Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection

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This article describes the rapidly growing homeschooling phenomenon, and the threat it poses to children and society. Homeschooling activists have in recent decades largely succeeded in their deregulation campaign, overwhelming legislators with aggressive advocacy. As a result, parents can now keep their children at home in the name of homeschooling free from any real scrutiny as to whether or how they are educating their children. Many homeschool precisely because they want to isolate their children from ideas and values central to our democracy. Many promote racial segregation and female subservience. Many question science. Many are determined to keep their children from exposure to views that might enable autonomous choice about their future lives. Abusive parents can keep their children at home free from the risk that teachers will see the signs of abuse and report them to child protection services. Some homeschool precisely for this reason. This article calls for a radical transformation in the homeschooling regime, and a related rethinking of child rights and reframing of constitutional doctrine. It recommends a presumptive ban on homeschooling, with the burden on parents to demonstrate justification for permission to homeschool.
# I. INTRODUCTION

# II. THE REALITY

## A. History and Trends

## B. The Varied Nature of the Homeschooling Population

## C. The Child Maltreatment Piece of the Homeschooling Picture

## D. The Social Science Research on Homeschooling Success & Failure

### 1. The Quality Research

### 2. The Policy Advocacy Research

# III. THE CURRENT LAW

## A. Federal and State Constitutions Permit Significant Restrictions on Homeschooling

### 1. U.S. Supreme Court Doctrine

### 2. State and Lower Federal Court Doctrine

## B. State Legislation Imposes Few Restrictions on Homeschooling

### 1. Limited Regulation Regarding Homeschooling

### 2. Absence of Enforcement

### 3. Absence of Regulation Regarding Abuse and Neglect

### 4. Trends in the Law

# IV. THE POLITICS

## A. Ideological Nature of the Homeschooling Movement

## B. Political Dominance of The Homeschooling Movement

## C. Positions and Tactics of The Homeschooling Movement

### 1. Parent Rights Absolutism

### 2. Organizational, Legal and Lobbying Tactics

#### a. Resisting Reforms Related to Education

#### b. Resisting Reforms Related to Child Protection

# V. THE WAY FORWARD

## A. International Law Provides A Model for the U.S.

### 1. Human Rights Treaties

### 2. Other Nations’ Domestic Law

#### a. Constitutional Mandates to Provide Education and Protect Children

#### b. Homeschooling Law

## B. Developing A Constitutional Duty to Educate and Protect Children in the U.S.

### 1. The Federal Constitution

### 2. State Constitutions

## C. Recommended Restrictions

### 1. General Presumption Against Homeschooling with Burden on Parents to Justify Exceptions

### 2. Restrictions Governing Any Homeschooling Allowed Under Exceptions to the General Presumption

#### a. Guiding Principles

#### b. Specific Requirements to Ensure an Adequate Education

#### c. Specific Requirements to Ensure Adequate Protection Against Abuse and Neglect

## D. Costs of the Proposed Restrictive Regime

## E. Private School Reform

## F. A New Political and Legal Reality
I. INTRODUCTION

Homeschooling is a realm of near-absolute parental power. This power is inconsistent with important rights supposedly guaranteed children under state constitutions and state legislation throughout the land. And it is inconsistent with a proper understanding of the human rights of children, one recognizing children as full human beings with interests entitled to the same value as adult interests.

Homeschooling parents can under current law deny their children any meaningful education, and subject them to abuse and neglect free from the scrutiny that helps protect children in regular schools.¹ This is true even though child rights to education and to protection against maltreatment are on paper universally guaranteed. All states have legislation requiring that children attend school in their elementary and high school years,² and constitutional provisions supporting public education.³

Every state has legislation imposing affirmative duties to protect children against parental maltreatment, and a related child protection system. This system includes child protection services (CPS) agencies charged with enforcing the laws that protect children, and mandatory reporting requirements making teachers and other school personnel responsible for reporting suspected child maltreatment to CPS.⁴

Every state requires parents to comply with compulsory education requirements either by covering “educational neglect” in child protection laws, or by truancy laws penalizing parents for not sending their children to school.⁵ Children thus have rights to education under both child protection law and education law.

But the current homeschooling regime means that parents can deny their children rights to education and to protection against maltreatment simply by not sending them to school.

Formal law of course does not affirmatively grant parents the right to deny education, or to commit child maltreatment. But effectively it does just this by allowing homeschooling and failing to regulate it in meaningful ways. Every state allows homeschooling. No state has effective regulation ensuring that homeschooled children receive an adequate education. No state provides homeschooled children the protection against maltreatment guaranteed to children in schools by the mandatory reporting system. Almost no state does anything to identify homeschooled children victimized by or at high risk for child maltreatment, or to provide them with minimal protective attention.⁶

¹ See infra Part III.
² See infra Part V.
³ See EMILY J. ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 67 (2013).
⁴ See ELIZABETH BARTHOLETT, NOBODY’S CHILDREN 35 (1999) (“[r]eporting laws throughout the country mandate professionals in contact with children—police officers, teachers, physicians, and others—to report suspected maltreatment”); see id. at 61-65, 102-110 (describing CPS investigations of maltreatment).
⁶ See infra Part III.
This homeschooling regime poses real dangers for children and for society. Children are at serious risk of losing out on opportunities to learn things that are essential for employment and for exercising meaningful choices in their future lives.

They are also at serious risk for ongoing abuse and neglect in the isolated families that constitute a significant part of the homeschooling world. Mandated reporters are key to child protection, and compulsory education has served to protect many children against maltreatment. Teachers and other education personnel have long been responsible for a significant percentage of all reports to CPS, larger than any other group.\(^7\) Parents have no obligation apart from compulsory education to get their children out of the home where they can be observed by others and reported to CPS for obvious signs of maltreatment. Parents don’t have to take their children to doctors. They don’t have to accept home visitors if a system is in place providing home visits for new parents, by contrast to many of our peer countries with universal or near-universal home visiting systems.\(^8\)

Society loses out as well. Appropriate education helps prepare children to participate productively in society as adults through employment and other forms of civic engagement, and makes children aware of important cultural values.

A recent book provides a chilling description of one homeschooling experience. In Educated,\(^9\) Tara Westover describes growing up with her siblings in a home where the parents provided nothing resembling an education, and a good deal of terrifying physical and emotional abuse. She managed to escape to claw her way into college and then up the educational ladder, eventually earning degrees from Cambridge University and Harvard. But most of her siblings remained imprisoned in the life of their childhood. She describes growing up with a father who was totally alienated from society and determined that his children should be as well. She and her siblings were prevented from going to school when they were old enough to ask to go, and prevented from going to hospitals when they suffered grievous injuries. They were coerced into hard, dangerous labor for her father’s business. She describes the terror of actual and threatened violence by her father and one of her brothers — men who clearly felt they had a license to terrorize and abuse, men she eventually realized suffered from serious mental illness. Perhaps most troubling, she describes how she remains psychologically subject to her father’s power years later, repeatedly drawn back to the family, repeatedly subjecting herself to its terrors, repeatedly hoping that it would be better than it was. Tara represents the extraordinary success story, the magically resilient child, the child capable of escape, the child whose brilliance

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\(^7\) In 2016 the highest percentage of child maltreatment reports (18.9%) were made by education personnel. See U.S. DEP’T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, CHILD MALTREATMENT 2016, at ix-x (2017), https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf; see generally JAMES G. DWYER & SHAWN F. PETERS, HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE 94 (2019); BARTHOLET, supra note X[NC], at 35; see also education professor Mitchell L. Stevens’ comment that school officials are “society’s best watchdogs of how parents treat children.” Jane Gross, Lack of Supervision Noted in Deaths of Homeschooled, N.Y. TIMES (Jan. 12, 2008), https://www.nytimes.com/2008/01/12/us/12bodies.html?_r=4&ref=education&.

\(^8\) See ELIZABETH BARTHOLET, Intervening Early with Home Visitation, in NOBODY’S CHILDREN, supra note X, at 163-75.

enabled her to overcome gross educational deficits. There is no way of knowing how many homeschooled children experience childhoods comparable to Tara’s. But we do know that the homeschooling regime permits children to be raised this way, and we know that few children resemble Tara.

Homeschooling proponents make two primary arguments in defense of the current regime, one factual and one legal. The factual claim is that homeschooled children do as well as or better than public schoolers, including on standard educational measures like college admission tests. The legal claim is that parent rights are and ought to be absolute.

The factual claim is largely based on flawed advocacy “research” that is not true social science. We have no way of identifying based on existing information the total group of homeschoolers, or the percentage whose progress is assessed by some objective testing system, and thus no way of knowing how homeschoolers do on average, or what percentage graduate from high school or college. The only methodologically sound social science indicates that even the a-typically privileged and successful subset of homeschoolers who graduate high school, take college tests, and attend college have some significant problems as compared to non-homeschoolers.\(^\text{10}\)

But the homeschooling advocates’ factual claim is also beside the point. Even if many homeschooled children did do all right on some standard educational measures, this would say nothing about significant subsets of homeschooled children we should be concerned about. These subsets include those whose parents are either uninterested in educating their children or incapable of doing so, and those whose parents subject them to serious abuse and neglect. These subsets also include a very large group whose parents are ideologically committed to isolating their children from the majority culture, because they have views and values in serious conflict with that culture. Some believe that women should be subservient to men, others believe that race stamps some people as inferior to others. Many don’t believe in the scientific method, looking to the Bible instead as their source for understanding the world.\(^\text{11}\)

The legal claim made in defense of the current homeschooling regime is based on a dangerous idea about parent rights – that those with enormous physical and other power over infants and children should be subject to virtually no check on that power. That parents should be granted monopoly control over children’s lives, development, and experience. That parents who are committed to beliefs and values counter to those of the larger society are entitled to bring their children up in isolation, so as to ensure that they will replicate the parents’ views and lifestyle choices.

This idea of parental rights absolutism is inconsistent with state laws and constitutional provisions guaranteeing child rights to education. It is inconsistent with state as well as federal child protection law guaranteeing children protection against abuse and neglect.

It is also inconsistent with our legal and cultural history. From early on our law recognized that the state has a role to play in child rearing, and that parents have responsibilities and not just

\(^{10}\) See infra Section II.D.

\(^{11}\) See infra Section II.B.
rights.\textsuperscript{12} Over the decades law has played an increasingly active role guaranteeing children certain important rights, including rights to be free from labor and from unfair criminal punishment, along with rights to education and to protection against maltreatment. These trends in the law reflect growing recognition of the principle that children should be seen as having rights, and not subject to any adult’s absolute power.

The legal claim is inconsistent with an idea central since the beginning of compulsory education – that the state has rights to educate children in ways that enable positive participation in the larger society, and has strong interests in doing so.\textsuperscript{13} “[P]reparation for citizenship,”\textsuperscript{14} including exposure to the values of tolerance and deliberative democracy,\textsuperscript{15} has been seen as a primary goal of public education from its origins.

Finally, the legal claim stands in contrast with international law and with the constitutional law of most other nations. This law recognizes that children have powerful rights to both education and to protection against maltreatment, and that nations have duties to protect those rights.\textsuperscript{16}

How did we arrive at today’s homeschooling regime, and how should we move forward?

The current homeschooling regime exists not because our society through its elected representatives has decided it should. It exists because homeschooling advocacy groups have become an overwhelming political force, and because there is no effective opposing political force.\textsuperscript{17}

It seems obvious that any appropriate weighing of the interests at stake would result in significant reform legislation designed to guarantee children adequate education and protection. The question is whether we can move beyond current power politics to achieve such reform.

\section*{II. THE REALITY}

\subsection*{A. History and Trends\textsuperscript{18}}

Homeschooling as it exists in the U.S. today is a relatively recent phenomenon. It is true that prior to the existence of public and private schools, some parents educated their children at home. But the development of free public education and compulsory education laws in the mid-19\textsuperscript{th} century was broadly accepted as an advance for both children and society.\textsuperscript{19} Children, protected simultaneously by the new child labor laws, were guaranteed the right to be educated for future employment and other opportunities. Education was supposed to protect against abusive child labor, and equalize opportunity, enabling poor children to move beyond the

\textsuperscript{12} See infra Part V.
\textsuperscript{13} See REBELL, supra note X, at 166-67.
\textsuperscript{14} Id. at 16.
\textsuperscript{15} See STEPHEN MACEDO, DIVERSITY AND DISTRUST (2009); AMY GUTMANN, DEMOCRATIC EDUCATION (1999).
\textsuperscript{16} See infra Part VA.
\textsuperscript{17} See infra Part IV.
\textsuperscript{18} For descriptions of the history of homeschooling see, e.g., MILTON GAITHER, HOMESCHOOL: AN AMERICAN HISTORY (2016); DWYER & PETERS, supra note X, at 1-119.
\textsuperscript{19} Gaither, supra note X, at 41, 69, 73, 83; REBELL, supra note X, at 5-6, 36.
circumstances of their birth.\textsuperscript{20} It was supposed to help integrate immigrant groups into the community. It was supposed to expose children to mainstream cultural values, and enable them to become productive participants in society in employment and other ways.

Homeschooling as we know it today began in the mid-20\textsuperscript{th} century as the result of political movements that were very different in nature.\textsuperscript{21} One was a left progressive movement, personified by John Holt’s rejection of traditional education as stifling the child’s natural creativity and instinct to learn. The other was a conservative Christian movement, which rejected many of the views and values reflected in public education and the larger society as inconsistent with their religious beliefs. As time went on the conservative Christian wing grew disproportionately to become the clear majority of all homeschoolers, with estimates today ranging from over half to two-thirds to 90\%.\textsuperscript{22}

Homeschoolers represent a small but still significant percentage of the total population of school-age children – roughly 3-4% or close to two million, comparable to the number in charter schools, and larger than the number in Catholic schools.\textsuperscript{23} As many as 10\% of all students spend some time being homeschooled.\textsuperscript{24} And the trend in recent decades has been dramatically rapid expansion.\textsuperscript{25}

\textsuperscript{20} REBELL, \textit{supra} note X, at 36; JEFFREY SUTTON, \textit{51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 27 (2018)} SUTTON (quoting Horace Mann) (“Education then, beyond all other devices of human origin, is a great equalizer of the conditions of men – the balance wheel of the social machinery”).

\textsuperscript{21} See generally \textit{Why Homeschooling Happened, 1945–1990} and \textit{Three Homeschooling Pioneers in GAITHER, \textit{supra} note X, at 91-130, 131-60.}


\textsuperscript{23} The 2016 NCES statistics indicate that 3.3\% of all school age children or 1,690,000 are homeschooled. Some other estimates are higher. MEGHAN MCQUIGGAN ET AL., \textit{supra} note X, at 18 tbl.7; see Robert Kunzman & Milton Gaither, \textit{Homeschooling: A Comprehensive Survey of the Research}, 2 OTHER EDUC.: J. EDUC. ALTERNATIVES 4, 8 (2013) (estimating that in 2013 homeschoolers constituted over 4\% of the school-age population); see DWYER & PETERS, \textit{supra} note X, at 1, 90-91 (estimating that in 2018 two million children, or 4\% of the school-age population, were homeschooled).

\textsuperscript{24} See Joseph Murphy, \textit{The Social and Educational Outcomes of Homeschooling}, 34 SOC. SPECTRUM 244, 245 (2014).

\textsuperscript{25} See DRIVER, \textit{supra} note X, at 394, 401 (“meteoric rise of homeschooling” attributed in part to religious parents’ resistance to secularization of public schools); Murphy, \textit{supra} note X at 245 (expansion of homeschooling “nothing short of remarkable”); DWYER & PETERS, \textit{supra} note X, at 66-67; id. at 88 (“explosive growth” of homeschooling).
B. The Varied Nature of the Homeschooling Population

Today’s homeschooling population reflects this politically mixed background but has become even more complicated. Some parents choose homeschooling because they feel that their children will be discriminated against in the public schools, or denied disability accommodations, or bullied. Some choose homeschooling because they want their children to have the flexibility to pursue demanding commitments in dance, sports or theater, or because they live in remote areas with no nearby schools, falling into a category characterized as practical or convenience homeschooling. Some believe that they can provide their children a superior traditional education because of the limitations of their local schools, or because of the parents’ advanced qualifications, ability to engage superior tutors, or access to on-line learning opportunities.

Some parents choose homeschooling, as did the original progressive wing, because of the flaws they see in traditional education. Some are concerned with an overemphasis on rote learning and testing, some with the schools’ ability to address particular issues such as racism.

The majority are, however, descendants of the original conservative Christian movement. Estimates range, as discussed above, from a majority up to 90%. They are committed to homeschooling because they reject majority culture and values, and want to ensure that their children adopt their own religious and social views. Many are fundamentalist religious groups, groups that Michael Rebell describes in his important new book, *FLUNKING DEMOCRACY*, as believing “that exposing their children to ideas such as secularism, atheism, feminism, and value relativism is inconsistent with the family values they espouse and undermines their ability to inculcate in their children their beliefs in the sacred, absolute truth of the Bible.” Many use alternative textbooks that teach creationism instead of evolution. Many seek to create for their

26 For descriptions of today’s homeschooling population, see, e.g., *Homeschooling Comes into its Own*, in *Dwyer & Peters*, supra note X, at 84; *McQuiggan ET AL.*, supra note X, see generally *THE WILEY HANDBOOK OF HOME EDUCATION* 32-58, 86-268 (Milton Gaither ed., 2016).
29 See *Driver*, supra note X, at 401 (the Holt liberal “demographic now accounts for a modest slice of the homeschooling phenomenon”).
30 See supra n. X.
31 *Gaither*, supra note X, at 162; *Driver*, supra note X, at 401.
32 *Rebell*, supra note X[book], at 86. Many fled the public schools because of their failed attempts during the 1970s and 1980s to control the education their children were receiving as well as increasing racial integration, gender equality, sex education and acceptance of gay and lesbian sexual orientations. West, supra note X, at 7-10.
children a system of “total socialization” aimed at negating the influence of competing socialization agents.34

Robert Reich and Robin West point out that many of these children are being raised in ways that are at odds with ideas about the importance of autonomy central to our liberal tradition.

