extent that accommodating such participation does not become administratively burdensome. Even partial participation helps achieve state goals for all its students, including those who are otherwise homeschooled.

Ensuring that homeschooled adolescents experience meaningful peer interaction is consistent with research that the social world and peer interactions within it become increasingly important during this developmental stage. Developmental psychologists have found that peer orientation—rather than being a primarily negative influence—facilitates adolescents' "development into independent adults, [and] enable[s] them to foster a more complete sense of social self-identity."<sup>295</sup>

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293. See Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 590–92 (2009).

294. Kuhn, *supra* note 271, at 65.

295. Amy Orben, Livia Tomova & Sarah-Jayne Blakemore, *The Effects of Social Deprivation on Adolescent Social Development and Mental Health*, 4 LANCET CHILD ADOLESCENT HEALTH 634, 635 (2020), <https://www.thelancet.com/action/showPdf?pii=S2352-4642%2820%2930186-3> [https://

F. *Anticipated Objections*

In a recent essay, Martin Guggenheim characterized a proposal to prohibit homeschooling as “radical” and suggested that no state has ever imposed a requirement that children attend regular school.<sup>296</sup> That a respected children’s law scholar considers such a prohibition to be radical demonstrates the wholesale transformation of the education landscape as well as public acceptance of homeschooling as a new normal.

Recall, however, that in striking down Nebraska’s requirement that all children attend not only regular school, but *public* schools exclusively, the Supreme Court explained that its holding left intact broad state authority over education, including compulsory attendance, noting that “[t]he *power of the State to compel attendance at some school* and to make reasonable regulations for all schools . . . is *not questioned*.”<sup>297</sup> And as recently as the 1980s, homeschooling was prohibited in many states, and parents who flouted compulsory attendance laws were prosecuted.<sup>298</sup>

A return to the pre-1980s state of affairs would require legislative fortitude on the part of state lawmakers. Thus far, the homeschool lobby has proven successful by launching uniquely aggressive targeted campaigns.<sup>299</sup> It will not be easy for legislators to defy this special interest group—particularly when the constituents whose interests legislators seek to protect are not yet of voting age.

Homeschooling parents, of course, will object to having to shoulder the burden of overcoming the presumption. For those who can and intend to provide adequate educations, the imposition will be a relatively minor inconvenience. For others, namely those parents who wish to homeschool for the express purpose of shielding their adolescents from external sources of information or different beliefs, burden shifting will operate as an effective prohibition on the homeschooling of their high school-aged children.

## CONCLUSION

The state’s interests in education of its citizenry include ensuring that children are cared for, able to live self-determined lives, and able to develop into a citizenry that is capable of self-government and workforce participation. These commitments require states to examine whether the unregulated practice

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296. Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J.F. 942, 950–51 (2018).

297. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (emphasis added).

298. See Yuracko, *supra* note 20, at 124; see also DWYER & PETERS, *supra* note 20, at 64–65 (discussing the prosecution of homeschooling parents in Texas in the 1980s).

299. See *supra* Section II.B.



of homeschooling is consistent with those commitments. I have argued that it is not. The regulatory approach I propose here, rather than being radical, is instead both principled and pragmatic, accommodating the interests of parents, children, and the state.