[Children are shielded] from the exposure to the diversity of ideas and skills they will need to become autonomous adults…. [T]hey know little of other ways of life than the one in which they are raised and educated…. Unregulated homeschooling, therefore, badly compromises the development of capacities for autonomy in the children subjected to it…. the children in some of these homes are being schooled quite intentionally for lives of submission to authority, not for autonomy…. They are discouraged from developing either the will or the skills to break those bonds.35

Members of a variety of Christian groups are included today in this conservative Christian wing, including many Mormons, Jehovah’s Witnesses, and Seventh-day Adventists. These homeschooling groups hold similar ideas about the importance of keeping their children isolated from the conflicting cultural values.36

Some homeschooling parents are extreme religious ideologues who live in near-total isolation and hold views in serious conflict with those generally deemed central in our society. For example, some believe that women should be totally subservient to men and educated in ways that promote such subservience. Milton Gaither, one of the leading experts on homeschooling, writes: “Throughout the 1990s and 2000s some homeschooling leaders pushed the Sectarian wing of the movement in a more and more radical direction. Some held that women should not vote. Some held that women must wear head coverings or that daughters should not go to college.”37 The “Quiverfull” and “Stay at Home Daughter” (SAHD) movements endorse confining women to the domestic sphere, and subjecting them to the control of first their fathers and then their husbands. Some in these movements believe homeschooled girls should only be educated in household tasks.38 Many homeschooling families that don’t belong to these groups

34 Lee Garth Vigilant, Lauren Wold Trefethren & Tyler C. Anderson, You Can’t Rely on Somebody Else to Teach Them Something They Don’t Believe: Impressions of Legitimation Crisis and Socialization Control in the Narratives of Christian Homeschooling Fathers, 37 HUMANITY & SOCIETY 201, 201-02, 218 (2013).
36 See Dwyer & Peters, supra note X, at 87.
still pursue a “less rigorous version of female submission,” limiting girls’ educations by assigning them extensive household and child-rearing duties.\textsuperscript{39}

Some engage in homeschooling to promote racist ideologies and avoid racial intermingling.\textsuperscript{40} A recent book describes a young leader of the white nationalist movement, Derek Black, seen as the leading light for the movement’s future.\textsuperscript{41} He describes being pulled out of school because his parents wanted to avoid the Haitians and Hispanics in West Palm Beach’s school system.\textsuperscript{42} He grew up totally immersed at home in the culture of white supremacy, encountering little in the way of diverse perspectives until he entered college. His homeschooling included building a children’s website for Stormfront, the largest racist community on the internet.\textsuperscript{43}

Many homeschooling parents are simply not capable of educating their children. Many have such limited educations themselves that their ability to teach complex or advanced academic subject matter is doubtful. Fifteen percent have less than a high school degree or equivalent; another 16% have no more than that.\textsuperscript{44} In 11% of homeschooling families neither parent speaks English. Some are mentally ill or disabled, or caught up in substance abuse.\textsuperscript{45} Many homeschooled graduates complain about educational neglect.\textsuperscript{46}

Many homeschooling parents are simply not interested in educating their children. Some remove their children from school specifically because they have been accused of truancy, and some to avoid vaccination requirements.\textsuperscript{47} Some do so specifically to avoid child protection laws.\textsuperscript{48}

The nature of the homeschooling population presents dangers for children and society, failing to adequately prepare many of the children involved for participation in employment and other

\textsuperscript{39} Telephone Interview by Isabel Macquarrie with April Duvall, Homeschool Alumnus (Nov. 3, 2018); see generally KATHRYN JOYCE, QUIVERFULL: INSIDE THE CHRISTIAN PATRIARCHY MOVEMENT (2009). For more on sexism experienced by homeschooled girls, see HOMESCHOOLERS ANONYMOUS, https://homeschoolersanonymous.org/.


\textsuperscript{41} ELI SASLOW, RISING OUT OF HATRED: THE AWAKENING OF A FORMER WHITE NATIONALIST (2018).

\textsuperscript{42} Id. at 10-11.

\textsuperscript{43} Id. at 11.

\textsuperscript{44} See Homeschool Demographics, CRHE, https://www.responsiblehomeschooling.org/homeschooling-101/homeschool-demographics/ (citing MCQUIGGAN ET AL., supra note X).

\textsuperscript{45} MCQUIGGAN ET AL., supra note X, at 18. Many are at the low end of the socioeconomic ladder, with 19% below the poverty line and 36% between poverty and 200% of poverty, a total significantly higher than that of those in all public and private schools. Although in the past homeschoolers were relatively privileged in socio-economic terms, that picture has recently been changing. See infra note X [re. SES in Section II.D.1].

\textsuperscript{46} See Green, supra note X, at 1008-09.

\textsuperscript{47} DWYER & PETERS, supra note X, at 94, 104.

\textsuperscript{48} See infra Section II.C.
productive activities in the mainstream world. It ensures that many will grow up alienated from society, ignorant of views and values different from their parents, and limited in their capacity to choose their own futures. It subjects many to serious health and safety risks.

C. The Child Maltreatment Piece of the Homeschooling Picture

Child abuse and neglect characterize a significant subset of homeschooling families. Many families choose homeschooling precisely because it enables them to escape the attention of child protection services (CPS), since teachers and other school personnel are “mandated reporters,” required by law to report suspected child maltreatment. Some, for example, take their children out of school when teachers report them for suspected violation of child protection laws. Others simply never send their children to school, knowing that whatever they do to children in the privacy of the home is not likely to trigger CPS intervention.

In addition, the very isolation of so many homeschooling families puts children at risk. Child maltreatment takes place disproportionately in families cut off from the larger community.

There is no way now to determine the exact scope of the child maltreatment problem in homeschooling because, given the absence of regulation, we simply don’t know who is in this population. Many states don’t even require that homeschoolers register, and even those with such requirements fail to systematically enforce them.

Even if we knew the total homeschooling population, official child maltreatment rates would tell us little since those rates are based on the discovery by CPS of child maltreatment, which in turn depends on reports to CPS. As noted above, homeschoolers tend to live in isolation, and by definition they live without observation by those responsible for the largest percentage of reports to CPS, teachers and other school personnel. Also no state connects its child protection system with its homeschooling system so as to facilitate understanding of the risk of maltreatment.

Nevertheless, we know enough to know that homeschooling in its current unregulated form poses serious risks of abuse and neglect. Many scholars, child abuse pediatricians, and others knowledgeable about homeschooling, have voiced concern based on their research and experience. One of the most serious and informed scholars of homeschooling, Milton Gaither,

49 See Green, supra note X, at 1097 (“a substantial amount of anecdotal evidence showing 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”).
50 See BARTHOLET, supra note X[HomeVisitationChapter], at 163-75.
51 See infra Part III.
52 See supra note X[re. mandatory reporters], and accompanying text.
53 See infra Section III.B.3.
notes that “professionals responsible for child services have long been wary of the potential for unregulated homeschooling to serve as a cloak for child abuse,” and voices his own concern about this risk.

One telling study is a systematic analysis of all students withdrawn from regular school, allegedly for homeschooling, in six Connecticut school districts over a several-year period. This found that of the 380 students withdrawn, more than one-third lived in families with at least one prior accepted report to CPS of child maltreatment, and one-fourth lived in families with multiple prior reports. (Prior reports are known to be the best predictors of future maltreatment, regardless of whether those reports are substantiated.) A similar study in a different state, to date unpublished, produced comparable results.

The Connecticut study was triggered by the death of Mathew Tirado at his mother’s hands. The mother eventually pled guilty to manslaughter in the first degree. Mathew had not attended school for the year prior to his death. Despite his death, as well as prior allegations of abuse and neglect in the home, his younger sister was allowed to be removed from school for alleged homeschooling.

Child abuse pediatricians have noted the apparent connection between child maltreatment and homeschooling. They have published studies analyzing samples of extremely serious abuse cases, finding a very high percentage of homeschooled children represented. One such study was initiated by the North Carolina Pediatric Society Committee on Child Abuse and Neglect. It documented several cases of horrific abuse by allegedly homeschooling parents, stating: “These highly publicized tragedies highlight an experience that is too commonly encountered by physicians caring for children who have been abused and neglected.” It concluded that there was a serious problem of “invisible children” – children whose parents intentionally hide them, sometimes under the guise of homeschooling – and noted concern with gaps in the system for monitoring homeschooling that put children at risk.

58 See id. at 2; Macquarrie, supra note X, at 11 n.44.
59 See, e.g., Emily Putnam Hornstein, Report of Maltreatment as a Risk Factor for Injury Death: A Prospective Birth Cohort Study, 16 CHILD MALTREATMENT 163 (2011) (“prior allegation to CPS” found “the strongest independent risk factor for injury mortality before the age of five”).
60 This study looked only at families with founded cases of prior abuse, which means that an even higher percentage of children were likely at high risk for child maltreatment. Telephone Interview by Isabel Macquarrie with Rachel Coleman, Founder and Executive Director, Coalition for Responsible Home Education (“CRHE”) (Oct. 29, 2018).
61 See EXAMINING CONNECTICUT’S SAFETY NET FOR CHILDREN WITHDRAWN FROM SCHOOL FOR THE PURPOSE OF HOMESCHOOLING, supra note X, at 1.
63 See id.
In another study child abuse pediatricians from five U.S. medical centers focused on a sample of cases involving horrific child torture. They found a powerful connection with homeschooling. Out of the school-age children, 76% were at home rather than in school, with 29% never allowed to go to school and another 47% withdrawn for homeschooling. They concluded that this “homeschooling” typically occurred after closure of a previously opened CPS case, and appeared designed to further isolate the child.

Anecdotal evidence is alarming. Several investigative journalists have pointed to risks for abuse and neglect in homeschooling. Many high-profile cases of horrific systematic abuse often amounting to torture, as well as gross levels of neglect, have involved children kept home under the pretense of homeschooling. One such case involved the Hart parents who drove their six children off a California cliff to their death. They had been allowed to homeschool despite repeated allegations of child abuse across three states. In 2008, one child complained to a teacher about physical abuse and the parents pulled three of their children out of school for homeschooling, later placing their children in different schools. In 2010 another child complained to a teacher of abuse. Days after the mother was criminally convicted and sentenced for this abuse, the parents pulled all six children out of school for homeschooling. Despite many subsequent reports of child abuse, homeschooling continued until the Harts drove their children off the cliff in 2018.

Another recent California case involved the thirteen Turpin children, discovered only when one seventeen-year-old child escaped through a window and called 911. The children, registered as homeschooled, had been living for many years in what authorities called “horrific” conditions, subject to desperate malnutrition and torture. In February 2019 the parents pled guilty to fourteen

64 See Knox et al., supra note X.
65 Id. at 39.
66 Id.; see also id. at 46 (“Older children were removed from school under the guise of home schooling…. [T]hese children show no evidence of receiving any education. Their removal from school appears to have been motivated by the need to keep the children hidden.”).
67 See, e.g., Michelle Goldberg, The Sinister Side of Homeschooling, DAILY BEAST, https://www.thedailybeast.com/the-sinister-side-of-homeschooling (“Because educating kids at home is almost entirely unregulated in much of the country, parents are able to hide their crimes—sometimes fatally”); Huseman, supra note X (discussing several scholars and activists who fear “lack of [homeschooling] laws hides abuse or no teaching at all”); Katie Reilly, Parents in the Deadly California Cliff Crash Were Allowed to Keep Home-Schooling Despite Abuse Claims, TIME MAGAZINE (April 16, 2018) (“Child-welfare experts say it can be harder to identify abuse… if children don’t regularly come into contact with teachers”).
68 See, e.g., DWYER & PETERS, supra note X, at 95 n.209-211, 108, n.242; see also Tyler Barnett, Pulling Back the Curtains: Undetected Child Abuse and the Need for Increased Regulation of Home Schools in Missouri, 2 BYU EDUCATION AND L. J. 341, 341, n.3. (2013).
69 See Reilly, supra note X.
felony charges including torture, false imprisonment, cruelty to adult dependents and willful child cruelty,\(^\text{71}\) and in April they were sentenced to twenty-five years to life.\(^\text{72}\)

Homeschooling graduates have formed several organizations to voice their concerns with the risks homeschooling poses to children, including the risk of maltreatment. *Homeschooling’s Invisible Children*, operated by the Coalition for Responsible Home Education (CRHE), maintains a comprehensive database of known cases of severe and fatal abuse in homeschooling.\(^\text{73}\) CRHE founder Rachel Coleman concludes, based on the available evidence: “home schooling is clearly overrepresented” in such cases.\(^\text{74}\)

CHRE published an Issue Brief in 2017 documenting evidence of the connection between child maltreatment and homeschooling and making recommendations for policy reform.\(^\text{75}\) It states: “A growing body of data points to the need for lawmakers to create protections for at-risk homeschooled children.”\(^\text{76}\)

CHRE’s most recent research firms up the connection between homeschooling and serious abuse:

> Our preliminary research suggests that homeschooled children are at a greater risk of dying from child abuse than are traditionally schooled children. This preliminary finding is based on an analysis of the cases in our … database and on national government reports on child maltreatment. When we compare the rate of child abuse fatalities among homeschooled families to the rate of child abuse fatalities overall, we see a higher rate of death due to abuse or neglect among homeschooled students than we do among children of the same age overall.\(^\text{77}\)

Homeschool Alumni Reaching Out (HARO) was formed with a special focus on the potential for abuse in homeschooling families. HARO created a website in 2013 for homeschoolers to share their stories, called “Homeschoolers Anonymous.”\(^\text{78}\) Their website states: “Due to a lack of


\(^{74}\) See Prothero, *supra* note X.


\(^{76}\) *Id.* at 1.


\(^{78}\) See About HARO, HOMESCHOOLERS ANONYMOUS, https://homeschoolersanonymous.org/haro/. Some representative samples follow. In January 2013 two homeschooled children ran away from home where they had
safeguards for homeschool students, many experience abuse, isolation, and neglect. This results in lack of access to higher education, stunted personal growth, mental illness, and substance abuse.”

HARO in consultation with CRHE conducted a survey of 3700 homeschool graduates and found a high percentage—42%—reported experiencing abuse or neglect. (This survey was, as the report authors admit, not a representative sample of the homeschooler population, but a self-selected group.)

Some homeschooling leaders openly promote what should be understood as child abuse. One very popular book recommends a spanking regimen beginning in infancy. Other popular books recommend severe physical punishment, teaching parents how to inflict it without leaving marks. Many make clear their opposition to the child protection system.

Officials in several other countries have expressed concern with the risks homeschooling poses for child abuse and neglect. In the United Kingdom, several high-profile cases of abuse have triggered reports calling for more restrictive regulation. In England the Secretary of State commissioned a report on homeschooling, including on whether it was being used to conceal

been beaten with plastic jump rope, locked in their rooms for up to twelve hours at a time, and had their hands bound with zip ties. The mother eventually pled “no contest” to two counts of torture and was sentenced to seven years to life in prison. See Snejana Farberov, Adoptive mother 'locked children in their rooms, beat them with a HAMMER, zip-tied their hands together and forced them to use trashcan as toilet', DAILYMAIL (Jan. 23, 2013), http://www.dailymail.co.uk/news/article-2267758/Ingrid-Brewer-Adoptive-mother-locked-children-rooms-beat-HAMMER-zip-tied-hands-forced-use-trashcan-toilet.html. In February 2013 a 17-year-old boy was found chained to a pole in his parents’ basement. He told police he had been there since September, when his parents pulled him out of school to “homeschool” him. See Frail teen found handcuffed to basement pole, NBC NEWS (Feb. 6, 2013), https://www.nbcnews.com/video/frail-teen-found-handcuffed-to-basement-pole-44428355918.


81 See id. at 4.


83 Telephone interview with Rachel Coleman, supra note X. A full description of this interview can be found in Macquarrie, supra note XY (memorandum at 14).


abuse and neglect. A leading child rights organization commissioned a similar report, which found that in the 800 cases of serious or fatal cases reviewed, homeschooling emerged as a major theme. In Wales, a notorious child abuse case triggered a report on homeschooling which found, after extensive investigation, that “where there is abuse or neglect home education can and does lead to children being hard to identify, monitor and assess.”

D. The Social Science Research on Homeschooling Success & Failure

Social science is supposed to move beyond anecdotes to tell us something more definitive about group experience. Such science is almost impossible here because, as described in detail below, the system allows homeschoolers to live off the grid. Many states don’t even require registration. Families can simply not register even if theoretically required to. It is therefore impossible to capture the entire group of homeschoolers as you need to in order to assess how they perform on average.

As a result, studies which make claims about homeschoolers’ performance capture only those who are most visible because they emerge from isolation to do things like take standardized tests, apply to college, or attend college. If, as is often the case, parents are in charge of test administration, they may only submit test results or reveal them to researchers if they are positive, either for fear of state intervention, or because researchers are often only looking for positive results. This means studies generally focus on a small subset of the most successful homeschoolers, and miss out entirely on the most at-risk subsets.

Another problem with the research in this area is that it is dominated overwhelmingly by policy advocacy research put out by the homeschooling movement. This is not true social science. It is

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90 See infra Section III.B.
91 See discussion infra Section II.D.2.
92 See discussion infra Section II.D.2. Milton Gaither, a leading scholar on homeschooling, notes that the research is almost entirely qualitative and “much of it is politically motivated.” Milton Gaither, Homeschooling in the United States: A review of select research topics, 28 Pro-Posições (2017); see Joseph Murphy, The Social and Educational Outcomes of Homeschooling, 34 Sociological Spectrum 244, 247 (2014) (noting that “rigorous empirical research on the effects of homeschooling remains scarce” and “studies on homeschooling effects suffer from major, interconnected problems”).

Page 16 of 71
advocacy masked as social science. Below I first discuss the relatively good research, and then the policy advocacy research.

1. The Quality Research

A very small body of professional, methodologically sound homeschooling research exists. This work tells us something, but not much, relevant to the important public policy issues at stake. It does not capture the generality of the homeschooling population, because given the absence of data it cannot. It does not provide any basis for concluding that homeschooling has a positive or negative causal impact on academic outcomes.

Some studies look at particular subsets of the homeschooling population, such as those who take standardized tests and those who enter college. These studies indicate that these subsets look relatively successful by traditional measures. But this doesn’t prove much. The studies tell us nothing about the generality of homeschooling students, because they look only at the subsets likely to be most successful and ignore those likely to be least successful. We don’t know what percentage of homeschoolers take standardized tests, what percentage of test results are revealed by parents, or what percentage of homeschoolers enter college.

These studies do, nonetheless, provide some basis for concern. One study known as the Cardus Education Survey examined the subset of homeschoolers who graduate from high school, analyzing their success on a range of social, psychological, and educational outcomes. This is a very significant study because it involves a large and randomly selected sample. It of course assesses a relatively successful subset of homeschoolers—those with high school degrees. Nonetheless it found that the homeschoolers were less likely to enter college and obtained slightly less post-secondary education than public schoolers. Homeschoolers who did pursue post-secondary education attended less prestigious universities than their non-homeschooled counterparts.

93 See, e.g., Christian P. Wilkens, Carol H. Wade, Gerhard Sonnert & Philip M. Sadler, Are Homeschoolers Prepared for College Calculus?, 9 J. SCHOOL CHOICE 30 (2015). Wilkens et al. used data from the national survey FICSmath to examine first-year college calculus grades. On average, students who were homeschooled for a majority of their high school years scored 5.2 points higher than their traditionally schooled peers—a statistically significant difference.

94 The results of the Cardus surveys, conducted in 2011 and 2014, are presented in three reports. See PENNINGS & WIENS, supra note X; DAVID SIKKINK & SARA SKILES, HOMESCHOOLING AND YOUNG ADULT OUTCOMES: EVIDENCE FROM THE 2011 AND 2014 CARDUS EDUCATION SURVEY (June 22, 2015); DAVID SIKKINK & SARA SKILES, CARDUS EDUCATION, MAKING THE TRANSITION: THE EFFECT OF SCHOOL SECTOR ON EXTENDED ADOLESCENCE (Apr. 17, 2018). The survey drew from a nationally representative sample of over 3,000 U.S. high school graduates. The authors controlled for many key variables. See id. at 5. For a review of the 2018 report (and summary of key findings from all three reports), see Milton Gaither, MAKING THE TRANSITION: Cardus Authors on Homeschooling and Adult Outcomes, Int’l Ctr for Home Educ. Research R. (Feb. 1, 2019), http://icher.org/blog/?p=4128.


97 Sikkink & Skiles, supra note X, at 8 [2015 summary]; PENNINGS & WIENS, supra note X, at 33.
peers.98 Homeschoolers were far less likely to obtain a four-year college or a graduate degree and reported lower incomes than other young adults.99

The Cardus study also shows that homeschoolers emerge with significantly different levels of civic engagement and well-being than public schoolers. They were less likely to volunteer, and were more politically disengaged.100 They reported significantly lower levels of wellbeing and social trust.101 They reported having a less strong direction in life or sense of purpose, and a greater sense of helplessness in dealing with life problems.102 They got divorced more.103 Religious homeschoolers were more likely than public schoolers to feel that the dominant U.S. culture was hostile to their moral values, and more likely to support a gendered division of labor within the home.104

The Cardus authors’ reports are situated somewhere between “good social science” and advocacy research. The authors make every effort in their 2018 summary of the results of their different surveys to explain away the negative findings:

The authors try very hard to avoid the obvious conclusions of their own data…. [Their final report represents] spin. … Why? Because they have one foot in the research world of legitimate methodology and the other in the advocacy world where the data must end up making home and private schooling look good no matter what.105

Other methodologically sound studies also reveal some evidence of problems even for the most successful subsets of homeschoolers. One found that while overall the homeschoolers who took standardized tests did slightly better than public schoolers, there was a huge divergence between homeschoolers receiving structured as versus unstructured home education. Those receiving unstructured education, as many homeschoolers do, scored significantly lower than public schoolers.106

None of these studies tell us how successful the students represented would have been had they gone to regular schools instead of being homeschooled. Homeschooling parents have in the past

98 SIKKINK & SKILES, supra note X, at 9; PENNINGS & WIENS, supra note X, at 33 (homeschoolers attend universities with lower average SAT scores and are more likely to attend open-admission universities).
99 See Gaither, supra note X [Making the Transition].
100 Id. at 11.
102 Id. at 10, 13.
103 Gaither, supra note X [Making the Transition].
104 SIKKINK & SKILES, supra note X [2015], at 6-7.
105 Gaither, supra note X [Making the Transition]. In an earlier review of the 2011 and 2014 Cardus reports, Gaither’s colleague Robert Lyon notes that the authors are representatives of Cardus which is a pro-homeschooling organization and that the research is “built on the premise that the success of homeschooling should be judged based on how well it fulfills the parent’s intended goals rather than traditional measures of success like grades, test scores, or graduation rates.” Lyon, supra note X.
106 See Sandra Lyn Martin-Chang, Odette Noella Gould, Reanne E. Meuse, The Impact of Schooling on Academic Achievement: Evidence From Homeschooled and Traditionally Schooled Students, 43 CANADIAN J. BEHAVIOURAL SCIENCE 195, 195 (July 2011); see also Macquarrie, supra note X (memorandum at n.89).
been atypically privileged in socio-economic terms,\textsuperscript{107} and since socio-economic status is a predictor of academic success,\textsuperscript{108} their children would likely have done better than average for that reason alone.

Most important, there are no studies of the problematic subsets within the homeschooling population. Studies of the average performance of the most successful subsets of homeschoolers – those who get high school degrees and go on to college, tell us nothing about those who don’t. We need to know how the at-risk subsets are doing: those who don’t get high school degrees, take standardized tests, or go to college; those who grow up entirely off the grid; those victimized by abuse and neglect.

\textit{Subsets matter.} Our child protection system operates on this principle. We could say that because, looking at statistical averages, most parents don’t abuse or neglect their children, we don’t need a system protecting children against abuse and neglect. We could say that because most people don’t commit murder we don’t need laws prohibiting murder. But we don’t. We say instead that we need a system designed to protect at-risk subsets.

We should have a comparable system governing homeschooling, designed to ensure all children an adequate education and adequate protection, even if we believed that most parents are capable of and interested in providing that education, and that few would abuse or neglect their children when free from any surveillance in the privacy of their homes.

Moreover, we know that \textit{by definition} a substantial percentage of homeschoolers are being deprived of the kind of education we should think of as minimally adequate. As Dwyer and Peters say, in their comprehensive recent book on homeschooling, many religious homeschoolers object in principle to some core goals of public education:

\begin{quote}
[T]hey reject the value of independent thinking about values and aims in life, they oppose instruction in scientific methodologies… and they want to constrain their daughters’ lives to a single occupation—housewife. To the extent parents in this group do value secular learning, they treat it—even basic literacy—as of little importance compared to unflinching acceptance of religious doctrine and reactionary political views.\textsuperscript{109}
\end{quote}

\textsuperscript{107} Until relatively recently, and likely during the time reflected in these studies, homeschooling children lived overwhelmingly in two-parent households, a majority had only one parent in the workforce, they had moderately higher education levels than the norm, and a lower percentage of low income parents. See Kunzman & Gaither, \textit{supra} note X, at 8 (surveys from 2001 to 2007 suggest around 75\% of homeschoolers were white, and 89\% of homeschoolers in 2007 lived in two-parent households). The most recent survey data show a somewhat different picture, with a smaller percentage of privileged homeschoolers. For example, the percentage of parents with no high school degree or GED increased from 1\% in 1999 to 15\% in 2016, while the percentage with a graduate or professional degree fell from 24\% to 15\% during this period. See Homeschool Demographics, CRHE, https://www.responsiblehomeschooling.org/homeschooling-101/homeschool-demographics/. For 2016 data, see McQuiggan ET AL., \textit{supra} note X, at 18 tbl.?; for 1999 data see Table 40: Number and percentage of homeschooled students ages 5 through 17 with a grade equivalent of kindergarten through 12th grade, by selected child, parent, and household characteristics: 1999, 2003, and 2007, NTL CTR EDUC. STATS., https://nces.ed.gov/programs/digest/d11/tables/dt11_040.asp.


\textsuperscript{109} Dwyer & Peters, \textit{supra} note X, at 211.
2. The Policy Advocacy Research

This constitutes the great body of alleged research on homeschooling. It is funded, designed, and
promulgated by those leading the homeschooling advocacy movement, primarily the Home
Schooling Legal Defense Association (HSLDA).\footnote{Id. at 98; Sandra Martin-Chang & Kyle Levesque, supra note X at 122 (“majority of the work investigating the
academic impact of homeschooling has been commissioned by the homeschooling groups themselves”); Martin-Chang et al., supra note X, at 195.}

It is regularly deployed by those same
leaders in legislative and court battles, helping shape the law and policy that define
homeschooling today.\footnote{Maclearrie, supra note X (memorandum at n.76). Brian Ray’s work is frequently cited by the HSLDA.
Maclearrie, supra note X (memorandum at 17 n.77); see, e.g., Mike Smith & Roy Hanson, New Tragedy Could

Much of this research has been conducted by Brian D. Ray and the National Home Education
Research Institute (NHERI) he founded in 1990 as the research arm of HSLDA.\footnote{For a critique of Ray’s studies see, e.g., Milton Gaither, Brian D. Ray and NHERI, part 1, HOMESCHOOLING
Ray’s ties to HSLDA, see Milton Gaither, Brian D. Ray and NHERI, part 2, HOMESCHOOLING RESEARCH NOTES
}

He has published numerous studies, almost all through NHERI, purporting to show that homeschoolers’
academic performance is at least as strong as that of their public school peers.\footnote{See generally Homeschooling Research, Studies and Scholarship, NATIONAL HOME EDUCATION RESEARCH
INSTITUTE, https://www.nheri.org/homeschooling-research-studies-and-scholarship/; see, e.g. Brian D. Ray,
Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study, 8 ACADEMIC
LEADERSHIP 1, 27 (Feb. 2010).}

He has also published work claiming that there is no relation between the level of homeschooling regulation
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and no evidence that homeschoolers are at greater
risk of maltreatment than other children.\footnote{See, e.g., Milton Gaither, Brian D. Ray and NHERI, part 1 (Sept. 2008),
https://gaither.wordpress.com/2008/09/30/brian-d-ray-and-nheri-part-1/; Lubienski et al., supra note X, at 388 (lack
of empirical evidence supporting claim that homeschooling causes better academic outcomes). See also Wilkens et al., supra note X, at 31 (“Work on the performance of homeschoolers… has remained largely anecdotal, subject to bias, and highly politicized (including experimental or quasi-experimental work”); Dwyer & Peters, supra note X, at 97-99; Martin-Chang et al., supra note X.}

This research has been persuasively debunked by many reliable scholars, who have thoroughly
demonstrated its methodological and other problems.\footnote{See, e.g., Milton Gaither, Brian D. Ray and NHERI, part 1, HOMESCHOOLING
of empirical evidence supporting claim that homeschooling causes better academic outcomes). See also Wilkens et al., supra note X, at 31 (“Work on the performance of homeschoolers… has remained largely anecdotal, subject to bias, and highly politicized (including experimental or quasi-experimental work”); Dwyer & Peters, supra note X, at 97-99; Martin-Chang et al., supra note X.}

These include the fact that almost all
Ray’s studies rely on self-selected samples of students likely to be in a tiny subset of the most
successful homeschoolers, and that their success is often measured by their parents’
administration of tests. These scholars have shown conclusively that Ray’s work is not true social science, but advocacy dressed up as science.

Education scholars Robert Kunzman and Milton Gaither conducted the most comprehensive analysis of homeschooling research. They describe it as generally “politically motivated,” noting the predominance of research sponsored by the HSLDA and conducted by Ray, and detail the “design flaws” characterizing this work. They note that Ray typically tells those who volunteer for his studies that they will be used for homeschooling advocacy, and that homeschooling leaders urge parents not to participate in research unless it is sponsored by advocacy groups.

Other education scholars have similarly found this body of research filled with unsubstantiated claims and “methodologically flimsy,” concluding that it serves simply as “empirical cover” for advocacy, and is “just a very useful marketing mechanism.” Gaither summarizes: “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….”

In 2012 a group of serious scholars from around the world founded the International Center for Home Education Research (ICHER) to address the proliferation of advocacy research. They condemn the “deeply flawed research focused more on scoring political points than furthering understanding,” and note that advocates often exacerbate the problem by popularizing research results in misleading ways.

The Ray studies purporting to address child maltreatment rates are similarly flawed. As discussed above, there is no way to assess maltreatment rates among homeschoolers given our

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117 See, e.g., DWYER & PETERS, supra note X, at 98-99 (such studies often examine only “a small subset of homeschooling parents,” those who have voluntarily chosen to administer standardized tests—in their homes, proctoring the exams themselves—and to reveal the results’’); Chelsea McCracken, HOW TO MISLEAD WITH DATA: A CRITICAL REVIEW OF RAY’S ACADEMIC ACHIEVEMENT AND DEMOGRAPHIC TRAITS OF HOMESCHOOL STUDENTS: A NATIONWIDE STUDY (2010), CRHE (Jan. 15, 2014), http://www.responsiblehomeschooling.org/wp-content/uploads/2013/12/ray-2010-for-pdf.pdf (Ray’s study “does not prove that homeschoolers have higher academic achievement than other children” but “merely gives a description of the demographics of a particularly privileged subset of homeschoolers (composing approximately 2-3% of all homeschoolers) and an average of their standardized test scores”); see also Kunzman & Gaither, supra note X, at 17.
118 Kunzman & Gaither, supra note X, at 4 (covering “virtually the entire universe of English-language academic texts on the topic”).
119 Id. at 16-21, 36.
120 Id. at 16, 36.
121 Lubienski, supra note X, at 379, 388. See also id. at 390 (“There is essentially no scientific evidence on the effectiveness of homeschooling”).
123 About ICHER, INTERNATIONAL CENTER FOR HOME EDUCATION RESEARCH, http://www.icher.org/icher.html. ICHER keeps a database of homeschooling research and a chart of homeschooling regulations by state.
124 Id.
125 See supra notes XX[2 fns re. Ray’s studies].
126 See supra Section II.C.
inability to take representative samples of the total community. Moreover, Ray relies on official maltreatment rates, which are misleadingly low in families isolated from the larger community, away from observation by those who might report to CPS, including the school personnel who are mandated reporters. Accordingly, his claims that there is no connection between home schooling and maltreatment are totally groundless.

This corrupt research/policy merger also exists in the child protection area, where it has had a devastating impact, regularly persuading policy-makers to adopt programs which favor parent rights to control children over child rights to protection. In both areas, the funding is there for the advocacy research. The studies are dressed up to look like true social science. And policy makers may have trouble telling good from bad science, particularly when subject to overwhelming pressure by advocacy forces with a parent rights perspective.

III. THE CURRENT LAW

Here I address the law as it is today. In Section V, The Way Forward, I address what I believe the law should be in the future.

A. Federal and State Constitutions Permit Significant Restrictions on Homeschooling

A major goal of the homeschooling movement was to establish parents’ right to homeschool as a powerful constitutional right triggering strict scrutiny, making all regulation presumptively unconstitutional. The movement has relied on parents’ liberty rights under substantive due process, and on parents’ religious freedom rights.

The movement largely failed to achieve this goal, regularly losing its claims in both federal and state courts. U.S. Supreme Court doctrine makes it clear that states are free to impose reasonable restrictions on homeschooling, and the state and lower federal courts have so held, interpreting both state and federal constitutions. The courts have generally rejected the strict scrutiny standard, applying either a rational relationship or an intermediate standard of review. They have generally upheld such restrictions as states have imposed, regardless of the standard applied. However, state courts have occasionally struck down restrictions, and have occasionally indicated that strict scrutiny is or might be the appropriate standard.

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127 See also AT-RISK HOMESCHOoled CHILDREN: AN ISSUE BRIEF, supra note X, at 2 (“There has been no research comparing the overall level of child abuse among children who are homeschooled with that among children who attend school; the data to conduct such a study does not currently exist.”).
128 See discussion supra Section II.C.
130 For descriptions of the development and current state of homeschooling law, see, e.g., Antony Barone Kolenc, Legal Issues in Homeschooling, in THE WILEY HANDBOOK OF HOME EDUCATION, supra note X, at 59-85; DWYER & PETERS, supra note X at 51-66; Milton Gaither, Making it Legal, in HOMESCHOOL: AN AMERICAN HISTORY, supra note X, at 207-40.
131 See DWYER & PETERS, supra note X, at 120 (“Homeschooling parents generally… lost when they claimed a constitutional right to be free of regulation… regardless of whether they asserted a religious basis for their objection and regardless of whether courts applied strict scrutiny”).
1. U.S. Supreme Court Doctrine

The Supreme Court has never ruled directly on a case involving parents’ rights to withdraw their children from the entire educational system in the name of homeschooling.\footnote{132 The one case arguably involving some version of homeschooling is Wisconsin v. Yoder, 406 U.S. 205 (1972), discussed below, but there the Amish only claimed the right to withdraw their children from regular schools after the eighth grade, and it’s not clear what form of alternative schooling they might receive. Dwyer suggests that the Supreme Court has implicitly ruled that “there is no parental constitutional right to homeschool.” See DWYER & PETERS, supra note X, at 58 (discussing the Court’s summary dismissal of Turner v. People of State of Cal, 347 U.S. 972 (1954), in which the California Supreme Court upheld the state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ

But it did make clear in the cases that first established parents’ rights, \textit{Meyer v. Nebraska},\footnote{133 Meyer v. Nebraska, 262 U.S. 390 (1923).} and \textit{Pierce v. Society of the Sisters}, that these rights are limited by the state’s right to impose “reasonable” regulations ensuring an adequate education.

The Court struck down the regulations at issue as unreasonable. But these cases raise very different issues from homeschooling. The children attended actual schools, with their many characteristics taken as a given—credentialed teachers, required courses and instructional hours, and extensive socialization with children and adults outside the family. \textit{Meyer} simply struck down a state law forbidding the teaching of foreign languages until eighth grade. \textit{Pierce} struck down a requirement that children attend public rather than private school.

Both cases give states a great deal of room to restrict homeschooling. In \textit{Meyer} the Court said:

\begin{quote}
[E]ducation of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. 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 ....\footnote{135 Meyer, supra note X, at 400, 402 (emphasis added).}
\end{quote}

In \textit{Pierce}, the Court said:

\begin{quote}
No 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 teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.\footnote{136 Pierce, 268 U.S. at 534 (emphasis added).}
\end{quote}

A later Supreme Court case summarized subsequent law as follows:

\begin{quote}
Since \textit{Pierce}, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ
teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes.\textsuperscript{137}

And in another case the Court described the fundamental purposes of public education as including preparation “for citizenship in the Republic,” and inculcation of “the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”\textsuperscript{138}

Education scholar Martha Minow notes that Pierce stresses the importance of the state’s educational goals related to such civic values as liberty and equality, the development of autonomy and self-determination, and the ability to accept the rights and responsibilities of citizenship.\textsuperscript{139} Pierce gives parents the right to select values that go beyond the public, but “it also makes sure that the private schools add, and do not subtract from or conflict with, the missions of the public.”\textsuperscript{140} Family law scholar Jeffrey Shulman states that private schools “can be required to provide an education equivalent to that of the public schools,” and that the Court’s decisions “do little to limit the scope of legitimate state regulation.”\textsuperscript{141} Michael Rebell notes in his recent book on education\textsuperscript{142} that the Court has in recent decades regularly referred to the schools’ “critical role in educating for citizenship.”\textsuperscript{143}

The Court’s decision in Prince v. Massachusetts\textsuperscript{144} supports the state’s right to regulate to protect children against maltreatment, and to ensure the child’s future autonomy. The Court upheld application of child labor laws against a claim to immunity based on both parent rights and religious freedom, saying: “Neither the rights of religion nor the rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as parens patriae may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.”\textsuperscript{145} It explained:

\begin{quote}
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.\textsuperscript{146} …[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty.\textsuperscript{147} … [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.\textsuperscript{148} … Parents may be free to become martyrs themselves. But it does not follow
\end{quote}

\begin{footnotes}
\item[137] Bd. of Ed. of C. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245-46 (1968) (emphasis added) (citation omitted)
\item[139] Martha Minow, Before and After Pierce, 78 UNIV. DETROIT MERCY L.R. 407, 413, 418 (2001).
\item[140] Id. at 415.
\item[141] Shulman, supra note X[chapter], at 8-9, 20.
\item[142] REBELL, supra note X.
\item[143] Id. at 46.
\item[144] 321 U.S. 158 (1944).
\item[145] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
\item[146] Id. at 165.
\item[147] Id. at 166.
\item[148] Id. at 167.
\end{footnotes}
they are free... to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.149

In more recent cases the Supreme Court has developed constitutional doctrine more specifically defining parental rights as part of the liberty protected by substantive due process.150 And it has identified various levels of scrutiny for state action impinging on individual rights ranging from rational relationship to intermediate scrutiny to strict scrutiny. Rational relationship imposes a minimal burden of justification on the state, intermediate scrutiny imposes a greater burden, balancing other interests at issue, and strict scrutiny imposes a very heavy burden.151

The Court applied a balancing approach in the Meyer, Pierce, and Prince cases, indicating that parental interests should be weighed against potentially conflicting child and state interests in deciding what regulation was reasonable. And Troxel,152 the Court’s most recent case addressing such a conflict, seemed to reject the strict scrutiny standard, applying instead an intermediate, balancing test. A careful academic analysis of all the Court’s cases involving conflicting parent and child interests concludes that the Court regularly balanced the interests, effectively applying an intermediate scrutiny standard.153

The Court’s Yoder decision154 is regularly relied on by the homeschooling movement as providing special protection for religious parents. There the Court held Amish parents exempt from compulsory education requirements after the eighth grade, based on parent liberty and religious freedom rights. However the Court noted the state’s general power, “having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”155 It stressed issues making the case inapplicable to broader claims for exemption, stating that its holding was based on a “convincing showing, one that probably

149 Id. at 170. Shulman characterizes Prince as applying a limited level of scrutiny, saying that the state need “demonstrate only that it had a legitimate (not a compelling) interest to promote the public welfare and that it had used a means – here, a restriction on commercial activity by children – reasonably related to its purpose (not the least restrictive means possible).” Shulman, supra note X[book], at 84.
151 See David D. Meyer, Family Law Equality at A Crossroads, 2013 MICH. ST. L. REV. 1231 (2013) (discussing constitutional standards of review in family law cases); see generally LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16 (2d ed. 1988) (describing the three standards of review under the Equal Protection Clause in sections 16-2, 16-3, 16-6, and 16-31.).
152 See Troxel, 530 U.S. 57.
153 See David D. Meyer, Family Law Equality at A Crossroads, 2013 MICH. ST. L. REV. 1231, 1245 (2013) (“strict scrutiny … was replaced with a murky standard that simply directed courts to give unspecified ‘special weight’ to the parent’s interest, along with a collection of other factual considerations”)(emphasis added); see also id. at 1236-37 (“[Despite describing parent rights as fundamental, the Court’s family-privacy cases strongly suggest that the Court in fact applies a less stringent form of review”); id. at 1245-46 (“the Court has pushed pragmatically toward murky forms of protection that allow for more flexible balancing of the competing interests.”); David Meyer, The Paradox of Family Privacy, 53 VAND. L. REV. 527, 545–46 (2000) (“the Court regards some form of heightened scrutiny as appropriate whenever the state intrudes significantly upon a parent's basic decision concerning child rearing… And yet the Court… stops short of embracing strict scrutiny as the governing standard.”); see also Shulman, supra note X[chapter], at 17-18. Troxel itself does not make entirely clear what standard is appropriate. But the majority did not embrace the strict scrutiny standard, an issue directly raised by the decisions below, the briefs, and the one Justice who found that strict scrutiny should be the standard.
155 Id. at 213.
few other religious groups or sects could make.”156 It found that Amish cultural values were generally consistent with core American values, and that raising children within the Amish culture was consistent with both child and societal interests,157 by contrast to much of what goes on in homeschooling. Since children were not formally represented, nor any conflict between parent and child interests raised, *Yoder* is limited on these grounds also.

*Yoder* is a deeply problematic case that should either be confined to its facts or overruled. The Court entirely ignored child interests in apparent conflict with Amish parent and group interests.158 It empowered the Amish to keep their children from mainstream cultural influence precisely because children might choose to escape the Amish community, should they receive an education enabling them to access other options.159 It vindicates parent and group control over children without regard to child rights, including what has been called “the right to an open future.”160

A subsequent Supreme Court case161 significantly undermined *Yoder*, holding that free exercise clause objections to neutral, generally applicable laws did not trigger heightened scrutiny.162 While this case suggested in dicta that cases involving a hybrid claim linking the religious right

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156 *Id.* at 235–36. The Court suggested its holding applied only to Amish and Mennonites, noting they lived separate and apart for centuries. *Id.* at 235.

157 *See id.* at 230 (“this case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated, or may be properly inferred”). The Court went on to explain: “the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education 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, or in any other way materially detract from the welfare of society.” *Id.* at 234.

158 *See id.* at 241-46 (Douglas, J., dissenting); *Tribe, supra* note X, at 1258 (“in a case like *Yoder*, it is at least arguable that the community’s autonomy – or the right of the parents – must yield if the rights of the children are to be defended”); *Id.* at 1299 (“the majority was plainly more concerned about the parents’ ability to prevent their adolescent children from being exposed to [conflicting] ‘attitudes, goals, and values’ than with the opportunity of children themselves to develop independent life styles and to pursue options potentially at odds with the views and aspirations of their families and religious mentors”).

159 The Court said that the school attendance requirement put the community at risk by interfering with the child’s religious development and integration into the Amish lifestyle, and warned that “compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice ….” *Id.* at 218; *see Tribe, supra* note X, at 1193 (“*Yoder* exempted the Amish from Wisconsin’s law … because the law would have gravely jeopardized the religion’s very survival”).

160 *See Dwyer & Peters, supra* note X, at 128; Shulman, *supra* note X[chapter], at 33 (“[C]hildren have a freestanding moral claim to intellectual autonomy… children have a constitutional claim against state action that empowers parents to limit unduly the educational experiences that make genuine autonomy possible”); *see also* Rob Reich, *How and Why to Support Common Schooling and Educational Choice at the Same Time*, 4 J. PHI. EDUC. 709, 721 (2007) (arguing the state “must make it possible for children to make decisions about the kind of lives they wish to lead”); *Macedo, supra* note X, at 238 (arguing “at the very least” child must “be provided with the intellectual tools necessary to understand the world around them, formulate their own convictions, and make their own way in life”).

161 *See Employment Division v. Smith, 494 U.S. 872 (1990).*

to another right, as in *Yoder*, might warrant different treatment, courts and commentators have generally rejected this vague hybrid rights theory, and courts have generally upheld homeschooling restrictions in the face of religious freedom claims.

In sum, Supreme Court doctrine fails to support homeschooling advocates’ claim that strict scrutiny should apply in this area in assessing the constitutionality of state action impinging on parent rights. It leaves states free to restrict homeschooling in ways designed to ensure that children receive an adequate education and adequate protection from harm.

However, the Supreme Court has not made the applicable constitutional standard entirely clear. This leaves room for courts and legislators to conclude that homeschooling regulation should be looked at through a strict scrutiny lens.

And even if the intermediate or rational relationship standards are recognized as appropriate, and courts engage in balancing conflicting interests, Supreme Court doctrine to date generally gives precedence to parent as opposed to child rights. This is in significant part because of our negative rights tradition, protecting individuals against wrongful state intervention, and not granting positive rights to state assistance. *Meyer* and *Pierce* balance the parents’ constitutional rights against the state’s rights to impose reasonable regulations, rather than the child’s constitutional right to obtain an appropriate education. In a famous child protection case involving a child grievously injured by his father, *DeShaney*, the Court found that the child had no constitutional claim for the state’s failure to provide protection, while at the same time recognizing that parents have constitutional protection against undue intervention by the state. Under any test involving a balancing of interests, children may lose out if parent interests are constitutionally protected while child interests are not. Also, current doctrine may leave states free not to protect children if they so choose.

2. State and Lower Federal Court Doctrine

The homeschooling movement has regularly lost its claims challenging the legality of restrictions on homeschooling in the state and the lower federal courts. As of the late 1980s the courts had

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163 See *Smith*, 494 U.S. at 881–82.

164 See *Driver*, supra note X, at 409, 410 (“The passage of time has only intensified doubts about *Yoder*’s legitimacy;” “with *Yoder* hanging by a thread it would hardly be surprising if the Court overruled the precedent”); *Dwyer & Peters*, supra note X, at 59 (“Most lower courts addressing parental objections to laws governing child-rearing after Smith, though, have dismissed this dictum [preserving the hybrid rights theory] as nonbinding and nonsensical.”); Shulman, supra note X(CPbook), at 118-23 (federal courts have either read hybrid rights theory out of existence or left it little room to apply). For cases rejecting the hybrid rights theory see, e.g., *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 246-47 (3d Cir. 2008) (applying rational relationship); *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001); *Douglas Cty. v. Anaya*, 269 Neb. 552, 557 (2005) (“[Smith] did not hold that a strict scrutiny review is required simply because more than one constitutional right might be implicated.”). But see *Kolence*, supra note X, at 72 (“lower courts have applied the hybrid rights doctrine inconsistently”). See related discussion infra Section III.A.2. State courts often limit *Yoder* to the Amish or similar groups. See *Dwyer & Peters*, supra note X, at 58 n.77 (collecting cases).

165 *DeShaney* v. Winnebago County Dept. of Soc. Services, 489 U.S. 189, 202 (1989). However, the Court stated that a claim of selective state failure to protect some class of children would raise equal protection issues. *Id.* at 196-7 n.3.

166 See generally Teri Dobbins Baxter, *Private Oppression: How Laws That Protect Privacy Can Lead to*
concluded, when dealing with outright bans on homeschooling, that such bans were constitutional.\textsuperscript{167} When later the issue became the constitutionality of specific homeschooling restrictions, the courts consistently rejected the claim that states have no right to impose restrictions,\textsuperscript{168} and generally upheld such restrictions as the states imposed.\textsuperscript{169} They generally rejected the strict scrutiny standard for one that imposes a lower burden of justification on the state, providing significant deference to the state interest in regulating education.\textsuperscript{170} Most appear to apply a rational relationship standard, upholding restrictions they find “reasonable.”\textsuperscript{171} The courts have upheld, for example, requirements related to parent qualifications,\textsuperscript{172} including prior certified instructor status,\textsuperscript{173} curriculum,\textsuperscript{174} annual reporting requirements,\textsuperscript{175} instructional time,

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\textit{Oppression, 58 U. KAN. L. REV. 415, 458 (2010) (“Constitutional challenges to statutes such as Pennsylvania's generally have not been successful.”); Gaither, supra note X at 209; DWYER & PETERS, supra note X, at 58; see, e.g., Duro v. District Attorney, 712 F.2d 96, 99 (4th Cir. 1983) (holding the state’s interest in compulsory education was sufficient to override parents’ religious interest in homeschooling); Clonlara, Inc. v. Runkel, 722 F. Supp. 1442, 1457 (E.D. Mich. 1989) (“No case has yet found a generalized right of privacy under the Constitution which would allow parents the right to home school free from reasonable government regulation.”). For two outlier cases, see Perchemlides v. Frizzle (CA-16641, Mass. Sup. Ct. 1978) (holding a school superintendent had gone too far by requiring that homeschoolers have a social experience equivalent to that of public schoolers, because the state could not “set standards that are so difficult to satisfy that they effectively eviscerate the home education alternative”); People v. DeJonge, 501 N.W.2d 127, 140 (Mich. 1993) (holding a teacher certification requirement violated the free exercise clause as applied to homeschooling parents who demonstrated a sincere religious objection, and who were otherwise providing an adequate education).}
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\textsuperscript{167} See DRIVER, supra note X, at 400 (citing TYLL VAN GEEL, THE COURTS AND AMERICAN EDUCATION LAW 21-22 (1987)).

\textsuperscript{168} Robin Cheryl Miller, Annotation, Validity, construction, and application of statute, regulation, or policy governing home schooling or affecting rights of home-schooled students, 70 A.L.R.5th 169 § 2[a] (Originally published 1999).

\textsuperscript{169} See generally Miller, supra note X; see id. at §2[a] (“courts have upheld… requirements that the home–school program be approved by school authorities, that an application for approval of a home–school program be submitted by a specified date, that parents submit progress reports on their home–schooled children, and that home–schooled children submit to various kinds of standardized testing”) (internal citations omitted).

\textsuperscript{170} See, e.g., Baxter, supra note X, at 452-61.

\textsuperscript{171} See Kolenc, supra note X, at (noting that strict scrutiny “rarely” applies, and that “[s]everal lower court cases” have “applied the deferential rational basis review instead”); see Immediato v. Rye Neck Sch. Dist., 73 F3d 454, 462 (2d. Cir. 1996) (under rational basis review, high school’s community service requirement did not violate parents’ Fourteenth Amendment right to direct their children’s upbringing); Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996) (same); Ohio Ass’n of Indep. Schools v. Goff, 92 F.3d 419 (6th Cir. 1996) (statute requiring charter schools to administer certain standardized tests, and prohibited awarding diplomas to students to students who failed to achieve a certain score, did not violate parents’ Fourteenth Amendment rights was “rationally related to a legitimate governmental interest”); Murphy v. Arkansas, 852 F.2d 1039, 1044 (8th Cir. 1988) (upholding regulations on homeschooling under rational basis review). For other cases applying rational basis review, see, e.g., Scoma v. Chicago Bd. of Ed., 391 F. Supp. 452 (N.D. Ill. 1974); Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980); People v. Bennett, 442 Mich. 316, 324 (1993).

\textsuperscript{172} See, e.g., Crites v. Smith, 826 S.W.2d 459, 466 (Tenn. App. 1991) (upholding requirement that parents have baccalaureate degree or equivalent against hybrid rights claim, appearing to apply rational relationship”); State v. Patzer, 382 N.W.2d 631 (N.D. 1986) (upholding teacher certification requirement under strict scrutiny).


\textsuperscript{174} See, e.g., Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231 (3d Cir. 2008).

\textsuperscript{175} See, e.g., State v. Rivera, 497 N.W.2d 878, 880-81 (Iowa 1993) (“in setting minimum educational standards the state is also empowered to adopt reasonable requirements to assure that those standards are honored”).
As noted above, the courts have also generally rejected claims that Yoder requires special protection for religious homeschoolers. They have generally upheld homeschooling requirements against religious claims, even when sometimes applying a heightened scrutiny standard. The Michigan Supreme Court DeJonge case stands as the one significant exception.

One important federal court decision illustrates the general readiness to uphold education rules against religious freedom challenges. It involved the issue of whether public school children could be required to use a reader exposing them to ideas and values in conflict with their parents’ religious beliefs. The Sixth Circuit Court of Appeals upheld the school’s requirement, finding that mere exposure to contrary beliefs did not violate religious freedom. The court noted that Yoder rested on “such a singular set of facts that we do not believe it can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden.”

Nonetheless the homeschooling movement has had some disturbing success in pushing its constitutional theories, in significant part because of its aggressive advocacy. Some courts have upheld instructional time and portfolio review requirements, minimum performance on standardized tests, and home visits to assess compliance.

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176 See, e.g., Combs, 540 F.3d 231 (upholding instructional time and portfolio review requirements).
177 See, e.g., Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988) (applying strict scrutiny to religious claim but upholding testing requirement as the least restrictive means of accomplishing state interest in education); In re Ivan, 48 Mass. App. Ct. 87 (Mass. App. 1999) (upholding standardized tests and portfolio review requirements).
178 See, e.g., Matter of Kilroy, 121 Misc. 2d 98, 100 (N.Y. Fam. Ct. 1983); (upholding in-home evaluation to assess mother’s ability to provide education substantially equivalent to public school); Blackwelder v. Safnauer, 689 F. Supp. 106, 113 (N.D.N.Y. 1988) (upholding requirements that parents submit detailed plan of instruction, curriculum materials and textbooks, description of teacher’s background, experience and credentials, and home visits). For caselaw generally upholding state requirements see generally Miller, supra note X, at I §2[a].
179 See discussion of Yoder supra Section III.A.1; Miller, supra note X, at II A §3; see, e.g., Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1385 (Me. 1988) (prior approval of homeschooling, including various instructor and instructor requirements, did not violate First Amendment rights).
180 The Michigan Supreme Court held in DeJonge that a requirement homeschoolers be taught by state-certified teachers was invalid under the state constitution as applied to parents whose religious beliefs prohibit using such instructors, applying a strict scrutiny standard. See People v. DeJonge, 501 N.W.2d 127, 129 (Mich. 1993). It ruled in a companion case that such a requirement was constitutional as applied to parents with non-religious objections, applying the rational relationship standard. See People v. Bennett, 442 Mich. 316 (1993). However the federal Sixth Circuit subsequently rejected the hybrid rights theory under the Federal Constitution, finding that rational basis review applied. See Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); see also Dwyer & Peters, supra note X, at 66 (noting Kissinger “eviscerate[ed] the legal foundation of the DeJonge decision”). Few cases apart from DeJonge have applied strict scrutiny based on a religious claim. But see, e.g., Murphy v. State of Ark., 852 F.2d 1039 (8th Cir. 1988) (upholding standardized testing under this standard). However some states have passed Religious Freedom Restoration Acts which apply to state regulations limiting religious freedom, requiring courts to apply strict scrutiny, and many state courts refuse to follow Smith in interpreting their own religious freedom constitutional clauses. See discussion of the complications of post-Smith law in Sutton, supra note X, at 205-07.
181 See Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).
182 See id. at 5, 10.
183 Id. at 9.
struck down apparently reasonable regulation. Some have indicated that strict scrutiny or some other very demanding standard might be the appropriate standard.

One example is the notorious Jonathan L. case in California. The homeschooling parents in this case had been repeatedly reported to CPS over a period of 20 years for physical abuse, neglect, failure to prevent sexual abuse, and unsafe home conditions. Eventually child protection proceedings resulted in a court order removing two of the younger children to foster care. The mother fled with the children to avoid this order; later when the court allowed the children to be kept at home on condition that the parents cooperate with CPS, the parents refused to cooperate, and limited social worker access to the children. The children’s lawyer then sought an order that they be enrolled in a school so they could be in regular contact with mandatory reporters. The court denied the order based on the parents’ “absolute constitutional right” to homeschool.

The intermediate appellate court originally ruled that California education law provided no basis for parents to homeschool where, as here, there was no certified teacher or tutor involved, since the law only allowed exemptions from compulsory education for “private full-time day school,” and for children tutored by someone with the appropriate state teaching credential.

The homeschooling movement kicked into gear, helping create a “national outcry.” Public statements were issued by several California officials, including the Governor and the state superintendent of schools, all opposing this straightforward interpretation of state law. The outcry focused on condemning restrictions on homeschooling and ignored entirely the risks that children might be subject to serious maltreatment in the absence of restrictions.

In response, the appellate court granted a rehearing. It received amicus briefs from a plethora of Christian homeschooling organizations as well as certain members of the U.S. Congress.

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184 See Miller, supra note X, at l§2[a] (observing courts have sometimes struck down home visits and parent qualification requirements).

185 See Kolenc, supra note X, at 68-69.


187 See id. at 1082 (describing the dependency court proceedings).


190 Then-Governor Arnold Schwarzenegger called for In Re. Rachel’s reversal, warning that "if the courts don't protect parents' rights then, as elected officials, we will." Chad Olsen, Constitutionality of Home Education: How the Supreme Court and American History Endorse Parental Choice, 2009 BYU EDUC. & L.J. 399, 405 (2009), https://digitalcommons.law.byu.edu/elj/vol2009/iss2/7.

supporting the parents, and a lonely few amicus briefs opposing. The HSLDA helped represent the parents.

The appellate court reversed its original ruling and overruled its prior precedent. It read the apparently restrictive California law in a legally dubious way, to allow homeschooling without limits related to parent teaching qualifications, under the “private full-time day school” exemption from compulsory education. The court said it was driven in part by the “constitutional difficulty” of restricting homeschooling.

The court did rule that in this case, given the parents’ extensive history with child protective services, the order requiring the child to attend school was valid. However, it again applied an apparently strict standard in assessing the state’s burden, finding that the law should be read to avoid constitutional questions. While not finding that “strict scrutiny” was the required constitutional standard, it went out of its way to say that such a standard would be met if removal was necessitated by safety concerns.

The related case history is also telling. In July 2008, the juvenile court terminated jurisdiction because the family had met the conditions set earlier regarding cooperation with CPS, indicating that the children never were removed from the homeschooling situation.

In sum, the homeschooling movement took a case showing the dangers of child maltreatment posed by homeschooling and transformed it into a case about unreasonable restrictions on homeschooling. It mounted pressure that led the court to reverse a reasonable reading of homeschooling law and to impose a relatively strict constitutional standard.

A case decided by the influential Supreme Judicial Court in Massachusetts similarly illustrates the movement’s success in persuading a court to strike down an apparently reasonable regulation, based on a relatively strict constitutional standard. In Brunelle v. Lynn Public Schools, Massachusetts’ highest court struck down a home visit requirement designed as a check on whether the approved homeschooling plan was actually being implemented. It did so based on reading the legislation “carefully in light of constitutional considerations,” looking to both the

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193 See Homeschool Freedom & the California Case Timeline, supra note X.

194 See Jonathan L., 81 Cal. Rptr. 3d at 592.


state and federal constitutions, and repeated throughout the opinion that the issue was whether the home visit requirement was “essential.”

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The U.S. Supreme Court and the state and lower federal courts have generally made it clear that states are free to establish a range of restrictions on homeschooling designed to ensure that children receive an adequate education. Few courts have indicated that strict scrutiny should be applied in assessing constitutionality, and few restrictions on homeschooling have been struck down. Dwyer and Peters, in their powerful and comprehensive book on homeschooling, sum up as follows:

[T]he current status of parents’ constitutional rights to control children’s upbringing appears quite weak, regardless of religious motivation, leaving states free to impose any rules and restrictions rationally connected to what they deem children’s well-being. If states have a reasonable basis for believing they will promote children’s educational interests or other aspects of children’s welfare by requiring attendance at a regular school or by conditioning any authorization of homeschooling on compliance with rules regarding qualifications to teach, content of curriculum, or assessment, Supreme Court doctrine clearly permits them to do so. No parent’s religious objection to such regulations entitles them to an exemption. At most, some courts might say the state must show there are no less-intrusive means of protecting children’s interests.

However, it is unclear whether courts would generally be likely to uphold significant restrictions on homeschooling such as the presumptive ban proposed below. And certain more limited restrictions on homeschooling like home visits might be struck down in some jurisdictions as overly intrusive or unnecessary.

Also, federal constitutional law imposes no clear duty on states to regulate homeschooling so as to guarantee rights to education and protection. But as discussed in Section V below, the building blocks exist in current federal law. And state constitutions provide a basis for development of such duties, separate and apart from the federal constitution. State courts are free to interpret their constitutions’ due process and equal protection clauses differently from the federal constitution. And many state constitutions have language specifically providing children positive rights to education and to other benefits.

**B. State Legislation Imposes Few Restrictions on Homeschooling**

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197 Id. at 517-19. However, Brunelle is based on an assumption of the constitutional validity of Massachusetts’ other restrictions on homeschooling, including pre-approval of the proposed curriculum, instructional materials, instructional time, student assessment plans, and parent qualifications. The court had upheld all these requirements in an earlier case, Care and Protec. of Charles, 399 Mass. 324 (1987). Charles applied a constitutional balancing test demanding that state restrictions be “essential” to serve the state interest. See id. at 337.

198 Dwyer & Peters, supra note X, at 59.

199 See infra Section V.C. Some state courts have upheld total bans in the past. See Driver, supra note X, at 400; see also, e.g., State v. Edgington, 663 P.2d 374 (1983) (upholding statutory ban on homeschooling).

200 See generally Sutton, supra note X.
While the homeschooling movement generally failed to achieve its goals in the courts, it has been hugely successful in state legislatures. It has managed to legitimate homeschooling in all states, and to eliminate almost all meaningful restrictions. It has also prevented the development of new regulations, many of which were proposed in response to child abuse scandals.

This strategy has resulted in the radical transformation of homeschooling law. Homeschooling went from being illegal in many states in 1980, to being legal in all states today. Homeschooling requirements that used to be common are now almost non-existent: for example, requirements that parents submit planned curricula, or have certain educational credentials, or be subject to mandatory home visits on an occasional basis. The pace of this transformation has been breathtaking.

1. Limited Regulation Regarding Homeschooling

_Homeschooling now exists in a virtual legal void; parents have near-total authority over what their children learn and how they are disciplined._

Jeffrey Shulman recently conducted a 50-state survey, and a review of other key sources including an earlier survey, on state regulation of homeschooling. He supports the above claim with the following summary:

[R]egulations vary, but state-by-state survey results highlight several features of this deregulation regime that, by ensuring a lack of meaningful state oversight, reinforce parental authority over educational decisions.

* Perhaps most egregious is the degree to which states allow children to fall off the regulatory radar altogether. About twelve states fail to impose any notification requirement on homeschoolers, effectively eliminating the need for contact with education officials. In about ten states requiring some form of notice, the requirement is limited to one-time notification, eliminating the need for any form of continuing outside contact. The notification requirement may be as simple as a mere statement of intent to homeschool, without further curricular detail or continuing assessment, and acceptance is almost always automatic. In some states, parents may escape a notification requirement altogether by homeschooling under the supervision of an “umbrella” private school itself free from attendance reporting requirements (usually because it is church-affiliated).

* Only about ten states require homeschooling instructors to have teaching qualifications, generally a high school diploma or its equivalence. But even this minimal

201 See Gaither, supra note X, at 175, 179-95; Dwyer & Peters, supra note X, at 82-83; Waddell, supra note X, at 543. State court interpretations of arguably ambiguous legislation has contributed to this transformation.
202 See supra note X [in “A. History and Trends” citing D&P, Murphy]
203 See Joyce, supra note X (emphasis added).
205 Shulman, supra note X[chapter], at 25-26 (citations omitted).
guarantee of teacher competency may be bypassed by affiliation with an umbrella school, in response to religious objection, or at the discretion of local education officials.207

* In at least fourteen states there are no curricular requirements, either because states fail to impose them or otherwise exempt homeschoolers.208 Where pre-approval of a homeschooling curriculum is mandated, approval may be at the complete discretion of local education officials.

* In only about nine states are there relatively rigorous assessment requirements, again because states fail to mandate them, fail to enforce them, or provide exemptions. Several states with assessment requirements do not require homeschoolers to submit testing results or impose minimal testing scores.209 In other states, parents may submit student portfolios in lieu of more objective test scores.210 Even where state law requires that homeschooling parents demonstrate adequate academic progress through annual assessments, it may take years before school officials can take remedial action to terminate deficient home education.211

Religious homeschoolers are especially immune from regulation. Shulman discusses how in the wake of Yoder-related court battles, statutory exemptions from homeschooling restrictions have generally liberated religious parents from such limited restrictions as exist.212 Even the minimal

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207 See also DWYER & PETERS, supra note X, at 68 (“A mere ten states require that homeschooling parents have any education themselves, and what they require is just a high school diploma or GED (and a few of these states allow parents who lack even this to try to demonstrate capacity to teach in some other, unspecified way”). Additionally, even among states with some requirements, three simply require that parents be “competent,” without defining competence. See Cal. Educ. Code § 48222; Kan. Stat. Ann. § 72-1111(a)(2); Kan. Attorney General Opinion 75-409; N.Y. Educ. Law § 3204(2) Six states with parent qualification requirements allow parents to bypass if they satisfy other vague criteria like having a “certificated person” supervise the homeschooling, or being deemed “sufficiently qualified” by the local superintendent of schools. See, e.g., Wash. Rev. Code § 28A.200.010(4)(a, b, c). In one state educational qualifications are only required to homeschool high school students. See Tenn. Code Ann. § 49-6-3050(2)(B), (3).

208 Several states have laws exempting parents from teaching anything that conflicts with their political beliefs. See, e.g., Mo. Rev. Stat.. § 167.031(3) (2014) (“Nothing in this section shall require a private, parochial, parish or home school to include in its curriculum any concept, topic, or practice in conflict with the school's religious doctrines or to exclude from its curriculum any concept, topic, or practice consistent with the school's religious doctrines.”); Wyo. Stat. Ann. § 21-4-101(a)(vi) (2014) (“These curriculum requirements do not require any private school or home-based educational program to include in its curriculum any concept, topic or practice in conflict with its religious doctrines…”). Some states, including California and North Dakota, require parents to teach the same range of subjects as in public schools, but many others do not. Similarly, many states do not require any particular amount of instructional time. See Instruction Time & Subject Requirements, CRHE, https://www.responsiblehomeschooling.org/policy-issues/current-policy/instruction-time-subject-requirements/.

209 Those states that do set minimum scores generally make them very low (e.g. 13th percentile in Colorado and 15th percentile in Oregon). See Assessment & Intervention, CRHE, https://www.responsiblehomeschooling.org/policy-issues/current-policy/assessment-intervention/.

210 Portfolio review generally requires a certified teacher to evaluate and approve the students’ progress, but parents are often allowed to choose the teacher, and there is generally no check on the adequacy of the evaluation. See id.

211 Another problem is that most states allow parents to administer the tests, and many states provide ways to bypass any meaningful portfolio review by registering in some kind of private or umbrella school. See Assessment & Intervention, CRHE, https://www.responsiblehomeschooling.org/policy-issues/current-policy/assessment-intervention/.

212 See Shulman, supra note X[chapter], at 29-30. Virginia allows religious parents who opt out of public schooling to so completely free of state regulation, with no need to show their children “are being home-schooled or otherwise
that exist in some states often provide religious exemptions, which would presumably make them inapplicable to the Christian conservatives that constitute the majority of homeschoolers.  

The Coalition for Responsible Home Education (CHRE), a homeschooling graduate group discussed above, maintains a comprehensive overview of state laws on its website. Their findings echo those of Jeffrey Shulman: homeschooling law provides little check on parents’ power to determine their children’s educational lives.

2. Absence of Enforcement

Even when restrictions exist on paper they are often meaningless in reality, as typically there is little to no enforcement. Some states that set requirements for credentials, subjects taught, or instructional hours, fail to require that parents submit the requisite information; others fail to review, or check on the accuracy of, information submitted. Parents may simply have to submit a letter saying they will teach certain subjects, and then be free to do whatever they want. Assessment requirements are characterized by similarly lax enforcement: “Some parents may homeschool under the radar or simply not complete the required assessment. In many cases enforcement falls to local school districts, which are often already overburdened and underfunded.” Few school systems demand that parents adjust their schooling to comply with requirements.

Dwyer and Peters’ recent book on homeschooling sums up enforcement and related problems as resulting in effectively no restrictions:

[T]here is today in the vast majority of states no real legal obstacle to parents’ withholding their children from school and doing whatever they want in terms of instruction at home. Regulations on the books vary significantly from one state to another, but by virtue of slight or no accountability measures in the great majority of states and school officials’ disinclination to enforce any significant regulations in other states, by and large states leave children to their parents’ devices…. In a majority of states, there is no effort whatsoever to see that children whose parents keep them out of school are receiving any sort of education.

Id. at 29 (citing Susan Svrluga, 7,000 Use Religious Opt-Out of Schools, WASHINGTON POST, September 11, 2012, at B1); see VA Code Ann. § 22.1-254-1.

See supra note X intronotew/HSstats.

See supra Section II.C.

See Current Homeschool Law, CRHE, https://www.responsiblehomeschooling.org/policy-issues/current-policy/. This article describes the state of regulation as reported by CRHE in December 2018.

See Robin L. West, The Harms of Homeschooling, 29 PHILOSOPHY AND PUBLIC POL’Y QUARTERLY 7, 8 (Dec. 2009); Homeschool Law & Truancy, CRHE, https://www.responsiblehomeschooling.org/policy-issues/abuse-and-neglect/homeschool-law-truancy/ (noting “Unfortunately, we have no hard statistical data on the extent of this problem” but “a wide variety of anecdotal accounts… indicate the existence of a problem”).


Id.

Id.
In most of the remaining states, ostensible efforts to hold parents accountable are minimal or easily evaded. In a few states, parents must submit a plan of instruction, but local officials have no authority to disapprove it. A few other states require preapproval of a homeschooling curriculum but give local school officials complete discretion in approving, so it is difficult to know whether this is a meaningful safeguard; presumably it varies by locality. Four states require parents to maintain records or subject their children to testing but do not authorize school officials to demand to see either. Three other states and the District of Columbia require parents to either maintain records of progress or submit to standardized tests in certain grades, but do not require parents to submit test results or a portfolio of work to school officials unless the officials ask them to do so. Among the small number of states that require submission of any evidence of performance, most allow homeschoolers to choose between standardized tests and a private evaluation of the child’s progress by someone of the parents’ own choosing.\(^{220}\)

3. Absence of Regulation Regarding Abuse and Neglect

The effective “law” of homeschooling is that parents are free to subject their children to abuse and neglect. Dwyer and Peters summarize: “Overwhelmingly, state legislatures… have chosen to give parents who wish to homeschool complete and unsupervised power and freedom, leaving children unprotected from the unknown number of parents who are seriously neglectful or abusive.”\(^{221}\)

Only a very few states have legislation providing any protection at all to homeschooled children identified as at high risk for abuse and neglect. And the protection in those states is extremely limited.\(^{222}\) Pennsylvania bans homeschooling if any person in the household has been convicted of crimes in the past five years that would disqualify them from teaching in public school.\(^{223}\) But Pennsylvania relies on homeschooling parents to provide accurate information rather than conducting an independent background check.\(^{224}\) Arkansas bans homeschooling if a registered sex offender lives in the household, but rather than mandating a background check to enforce this, relies on local school districts to take the initiative, which not all do.\(^{225}\) Parents can petition to have this restriction waived.\(^{226}\) Georgia recently passed a bill in response to the horrific torture and murder of two homeschooled students, providing that child protective services be notified of homeschooling parents who fail to fill out a required declaration of intent to homeschool, so that they can be assessed.\(^{227}\)

\(^{220}\) DWYER & PETERS, supra note X, at 67-68; see also id. at 70-72, 109-110.

\(^{221}\) DWYER & PETERS, supra note X, at 2.

\(^{222}\) See AT-RISK HOMESCHOoled CHILDREN: AN ISSUE BRIEF, supra note X, at 5.


\(^{224}\) See AT-RISK HOMESCHOoled CHILDREN: AN ISSUE BRIEF, supra note X, at 5.

\(^{225}\) See id.

\(^{226}\) See id.

No state has a system for screening or monitoring homeschooling families based on past or present CPS involvement, and related evidence of maltreatment.

When homeschooling scandals have erupted, involving horrific abuse suffered by children supposedly being homeschooled, the movement has successfully fought off attempts to impose protective regulation. Thus while some say that these scandals may finally trigger some minimal regulation, this has generally not occurred. Examples abound of legislators proposing modest protective regulation only to be overwhelmed by the movement’s lobbying force as discussed below. The Georgia law noted above represents the only example in recent years of regulation being increased, and this involved a very modest restriction.

4. Trends in the Law

The trend over the past few decades has been overwhelmingly in the direction of legitimation and deregulation. During this period homeschooling moved from being illegal in many states to being legitimate in all 50 states. Once homeschooling became legitimate, the move was systematically in the direction of reduced regulation, a trend continuing in recent years.

In 1985, seven states reduced restrictions; in 1988, five more states reduced restrictions. In 2014 Pennsylvania reduced assessment requirements. In 2014 Utah declared that “the homeschooling parent assumes sole responsibility” for children’s education, and eliminated the requirement that parents teach subjects mandatory in public schools, and for the same amount of time. In 2015 Arkansas eliminated assessment requirements. In 2016 West Virginia relaxed

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228 See discussion infra Section IV.C.2.
229 This is the first case of homeschooling regulation being increased since the District of Columbia modestly increased oversight by adding notification and portfolio requirements, following a quadruple murder of homeschooled children See Coleman, supra note X [right above, Victory for HS Students]; Gross, supra note X, noting that the District of Columbia enacted Chapter 52, giving the Office of the State Superintendent (OSSE) somewhat greater oversight authority (see D.C. Mun. Regs. tit. 5-E, § 5200).
231 See supra note X [Waddell, Gaither, etc. on how HS became legal in 1980s].
232 See DWYER & PETERS, supra note X, at 65.
annual notice and assessment requirements, and lowered the threshold for “acceptable progress” for homeschoolers.236

Efforts to increase regulation have been successfully fought off, with the HSLDA’s aggressive tactics playing a major role.237 Two of the most comprehensive recent studies of homeschooling sum up the trend similarly. Dwyer and Peters state:

Today the real legislative battles arise not over efforts to impose greater oversight of homeschooling but rather over efforts to eliminate what little oversight does exist and efforts to channel state education funding to homeschoolers. The [HSLDA] has been relentless and extremely aggressive in lobbying for legislation to remove reporting and assessment provisions.”238

Milton Gaither states:

[T]he clear nation-wide legislative trend in recent years is that bills aiming to increase homeschooling regulations almost always die in committee due to massive outcry from homeschoolers, responding to HSLDA alerts, and bills aiming to decrease homeschooling regulations are often successful, sometimes because of vocal advocacy by homeschoolers and sometimes because of behind-the-scenes lobbying by HSLDA and its allies.”239

IV. THE POLITICS

A. Ideological Nature of the Homeschooling Movement

It is the religious ideologues who dominate the powerful homeschooling movement.240 And they dominate it overwhelmingly. They founded the extraordinarily powerful Home Schooling Legal Defense Association (HSLDA), which has played the leading role fighting against regulation and shaping homeschooling law. The different political strains and variety of populations represented within the homeschooling population are not reflected in the political leadership of HSLDA and related advocacy organizations. Nor is there any other significant advocacy organization designed to represent the views of the highly educated non-religious homeschoolers, or the descendants of the John Holt progressive wing of the homeschooling movement, or those who choose homeschooling to allow room for competitive sports, dance, or acting careers.241

236 See West Virginia House Bill 4175 (2016), http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB4175%20SUB%20ENR.htm&yr=2016&sesstype=RS&i=4175. Specifically, homeschoolers are no longer required to provide notice or assessment results annually. Additionally, the criteria for “acceptable progress” are extremely flexible. Acceptable assessment methods include standardized tests, but also portfolio evaluation or a “mutually agreed upon alternative.” See W. Va. Code § 18-8-1(c)(2)(D).

237 See infra Section IV.C.2.

238 See Dwyer & Peters, supra note X, at 110.

239 Gaither, supra note X[book], at 233.

240 See, e.g., Dwyer & Peters, supra note X, at 82-83; Waddell, supra note X, at 547.

241 See, e.g., Dwyer & Peters, supra note X, at 87-88 (observing that the movement “shifted over time ‘from pedagogy to ideology’”); see id. at 88 (quoting Gaither, supra note X [book on history] at 145) (“John Holt and Ray Moore were increasingly displaced as leaders in the 1980s ‘as a younger and more aggressive group of baby-boomer Christian leaders emerged’”).

Page 38 of 71
B. Political Dominance of The Homeschooling Movement

The HSLDA is a Christian non-profit organization founded in 1983, which grew at a phenomenal pace in the next years as it established leadership in the homeschooling advocacy world. HSLDA’s stated mission is to:

preserve and advance the fundamental, God-given, constitutional right of parents and others legally responsible for their children to direct their education. In so doing, we rely on two fundamental freedoms—parental rights and religious freedom. We advocate for these freedoms in the courtrooms, before government officials, and in the public arena. Additionally, we assist other educational organizations in similar activities, where possible and appropriate.

HSLDA’s advocacy efforts are backed by local homeschooling organizations in every state. It has branches in several other countries and encourages them to rally opposition to restrictive regulation.

HSLDA’s anti-regulatory position is supported by the conservative Heritage Foundation. The conservative Rutherford Institute played an important early role in homeschooling advocacy.

Many students of homeschooling have remarked on the extraordinary power of the homeschooling lobby. This power is illustrated by the overall legitimation and deregulation accomplished as described above, and by some of the specific successes detailed below.

There are a wide range of critics of homeschooling, but none of them exercise real political power or have significant influence in shaping policy. One set of critics come from within the homeschooling community. Many who experienced homeschooling in their childhood have spoken out about problems related both to education and to child maltreatment. As discussed above, some founded the Coalition for Responsible Home Education (CRHE), which constitutes

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242 See HSLDA FAQ, HOME SCHOOL LEGAL DEFENSE ASSOCIATION “(HSLDA”), https://hslda.org/content/docs/faq/; see also DWYER & PETERS, supra note X, 63-66.
243 Gaither, supra note X[book], at 186-89.
244 Our Mission, HSLDA, https://hslda.org/content/about/mission.asp.
247 Gaither, supra note X, at 182; DWYER & PETERS, supra note X, at 63.
248 See infra note X [Yuracko, others], note 394 [D&P quote].
249 See supra Section III.B.
250 See infra Section IV.C.2
the main advocacy organization for critical homeschooling graduates. CRHE advocates for “sensible oversight.” It has developed a set of detailed reform recommendations both for education issues, and for child maltreatment issues, an area of key concern.

Many homeschooling graduates speak out on the CRHE and other websites. Many maintain blogs giving voice to their own and other homeschoolers’ concerns. Homeschoolers Anonymous is a blog operated by former homeschoolers with the goal of raising awareness of problems including isolation, abuse, and neglect. Recovering Grace provides support for homeschoolers and publishes stories of young people raised in the cultish Advanced Training Institute (ATI). Love, Joy, Feminism is a blog by “Libby Anne” documenting her critical reflections on being raised in a Quiverfull homeschooling family. “Homeschool Alumni Reaching Out” (HARO) helps homeschoolers share their stories and encourages them to promote awareness of child abuse and neglect. But, notably, it “does not advocate for or against public policy.”

251 See discussion supra Section II.C.
253 Their recommended education-related reforms include:

- Annual notification of intent to homeschool with method of ensuring compliance
- Parents must have at least a GED
- Parents must teach same subjects as public schools
- Students must show progress “commensurate with their ability,” with progress assessed annually by either portfolio reviews or standardized tests. Portfolio reviews should be done “by certified teachers or other education professionals who are neutral parties and meet with each child as a part of the reviewing process.” Standardized tests should similarly “be administered by qualified individuals other than students’ parents.”
- Inadequate academic progress results in intervention and, if it persists, discontinuance of homeschooling
- Students must meet same medical requirements as public schoolers and parents must submit immunization records. See id.

254 Their recommended reforms related to child maltreatment include:

- Background checks: Bar parents from homeschooling if they have committed a crime that would prevent them from teaching in a public school.
- A flagging system: Bar parents from homeschooling if they or anyone in the household have previously had a founded abuse or neglect report.
- Risk assessments: Conduct risk assessments when parents begin to homeschool after a recent child abuse report or concerning history of reports.
- Mandatory reporter contact: Ensure that homeschooled children are seen by mandatory reporters via academic assessments, medical visits, or other means. See id. at 5.

255 See Joyce, supra note X [Apostates], (“As their movement spreads, the ex-homeschoolers are developing a reform agenda”); Catherine Wagley, The Duggars: Sexual Abuse in the Christian Homeschooling Movement, JSTOR Daily (Jan. 13, 2016), https://daily.jstor.org/the-duggars-sexual-abuse-christian-homeschool-movement/ (“Former homeschoolers are speaking out about sexual abuse by the Duggars and other leaders in the Christian homeschooling movement.”)
257 Jenna Tracy, My childhood in a cult is hard to imagine - but my survival is truly unbelievable, THE GUARDIAN (June 1, 2015), https://www.theguardian.com/commentisfree/2015/jun/01/childhood-in-cult-hard-imagine-survival-truly-unbelievable; see also What is ATI?, ADVANCED TRAINING INSTITUTE INT’L, https://ati.org/about/.
258 See Libby Anne, Who is Libby Anne?, LOVE JOY FEMINISM, http://www.patheos.com/blogs/lovejoyfeminism/about. Libby Anne is the author’s pen name.
These homeschooling graduate groups get limited attention outside of their own community. They are yet to have a significant impact on law and policy.

Professional educators constitute the other main advocacy group critical of homeschooling. The National Education Association (NEA), the nation’s largest teachers’ union, has taken a strong position against homeschooling being permitted at all.\textsuperscript{260} And it says that if permitted, regular teacher licensing and curriculum requirements should apply.\textsuperscript{261} However, the NEA has not embraced this cause with anything resembling the passion and resources of the homeschooling movement.

A good number of serious academics have leveled severe criticism at the current homeschooling regime.\textsuperscript{262} Their concerns include the absence of any significant regulation, the inability of most homeschooling parents to teach the variety of courses appropriate, the extreme ideological views many hold, the limited socialization most provide, and the risks of abuse and neglect.

They make a range of arguments based on the importance for both children and society of an education teaching core academic skills, as well as other capacities enabling productive participation as adults in society. They discuss the importance of an education that exposes children to a range of viewpoints, and to fundamental democratic values.

\textsuperscript{260} NAT’L EDUC. ASS’N., 2017-2018 NEA RESOLUTIONS 242 (2018), https://www.nea.org/assets/docs/Resolutions_NEA_Handbook_2018.pdf (“The National Education Association believes that homeschooling programs based on parental choice cannot provide the student with a comprehensive education experience”). \textsuperscript{261} See id. (“When home schooling occurs, students enrolled must meet all state curricular requirements, including the taking and passing of assessments to ensure adequate academic progress;” “Instruction should be by persons who are licensed by the appropriate state education licensure agency, and a curriculum approved by the state department of education should be used.”) \textsuperscript{262} For example, Stanford political science professor Rob Reich has long criticized and advocated for greater regulation of homeschooling. See Rob Reich, More Oversight is Needed, NEW YORK TIMES (Jan. 4, 2011, updated 2015), https://www.nytimes.com/roomfordebate/2011/01/04/do-home-schoolers-deserve-a-tax-break/more-oversight-is-needed; see also Barbara Bennett Woodhouse, Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own", 11 CORNELL J.L. & PUB. POL’Y 481, 482 (2002) (“Especially as children mature, serious tensions may develop between parents' rights of control and children's liberty interests in receiving an education that fits their needs and aspirations.”); Ross, supra note X (arguing homeschooling denies children a proper civic education, and failure to expose them to constitutional norms like tolerance and diversity impacts the fabric of democracy); John Scott Gray, Dewey and the American movement to homeschooling, 46 EDUC. 3-13, 441 (2018) (religious homeschool education may prevent fostering a “permeating social spirit,” sense of collective responsibility and “effective moral training”); Yuracko, supra note X ( by deregulating under pressure from homeschool groups, states are abdicating their responsibility to ensure children are educated); West, supra note X, at 10, 12 (arguing that homeschooling sacrifices children’s “exposure to diverse ideas, cultures, and ways of being” and advocating for “curriculum, content, visitation, and testing requirements”); DWYER & PETERS, supra note X, at 203-06; Anne C. Dailey & Laura A. Rosenbury, The New Law of the Child, 127 YALE L.J. 1448, 1496, 1522-23 (2018). A few scholars and lawyers have argued against what they see as undue regulation of homeschooling. See, e.g., Tanya K. Dumas, Sean Gates & Deborah R. Schwarzer, Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research, 16 WIDENER L. REV. 63, 88 (2010). Notably, this article relies heavily on Brian Ray’s flawed research and all three authors homeschooled their own children. For a scathing review of this article see Milton Gaither, Three Lawyers Praise Homeschooling, HOMESCHOOLING RESEARCH NOTES (July 1, 2011), https://gaither.wordpress.com/2011/07/01/three-lawyers-praise-homeschooling/.
Most call for reforms designed to better ensure that homeschoolers receive an adequate education. These include such requirements as notice and registration, credentials demonstrating fitness to teach, review of proposed curriculum, teaching of certain required courses, and assessments of educational progress. Some call for reforms designed to better protect children against maltreatment.

Some academic critics propose a total ban on homeschooling. Others propose a ban after the elementary grades. Some question whether regulation short of a ban could succeed in ensuring that children are exposed to a range of viewpoints and values, given that many parents choose homeschooling precisely in order to keep their children from exposure to alternative views.

Some propose conditioning any financial support for homeschooling on compliance with state oversight. This idea is based in part on despair at achieving reform otherwise, given the power of the homeschooling lobby.

Lawyers with an interest in education have joined in the critique and the call for reform. Scholars and physicians knowledgeable about child maltreatment have noted the risks to children in homeschooling, and called for related reforms. International academics have united to

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263 See, e.g., Yuracko, supra note X, at 132; West, supra note X, at 12 (suggesting “curriculum, content, visitation, and testing requirements”); Reich, supra note X (suggesting homeschoolers should have to register and take all tests required for public school students). Dwyer and Peters have an interesting and somewhat unusual set of recommended reforms: states should allow homeschooling, but only if parents accept certain conditions including background checks for all adults in household, and investigation if any have felony or child maltreatment history. Parents would be required to possess a high school diploma or GED and prove that they had successfully educated their child in the past. Regular assessments of educational progress and interpersonal personal skills would be required, and underperformance would trigger remedial measures. See Dwyer & Peters, supra note X, at 229-30.

264 See, e.g., Woodhouse, supra note X, at 490 (recommending private interviews with children to explore any evidence of abuse as part of the process for permitting homeschooling); Dwyer & Peters, supra note X


267 See Ross, supra note X, at 1013 (“requiring homeschoolers to teach lessons about tolerance is largely hortatory, and may even be illusory”); Dwyer & Peters, supra note X, at XXX. See Fineman & Shepherd, supra note X, at 99 (“Homeschoolers’ outrage over the possible effects of minimal government regulation … is a strong argument as to why homeschooling should not be permitted…”). See discussion infra Section V.C.1.

268 See, e.g., Dwyer & Peters, supra note X, at 227.

269 See, e.g., Waddell, supra note X (arguing for increased assessment requirements to ensure children are adequately educated); Alicia Kreh, Where Do We Belong?: A Call for Consistency in Homeschooling Regulation, 36 U. LA VERNE L. REV. 237, 238 (2015) (suggesting Congress create a regulatory scheme requiring notification, school district approval of the proposed curriculum, and yearly assessment tests with minimum standards); Paul A. Alarcón, Recognizing and Regulating Home Schooling in California: Balancing Parental and State Interests in Education, 13 CHAPMAN L. R. 391 (2010); see also Noah Aleshire, Defining the New "Species": Recommendations for California Homeschool Legislation After Jonathan L. v. Superior Court, 246 ED. LAW REP. 607 (2009) (recommending that in response to Jonathan the legislature require notice and curriculum guidelines; a minimum high school education for parents (with limited exceptions); various assessment options; removing children from homeschooling when in their best interests; and banning homeschooling in homes of registered sex offenders).

270 See supra Section II.C, particularly note X.

271 Tyler Barnett, Pulling Back the Curtains: Undetected Child Abuse and the Need for Increased Regulation of Home Schools in Missouri, 2 BYU EDUC. AND L. J. 341, 348 (2013) (proposing mandatory notification; progress reports; and home visits when progress inadequate or parent has prior record of abuse); Baxter, supra note X, at 465-
counter the policy advocacy research put out by the homeschooling movement, and to promote methodologically sound research.272

But it is the conservative religious homeschooling groups that engage aggressively in the courts and legislatures, and overwhelmingly dominate policy advocacy. They are rich, organized, and passionately motivated to push their particular cause. As a result, like the gun lobby, they wield political power vastly disproportionate to their numbers.

By contrast, critics of homeschooling tell poignant stories and mount rational arguments, but do not today constitute a political movement capable of countering the homeschooling movement. So while there are many critics of homeschooling, they have to date proven powerless on the advocacy battlefield.

C. Positions and Tactics of The Homeschooling Movement

1. Parent Rights Absolutism

The homeschooling movement takes the position that parents have, and should have, absolute power over the education of their children.273 It relies on both natural law and on constitutional theory.274 The constitutional claim looks to cases recognizing parent rights as part of the liberty guaranteed by substantive due process, and to religious freedom guarantees.

Movement advocates generally contend that any restrictions on homeschooling violate parent rights, even such minimal requirements as notice by parents that they are planning to homeschool.275 Some see as possibly tolerable supportive regulation, such as policies providing

71 (proposing periodic evaluation of homeschooled students by a government official; prohibiting homeschooling for children at risk of abuse or neglect; creating support and public education programs for survivors of abuse); DWYER & PETERS, supra note X, at 226 (proposing at minimum “a meaningful prequalification procedure and subsequent periodic assessment of the homeschooled children’s academic progress and basic well-being”); Goodpasture et al., supra note X, at 91 (recommending consideration of a home visit requirement, increased monitoring, and creation a formal system of collaboration between the educational system and the child protective system).

272 See discussion of ICHER supra Section II.D.2.

273 See Yuracko, supra note X, at 127 (quoting Michael Farris, co-founder and leader of HSLDA, saying “[P]arents have the constitutional right to obey the dictates of God concerning the education of their children.”); DWYER & PETERS, supra note X, at 120-21 (“The refrain of HSLDA and of litigants in the challenges to homeschool regulations… was that the state has no business involving itself in child-rearing, at least not when fit parents are acting on principle, unless those parents request state assistance… The legal regime thought to follow from this position is one devoid of any laws regarding homeschooling.”).

274 See, e.g., Fineman, supra note X, at 91 (“The focus on parental rights – with the belief they are rooted in natural law and reaffirmed by both common law and the United States Constitution – reflects our cultural obsession with autonomy”).

275 See id.; see, e.g., William A. Estrada, 4 Ways That HR 610 Will Threaten Your Rights, HSLDA (2017) https://nche.hslda.org/docs/news/2017/201702140.asp (opposing homeschool vouchers because they would impose a notice requirement). Some would allow notice requirements but see them as the the only reasonable regulation. See, e.g., Gross, supra note X (quoting HSLDA Senior Counsel Christopher Klicka to this effect).
homeschoolers access to school sports and other programs their parents want them to participate in, but others oppose even that as opening the door to restrictive regulation.276

In the name of parent rights, the movement has gone beyond simply opposing restrictions related to education, to oppose other restrictions on parent power including in the area of child maltreatment. To this end, HSLDA created a new organization, ParentalRights.org (PRO). PRO advocates amending the Federal Constitution to further expand and entrench parental power.277 Their proposed amendment would effectively establish a strict scrutiny standard, protecting parents against intervention on behalf of children except where the government interest “is of the highest order and not otherwise served.” The extremes of their position are illustrated by the stated limit: “this article shall not be construed to apply to a parental action or decision that would end life.”278

The homeschooling movement has for related reasons opposed U.S. ratification of the Convention on the Rights of the Child (CRC).279 Ratified by every other country in the world, the CRC gives child rights equal status with adult rights. It gives children affirmative rights to be educated and protected against maltreatment, imposing related duties on nations to provide education and protection.280 The movement considers this vindication of child human rights a threat to parental power.

PRO has a companion organization called the Parental Rights Foundation, designed as a research and information branch. It too focuses broadly on parent rights including in the child

276 See, e.g., Bryan Toporek, Wisc. Bill Allowing Home-Schoolers in Public School Sports Drawing Opposition, EDUC. WEEK (July 3, 2015), https://blogs.edweek.org/edweek/schooled_in_sports/2015/07/wisc_bill_allowing_home-schoolers_in_public_school_sports_drawing_opposition.html (homeschooling group Wisconsin Parents Association opposed a bill which would allow homeschoolers to participate to participate in public school extracurricular activities); Nicki Truesdell, Why UIL Access (Tebow Bill) is Not Freedom for Texas Homeschoolers, NICKTRUESDELL.COM (Mar. 25, 2015); https://nickitruesdell.com/2015/03/UIL-access-tebow-bill-not-freedom-texas-homeschoolers/ (opposing “Tebow bill” in Texas which would give homeschoolers access to extracurriculars); see also HSLDA FAQ, HSLDA (“HSLDA takes a neutral position when state legislation is introduced to require public school access for homeschoolers, unless the legislation would impose additional regulations on all homeschool students”).

277 See Protecting Children by Empowering Parents, ParentalRights.org, https://parentalrights.org/; Lubinski et al., supra note X, at 389. PRO Board members include key HSLDA leader J. Michael Smith, President and co-founder of HSLDA. PRO staff includes key HSLDA leaders such as James Mason, PRO President and also Vice President of Litigation and Development at HSLDA, Katherine A. Loop, PRO Communications Assistant and also director of publication and marketing for the Home Educators Association of Virginia, and Steve G. Oberlander, Chief Financial Officer and also CFO of HSLDA and Home School Foundation. See ParentalRights.org Board & Staff, PARENTALRIGHTS.ORG, https://parentalrights.org/about/.

278 The Amendment, PARENTALRIGHTS.ORG, https://parentalrights.org/amendment/.

279 See, e.g., Parental Rights Amendment, HSLDA, https://hslda.org/content/docs/ncche/Issues/P/Parental_Rights_Amendment.asp (stating the CRC “would radically alter the American flow of power and family structure, wresting authority from parents and giving it to the courts, and in some cases, to the United Nations. HSLDA continues to uphold the right of parents, not an 18-member international panel, to decide what is best for America’s children”).


Homeschoolers Anonymous blogger “Libby Anne” argues that HSLDA has been complicit in aiding child maltreatment in four key ways: (1) it works to minimize the reporting of child maltreatment; (2) it works to impede the investigation of child maltreatment cases; (3) it defends the legality of excessive corporal punishment; and (4) it opposes any homeschooling regulation that might provide a check on maltreatment.\footnote{See Libby Anne, HSLDA and Child Abuse: An Introduction, LOVE JOY FEMINISM (Apr. 17, 2013), http://www.patheos.com/blogs/lovejoyfeminism/2013/04/hslda-child-abuse-and-educational-neglect-an-introduction.html .}

The evidence supports her claims. HSLDA has long opposed mandatory reporting laws.\footnote{See, e.g., William A. Estrada, Oppose S. 1877, Federal Mandatory Reporting of Child Abuse Legislation, HSLDA (Dec. 15, 2011), https://hslda.org/content/docs/news/201112150.asp.} It actively opposed federal legislation to expand reporting in response to the Sandusky abuse scandal at Pennsylvania State University. This legislation would have amended the federal CAPTA act governing mandatory reporting, to require that all adults report suspected child maltreatment. HSLDA claimed this would create a “police state,” massively increasing reports and hurting innocent families.\footnote{See William A. Estrada, Oppose S. 1877, Federal Mandatory Reporting of Child Abuse Legislation, HSLDA (Dec. 15, 2011), https://hslda.org/content/docs/news/201112150.asp.} HSLDA has opposed many other proposals to increase reporting requirements, threatening to send “e-lerts” to their members if the bills came up for hearing.\footnote{See, e.g., S. 1879—Child Abuse Reporting Enforcement Act, HSLDA (Jan. 27, 2012), https://hslda.org/content/Legislation/National/2012/S1879/default.asp.}

HSLDA has worked to make the Federal Constitution’s Fourth Amendment a more significant limit on CPS agencies’ ability to investigate and document child maltreatment. It seeks to expand the meaning of the Amendment’s ban on unreasonable search and seizure, so as to protect parents against any nonconsensual entry into the home by authorities.\footnote{See Duke, supra note X, at 138 (“The HSLDA has taken a very active role in this movement, which seeks to set precedent that the Fourth Amendment’s protection against unreasonable searches and seizures is applicable to child abuse and neglect investigations by social workers or traditional law enforcement officers”).}

This would seriously hamper efforts to monitor homeschooling to ensure that parents follow through on educational commitments. It would also seriously hamper CPS and police efforts to address maltreatment.
HSLDA has opposed legislation designed to provide some check on corporal punishment so that it doesn’t cross over into brutal abuse. It opposed one bill forbidding the use of “implements” to beat children, and another forbidding beating that results in “significant welts and bruises.”

HSLDA has adamantly opposed legislative responses to homeschooling scandals involving child maltreatment, successfully fighting off efforts to increase protection for homeschooled students. And HSLDA represents parents charged with maltreatment, as part of the membership benefits offered all members, as discussed in the next section.

2. Organizational, Legal and Lobbying Tactics

The homeschooling movement has been both strategic and brutal in its tactics. HSLDA has built its membership to impressive numbers, providing a significant base of financial support and a large list of potential lobbyists. It now has over 80,000 families, a full-time staff of dozens, and annual revenue of well over 11 million dollars.

Membership benefits include a guarantee of legal representation in any situation where homeschooling parents are threatened with restrictions related to education or child protection. Members are promised a 24/7 emergency legal hotline, legal advice and representation from an experienced litigation team, access to state laws and legal forms, and legal updates.

Every state has at least one active homeschooling organization. Several of these are extremely active.

HSLDA founded a Political Action Committee (PAC) in 2003, “dedicated to providing support and services to pro-family, pro-homeschooling candidates running for federal office.” HSLDA maintains an online “Legislative Action Center,” and encourages its members to get involved in lobbying on local and national homeschooling issues. HSLDA’s influence is illustrated by the fact that the current U.S. Secretary of Education, Betsy DeVos met with HSLDA leaders early in her tenure.

287 See J. Michael Smith, Washington Times Op-ed—California May Ban Spanking, HSLDA (Apr. 28, 2008), http://www.hslda.org/docs/news/washingtontimes/200804280.asp (expressing dismay that, "[i]f the bill passes, spanking with an object such as a stick, rod or switch would be lumped in with throwing, kicking, burning, or cutting a child").
289 See infra Section IV.C.2.
291 See Macquarrie, supra note X[memo2] (memorandum at 2-7).
293 See About, HSLDA ACTION PAC, https://www.hsldaactionpac.org/about.asp.
294 See Legislative Action Center, HSLDA, https://hslda.org/content/legislation/; Macquarrie, supra note X (memorandum at 5 n.17, 6 n.18).
HSLDA has demonstrated its lobbying power in numerous recent cases where it has opposed regulatory reform designed to improve the quality of education in homeschooling, or to better protect children against maltreatment. Some examples follow.

a. Resisting Reforms Related to Education

A 2014 bill in Virginia would have required that the state conduct a study on how decisions were made regarding religious exemptions from compulsory education, and whether homeschoolers’ educational progress was being monitored. HSLDA families flooded legislators’ offices with calls. The bill gained only one vote in committee.

HSLDA killed a 2013 bill in South Carolina that would have required mandatory testing for homeschooled students and tightened recordkeeping requirements.

A 2009 bill in Illinois would have required parents to give notice of their intent to homeschool. It was tabled after pressure from 4000 homeschoolers mobilized by HSLDA.

On the federal level, in the 1990s HSLDA helped defeat an attempted amendment to the federal Elementary and Secondary Education Act, which would have required that teachers be certified. “HSLDA argued that this amendment could conceivably be interpreted to apply to homeschoolers, and initiated a no-holds barred media alert that produced such a flood of letters and phone calls to Congress that the Capitol switchboard was completely shut down. AT&T estimated that in the eight days leading up to the vote… Congress received between 1 and 1.5 million calls.” In the early 2000s the HSLDA succeeded in getting the No Child Left Behind Act amended so as to omit homeschooled children from its testing requirements.

HSLDA helped defeat ratification of an international treaty designed to protect children with disabilities, based on concern that the proposed “best interests of the child” standard might interfere with parents’ ability to determine the education of their special needs children.

b. Resisting Reforms Related to Child Protection

Some attempts have been made in recent years to increase protective regulation in homeschooling in response to particularly horrific cases of child maltreatment. These have

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297 See Green, supra note X, at 1116.
298 See id.
299 See id.
300 See Gaither, supra note X, at 192.
301 See West, supra note X, at 11; No Child Left Behind, HSLDA (“When the [No Child Left Behind] Act came up for reauthorization in 2001, HSLDA worked with Congress to place language in NCLB to ensure that federal, state, and local governments could not use provisions of the law to regulate homeschoolers”).
302 See Lubinski, supra note X, at 389.
303 See Milton Gaither, Making it Legal, in HOMESCHOOL: AN AMERICAN HISTORY, supra note X, at 207-40. For a list of recent reform attempts, see AT-RISK HOMESCHOoled CHILDREN: AN ISSUE BRIEF, supra note X, at 5-11.
been overwhelmingly rejected as a result of massive pressure by the homeschooling movement.304 Some examples follow of legislators proposing modest protective regulation only to be beaten back by the movement’s lobbying force.305

A California bill was introduced in 2018 in response to the infamous Turpin case discussed above.306 This bill initially proposed annual homeschool inspections, but was watered down due to pressure from the homeschooling lobby, leaving a bill that simply required the state to collect more data on homeschooling, and create an advisory committee to suggest potential additional requirements.307 This bill then died after homeschoolers flooded the committee hearing.308

A bill was introduced in Hawaii in 2018 in response to the case of Shaelynn Lehano who was starved to death while allegedly being homeschooled, along with other horrific child abuse cases.309 This bill would have required background investigations for every individual living in a proposed homeschooling household, and disqualified households based on prior histories of child maltreatment. HSLDA members flooded the legislative committee hearing, and the bill’s author asked that it be withdrawn.310

A bill was introduced in Kentucky in 2017 in response to a case involving an eight-year-old girl tortured almost to death while allegedly being homeschooled. CPS had long been aware of the family’s problems and had received abuse reports from sources at the girl’s school. The parent responded by withdrawing the child allegedly to homeschool. The bill would have required that anyone found to have abused or neglected their child must send the child to school unless they received an exemption. Legislative leaders declined to consider the bill.311

304 Gaither summarizes: “[C]oncerns about child abuse have lately led to a backlash against the last two decades of steady deregulation and to the sharpest criticism HSLDA has yet faced, though it has as yet made no legislative mark.” Id. at 218; see also The Homeschooling Movement and the Return of Domestic Education, 1998–2016, in HOMESCHOOL: AN AMERICAN HISTORY, supra note X, at 241; Joyce, supra note X. CRHE’s 2017 Issue Brief lists current legislation and recent attempts at regulation related to child maltreatment. See AT-RISK HOMESCHOoled CHILDREN: AN ISSUE BRIEF, supra note X, at 5-11.

305 This article only discusses legislation through the end of 2018, but this pattern has continued in 2019. See e-mail from Dr. Rachel Coleman, Executive Director, Coalition for Responsible Home Education, to Author (May 28, 2019, 16:57 EST) (on file with author).

306 See discussion supra Section II.C.

307 See e-mail from Isabel Macquarrie, J.D. Candidate, Harvard Law School, to John Affeldt, Managing Attorney, Public Advocates (Oct. 6, 2018, 16:50 EST) (on file with author); e-mail from John Affeldt, Managing Attorney, Public Advocates, to Isabel Macquarrie, J.D. Candidate, Harvard Law School (Oct. 6, 2018, EST) (on file with author); Benjamin Purper, California Lawmakers Consider How To Regulate Home Schools After Abuse Discovery, NPR (Apr. 9, 2018), https://www.npr.org/2018/04/09/600245558/california-lawmakers-consider-how-to-regulate-homeschools-after-abuse-discovery.


310 See Peter Kamakawiwoole, Major Victory: SB 2323 Sponsor Asks for Bill to be Withdrawn, HSLDA, https://contentsharing.net/actions/email_web_version.cfm?message_id=15211333&user_id=HSLDA.

311 Although it’s unclear whether HSLDA was directly involved, it may well have influenced the result: the Senate refused to hear the bill to avoid getting “involved in the sensitive subject of home-schooling.” John Cheves,
A bill was introduced in Iowa in 2017 in response to 16-year-old Natalie Finn being starved to death by her homeschooling parents, who had been the subject of multiple CPS reports. The bill would have required school districts to conduct “health and safety” visits to homeschooled students.\textsuperscript{312} It was opposed by HSLDA and the Iowa Christian Home Educators, who contacted all members of the key committee. The bill never moved out of committee.\textsuperscript{313}

A bill was introduced in West Virginia in March 2017\textsuperscript{314} which would have provided that students could not be homeschooled if they had 10 or more unexcused absences from school, until an investigation was conducted. The investigation could trigger reports to appropriate authorities of maltreatment, as well as reports that the child would not receive “necessary education.” HSLDA opposed the bill and it was pulled from the Education Committee’s agenda.\textsuperscript{315}

A bill was introduced in Kansas in 2015 in response to the torture killing of seven-year-old Adrian Jones by his father, who then fed the boy’s body to pigs. The legislation would have required that adults living in the same house as a child report child maltreatment.\textsuperscript{316} The homeschooling movement lobbied against the proposed bill, and it never moved forward.\textsuperscript{317}

A bill was introduced in Michigan in 2015 in response to the death of two children found in a freezer.\textsuperscript{318} They had been withdrawn from school for alleged homeschooling despite the mother’s prior CPS involvement. The bill would have required that homeschoolers be registered with the local school district and meet with a mandatory reporter twice per year. The bill was

\textsuperscript{312} See H.R.J. 268, 21\textsuperscript{st} Sess. (Iowa 2017).


\textsuperscript{316} See Martin Gould, Murder of boy, age seven, who was fed to pigs by his father prompts calls for stronger rules about home schooling, DAILY MAIL (May 16, 2017), http://www.dailymail.co.uk/news/article-4511728/Kansas-boys-slaying-prompts-call-new-home-school-rules.html.

\textsuperscript{317} See Beth Dalbey, Powerful Lobby Opposes Homeschool Reform Efforts, PATCH (Mar. 28, 2018), https://patch.com/kansas/overland-park/hidden-torture-powerful-lobby-opposes-homeschool-reform-efforts (“The formidable homeschool lobby not only thwarted homeschool reform efforts before legislation could even be introduced in Kansas, but also is lobbying against a child-welfare bill that is related only to the extent that it sprang from Adrian's tragic circumstances.”).

criticized by the HSLDA and the Michigan Freedom Fund, a conservative advocacy organization.\textsuperscript{319} It never moved out of committee.\textsuperscript{320}

Legislators in several states have tried to enact legislation monitoring homeschooling families with CPS histories and run into similar roadblocks.\textsuperscript{321}

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A recent comprehensive book on homeschooling credits HLSDA’s legislative success to its “ability to foment outrage among homeschoolers in any state contemplating a regulation, causing any legislator who supports the regulation to become the victim of a relentless barrage of hostile communications – occasionally including death threats – by mail, email, and office visits.”\textsuperscript{322} A recent article describes a number of extreme lobbying tactics, including a death threat, and quotes a state legislative aide: “I’ve never seen a lobby more powerful and scary.”\textsuperscript{323}

V. THE WAY FORWARD

The current homeschooling regime gives parents free rein to educate their children or not, free rein to isolate their children entirely from society, and free rein to commit egregious child abuse.

Parents can escape the laws that purport to guarantee all children important rights to education and protection simply by keeping them out of school. Parents can choose not to educate their children at all, not to teach them the fundamentals of reading, writing, arithmetic, not to teach them science, history, government. Parents can choose to teach that Biblical truth trumps all, that all science is false science, that women should be educated to be subservient to men, that people of color are inferior to whites, that people who claim non-traditional sexual orientations or gender identities should be “cured” or condemned.

Parents can choose to put their children to work, notwithstanding child labor laws. Parents can choose to beat their children, starve them, chain them up, free from scrutiny by any who are required to report suspected abuse and neglect. They can withdraw their children from school specifically to avoid attention from mandated reporters and CPS.

We need a new legal regime designed to ensure that all children actually enjoy the rights to an adequate education and to adequate protection against child maltreatment that appear to be guaranteed by law. We need a related radical transformation of law governing homeschooling.

\textsuperscript{321} See AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF, supra note X, at 5-11.
\textsuperscript{322} Dwyer & Peters, supra note X, at 65.
\textsuperscript{323} See Huseman, supra note X; Yuracko, supra note X, at 128 (a Congressional representative called homeschoolers “the most effective educational lobby on Capitol Hill”).
The homeschooling movement’s claim that the current regime is justified by absolute parent rights is morally wrong, and inconsistent with growing recognition in the law worldwide that child human rights have equal status with adult human rights.

The homeschooling movement relies on adult autonomy rights to oppose all homeschooling regulation. But such rights should not trump child rights to an education allowing them to exercise autonomy rights in their future lives, including rights to make meaningful career and lifestyle choices. The movement relies on adult freedom of religion rights to oppose regulation affecting religious homeschoolers. But such rights should not trump child rights to exposure to alternative views enabling them to exercise meaningful choice about their future religion.

The new legal regime should impose a presumptive ban on homeschooling, allowing limited exceptions for parents who can satisfy a burden of justification. And it should impose significant restrictions on any homeschooling allowed under those exceptions.324

Given the current politics of homeschooling, legislatures are not likely to enact these restrictions on their own initiative. As described above, in recent decades they have moved systematically to deregulate, and refused in the face of serious problems to enact even the most limited restrictions.

Nor is it adequately clear that today’s courts would uphold such extensive restrictions if they were enacted. While courts have upheld most homeschooling regulations challenged, these cases have generally involved relatively limited restrictions. The courts have judged the constitutionality of state intervention by standards that sometimes indicate significant deference to parent rights.

We need a change in the culture surrounding child rights generally and their rights to education and protection in particular. We need a new understanding of children’s constitutional and related human rights, and we need both political and litigation campaigns built on this understanding.

Constitutional doctrine should recognize that children have enforceable rights to an appropriate education, and to protection against maltreatment. This would mean that legislatures could be required to enact legislation protecting those rights. And it would mean that if legislatures imposed significant restrictions on homeschooling, courts would uphold those restrictions.

Current thinking about homeschooling issues is generally skewed by assumptions that parents have powerfully protected rights under the Federal Constitution in the education and protection arenas, while children do not. Parents are said to have rights to raise and control their children, while children have no reciprocal rights to appropriate parental care. States are said to have rights to regulate education and to protect children if they choose to, but not duties.

This way of thinking puts at risk all state action to protect children in the education and child welfare context. Parents can always claim that state action violates their constitutionally protected rights. Courts generally assess whether protective efforts satisfy the kind of scrutiny

324 See discussion infra Section V.C.
deemed appropriate for limits on parental liberty, without giving equal attention to whether the protective efforts are appropriate to further child rights.

Also, this way of thinking leaves states free not to protect children at all if they choose not to. This is especially problematic when parent rights advocates constitute the only significant lobbying force.

This way of thinking should not be accepted as a given. It is inconsistent with earlier constitutional understandings in this country, which emphasized parental responsibilities over rights, and emphasized the state’s own responsibility for children, and for ensuring that parents fulfilled their responsibilities. It is inconsistent with international law, and with the way other countries think, the way they treat homeschooling, and the way they structure constitutional rights and duties regarding education and child protection, as discussed below.

A. International Law Provides A Model for the U.S.

The U.S. Constitution with its negative rights structure is an anomaly, outdated and inadequate by the standards of the rest of the world. Negative rights are particularly inadequate for children, for whom rights to be free from state intervention are not especially relevant, since the most powerless children are young children incapable of the kind of autonomy that negative rights protect. The key rights children need are positive rights – rights to be nurtured by parents and provided for so that they can grow up to enjoy autonomy and other adult rights.

Most other countries, especially those with newer constitutions, provide positive rights, by contrast to the U.S. Constitution’s negative rights tradition. The U.S. Constitution represents an older Western constitutional tradition, “increasingly out of step with emerging constitutional

325 See generally Toward Constitutional Parenthood, in SHULMAN, supra note X, at 136-223; see also Shulman, supra note X, at 2 (grounding constitutionality of regulation of private schooling, including homeschooling, on “a trust model of parent-child relations, a model that construes the right to parent as a responsibility rather than a right”). Dwyer and Peters point out in their recent comprehensive book on the history and law of homeschooling that “the earliest references to individual rights in connection with schooling in America were rights of children, not of parents.” DWYER & PETERS, supra note X, at 11 (citing Horace Mann insisting that it was a great, immutable principle of natural law” that every person possessed an “absolute right” to an education).

326 See, e.g., Fineman, supra note X, at 91 (“The focus on parental rights … reflects our cultural obsession with autonomy”).

327 See generally ZACKIN, supra note X, at 4 (“many other nations’ constitutions enshrine positive rights, which obligate the state to intervene to protect citizens from nongovernmental dangers”); Tamar Ezer, A Positive Right to Protection for Children, 7 YALE HUM. RIGHTS & DEV. L.J. 1, 5 (2004) (“most other liberal democracies enshrine affirmative government obligations in their constitutions”).
norms … in the rest of the world.” International law shows this same trend. Relatedly, few other countries have constitutions placing the high priority our federal and state constitutions do on adult autonomy rights, including parent rights to raise children free from undue state intervention.

The powerful trend in the rest of the world has been toward including positive rights in their constitutions, and making them justiciable or enforceable. Katherine Young writes in her recent book, *The Future of Economic and Social Rights*:

> [T]he rights to education, health care, housing, social security, food, water and sanitation are increasingly at the top of the human rights agenda… Economic and social rights are now expressly guaranteed… in most of the world’s constitutions and in most of the main human rights treaties. They are also increasingly being given an explicit justiciable status.

1. Human Rights Treaties

The Convention on the Rights of the Child (CRC) demands that nations honor child human rights equally with adult human rights. It imposes a duty on nations to provide education and protection against maltreatment. Other international law also provides children significant rights to education and protection. The International Covenant on Civil and Political Rights

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328 Evan Rosevear, Ran Hirschl & Courtney Jung, *Justiciable and Aspirational Economic and Social Rights in National Constitutions*, in *The Future of Economic and Social Rights* 37, 65 (Katharine G. Young ed., 2019) (forthcoming July 2019); see, e.g., Columbian Constitution of 1991, as described in Manuel José Cepeda Espinosa & David Landau, *Colombian Constitutional Law*, at ix (2017) (“the Court’s case law is a prime example of transformative constitutionalism aiming to overcome entrenched economic and social inequalities”); see id. at 6 (the Constitution goes “well-beyond the liberal constitutionalism of the [earlier constitution] – it enshrined a long list of socioeconomic rights, such as the right to housing, health, education, and social security”).


330 Young, *supra* note X[Book Intro]; Rosevear et al., *supra* note X, at 37 (economic and social rights now “so commonly enshrined that they may reasonably be seen as a defining characteristic of third wave constitutions”), 40 (economic and social rights “more present” and “more likely to be justiciable than ever before”), 62 (this trend continues today).

331 Young, *supra* note X[Book Intro], at 1.


333 *See* Bartholet, *supra* note X[Ratification Annals article]

334 *See* Ezer, *supra* note X, at 23-24 (UN 1959 Declaration of the Rights of the Child, UN 1989 Convention on the Rights of the Child); *see also* Sarah Ramsey and Daan Braveman, *Let Them Starve: Government’s Obligation to Children in Poverty*, 68 TEMPLE L. REV. 1607, 1636-47 (1995). Ramsey and Braveman discuss the 1948 Universal Declaration of Human Rights (special protection for children including right to education); 1924 Declaration of the Rights of the Child (right to normal development, materially and spiritually, right to be put in position to earn livelihood and to be protected against exploitation); and the 1959 Declaration of the Rights of the Child (child shall enjoy special protection and given opportunity to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity, and child best interests shall be paramount consideration in related laws). For a discussion of how customary law principles should make such international law relevant in U.S. courts regardless of whether the U.S. has ratified the relevant treaties, *see id.* at 1639-47.
(ICCPR), which the U.S. has ratified, provides extensive positive rights, with related duties on states to ensure them to individuals, including by adopting legislative or other measures necessary. These rights include protection against private as well as public action, including against private violence and private deprivation of liberty. The International Covenant on Economic, Social and Cultural Rights (ICESCR), broadly ratified even if not by the U.S., provides a broad range of positive rights, with states mandated to ensure their full realization.

2. Other Nations’ Domestic Law
   a. Constitutional Mandates to Provide Education and Protect Children

Child rights to education and to protection against maltreatment count as two of the four most popular positive social and economic rights in other countries constitutions. A full two-thirds of all countries today embody these rights in their constitutions. They are considered “standard features of new constitutions.” The right to education now exists in 81% of national constitutions and is justiciable in 59%. Some of the most recent constitutions have given powerful recognition to children’s rights specifically. The Columbian Constitution reflects this modern trend in striking terms:

The following are basic rights of children: life, physical integrity, health and social security, a balanced diet, their name and citizenship, to have a family and not be separated from it, care and love, instruction and culture, recreation, and the free expression of their opinions. They will be protected against all forms of abandonment, physical or moral violence, sequestration, sale, sexual abuse, work or economic exploitation, and dangerous work. They will also enjoy other rights upheld in the Constitution, the laws, and international treaties ratified by Colombia.

The family, society, and the State have the obligation to assist and protect children in order to guarantee their harmonious and integral development and the full exercise of their rights. Any individual may request from the competent authority the enforcement of these rights and the sanctioning of those who violate them.

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336 Id.
337 Id. at 5, 17; Rosevear et al., supra note X.
338 Rosevear et al., supra note X, at 39
339 Id. at 50.
340 Ezer, supra note X, describes how “positive rights take a central place in the South African constitution,” noting that it provides explicit constitutionalization of children’s rights to social services, to protection from “maltreatment, neglect, abuse or degradation,” and to parental care. Id. at 9, 27. Ezer argues that children’s “simultaneous dependence and capacity for growth lead to a positive right to protection and to the means necessary for their development.” Id. at 41; see id. at 49.
The rights of children take precedence over the rights of others.

While some constitutions embrace positive rights in largely aspirational terms, the clear trend is in the direction of making such rights enforceable. While commentators describe the results as mixed to date, some progress is evident in making these rights meaningful. Given the challenge of making rights real, especially for the most powerless in society, even mixed results demonstrate the significance of embodying positive rights in constitutions.

b. Homeschooling Law

The U.S. has embraced homeschooling more enthusiastically than other countries. Many more parents here choose to homeschool, and there are far fewer restrictions, than in most peer countries.

This may relate to the fact that the larger legal context differs significantly, with other countries seeing children as having rights to education and protection against maltreatment, both under the CRC, and under their own constitutions.

Many countries ban homeschooling altogether, others fail to legally recognize it, and many impose significant requirements, often including required home visits and annual testing. European countries have a variety of legal approaches to homeschooling ranging from restrictive to relatively permissive. On the restrictive end, some countries, like Germany, ban it altogether, and enforce the ban strictly. Sweden effectively bans homeschooling, allowing it only in “special circumstances;” religious or philosophical convictions are not valid reasons for homeschooling. Some countries, like Bulgaria, the Netherlands, and Spain, provide no affirmative right to homeschooling, though they may permit some to take place. France

342 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 44 (emphasis added). The Columbian Constitution also incorporates international human rights law, including treaties ratified by the Congress such as the Convention on the Rights of the Child. See Espinosa, supra note X[book], at 7; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.
343 See Young, supra note X[Book Intro].
344 See generally id. at 10, 13, 17-19.
345 See generally Chapters 12 through 20 in THE WILEY HANDBOOK OF HOME EDUCATION, supra note X.
347 See generally HSLSDA International, HSLDA https://hslda.org/content/hs/international/.
349 See Blok et al., supra note X, at 401 tbl.16.2, 407-08, 413; Germany, HSLDA (2019), https://hslda.org/content/hs/international/germany/default.asp.
351 Id. at 413.
permits homeschooling but requires notice and home visits which include interviewing the child and reviewing the educational plan. France prescribes the subjects to be taught and requires that the homeschooled child attain by age sixteen the same standard as one educated in school. A negative assessment of educational progress triggers an early second assessment, and if it is negative then the parents must enroll the child in school.\textsuperscript{352} Norway permits homeschooling but requires that it be equivalent to school education. To this end Norway requires notice, and home visits twice per year to assess compliance with education requirements. Problematic assessments may trigger requirements that students take achievement tests; problematic test results may trigger a requirement to enroll in public school.\textsuperscript{353}

European countries on the permissive end generally have far more restrictions than exist in the U.S.\textsuperscript{354} All countries that permit homeschooling require registration, and most have some monitoring system, typically through annual school-administered tests, and sometimes also through home visits. Most require parents to follow the standard school curriculum. In no European country, even the most permissive, does homeschooling exist at anything like the scale it does in the U.S.\textsuperscript{355}

South Africa allows homeschooling but has many requirements, including that parents “not instill unfair discrimination, racism or religious intolerance,” and that the “values of the constitution of the Republic of South Africa prevail in the education.”\textsuperscript{356} Israel allows homeschooling only under significant restrictions: parents must demonstrate they will provide an adequate education, including academic skills and that they will enable the child to interact with their age group, “will develop values relating to life in society,” and will provide for adequate evaluation of learning success; approval will be provided based on approval of the educational plan, and a home visit by a committee confirming that the child will receive a proper education; and approval shall be for no longer than two years, with parents required to reapply for any extension.\textsuperscript{357} The Brazilian Supreme Court ruled recently that homeschooling was not a lawful means for parents to provide education to their children, because there was no law regulating the practice. Two justices ruled that it would be unconstitutional even if legislation allowed it.\textsuperscript{358}

Regulation in other countries is not moving systematically in the direction of deregulation. Many European countries have been increasing homeschooling restrictions.\textsuperscript{359}

\textsuperscript{352}Id. at 401 tbl. 16.2. The content of the “assessment” varies, but it is done by an outside “inspector” who interviews the child each year, usually in the home, and tests progress in certain subjects. Id. at 145-46.

\textsuperscript{353}Id. at 410.

\textsuperscript{354}Id. at 414; see also Blok & Karsten, supra note X.

\textsuperscript{355}Blok et al., supra note X, at 414; Kunzman & Gaither, supra note X, at 31.

\textsuperscript{356}Michael Olalekan Olatunji, Contemporary Homeschooling and the Issue of Racism: The Case of South Africa 494, in THE WILEY HANDBOOK OF HOME EDUCATION, supra note X, at 497-98.

\textsuperscript{357}Arnon Gutfeld & Yoram Rabin, Homeschooling in the U.S. and Its Lesson for Israel, 47 ISRAEL YEARBOOK ON HUM. RTS 175, 215-17 (2017).

\textsuperscript{358}A majority found that it would be constitutional if the legislature allowed it. One found that it should be allowed under current law so long as the child would take exams at a regular school and show a good level of learning. See e-mail from Luis Roberto Barroso, Justice, Supreme Federal Court of Brazil, to Author (Jan. 23, 2019 13:32 EST) (on file with author); Reynaldo Turollo Jr. & Natália Cancian, Brazilian Supreme Court Outlaws Homeschooling, FOLHA DE SÃO PAULO (Sept. 13, 2018), https://www1.folha.uol.com.br/internacional/en/brazil/2018/09/brazilian-supreme-court-outlaws-homeschooling.shtml.

\textsuperscript{359}See generally Blok et al., supra note X, at 414-15; Rothermel, supra note X, at 6-7.
The European Court of Human Rights upheld Germany’s ban on homeschooling against a challenge that it violated fundamental parent and religious rights under the European Convention on Human Rights. The Court noted that the Convention “recognizes the role of the State in education as well as the right of parents…”360 It noted approvingly the reasoning of the German Constitutional Court, which stressed society’s interest in avoiding “the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society.”361 And it said that given parents’ ability to educate their children at home during non-school hours, their right to educate “in conformity with their religious convictions is not restricted in a disproportionate manner.”362

The current approach to homeschooling in the U.S. is out of synch with global views on the importance of child rights and the related importance of education. It is anomalous in terms of global regulation of homeschooling.

B. Developing A Constitutional Duty to Educate and Protect Children in the U.S.

The building blocks already exist for developing appropriate constitutional doctrine guaranteeing children’s affirmative rights to education and protection against maltreatment. A number of scholars have mounted the case that a proper understanding of substantive due process and equal protection under the Federal Constitution, and state constitutional provisions governing education, support such rights.363

1. The Federal Constitution

There are bases in current law for thinking that the Supreme Court should conclude that the Federal Constitution provides children with positive rights to education and protection.364 The Court created parent rights as part of substantive due process without the benefit of any specific language in the Federal Constitution. It relied on the vague promise that states could not deprive people of “life, liberty or property” without “due process,” to create the principle that parents had

361 Id. at 7.
362 Id. at 7.
363 See REBELL, Advancing Civic Preparation through the State Courts and Advancing Civic Preparation through the Federal Courts in FLUNKING DEMOCRACY, supra note X; id. at 160-66 (also arguing that such rights are guaranteed by the privileges and immunities and the republican form of government provisions of the Federal Constitution); Dwyer, The Regulation Question, in HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE, supra note X, Dailey & Rosenbury, supra note X; Shulman, supra note X[chapter] (making this argument in the context of private schools as well); Yuracko, supra note X, at 209 (“as a matter of state and federal constitutional law states are required to oversee and regulate homeschooling parents so as to ensure that they provide their children with the same basic minimum education as their state’s own schools”); id. at 132 (under federal and state constitutions states must regulate to check the existing “rampant forms of sexism in homeschooling so as to prevent the severe under-education of girls be homeschooling parents who believe in female subordination”); see also DWYER & PETERS, supra note X, at 199, 227-28.
364 See generally Tamar Ezer, supra note X, at 1 (“This Article argues for a positive right to protection for children, rooted in dignity, by probing and exploring alternate legal approaches to protecting children’s right in both international and comparative law,” by contrast to the current negative rights American constitutional regime typified by the DeShaney case discussed below).
the right to raise their children free from undue state intervention. Former U.S. Supreme Court Justice Stevens and some bold state court judges have moved in the direction of finding that children have constitutional rights to nurturing parental relationships.365

Equal protection doctrine provides that states cannot deny certain classes of individuals important rights, unless the denial can be demonstrated by a heightened scrutiny standard.366 The Court applies strict scrutiny when a suspect class like race is involved, or when fundamental rights specified in the Constitution are involved.367 The Court has found that heightened or intermediate scrutiny is appropriate in an increasing number of situations, based both on the importance of the interest at stake, and on the “sensitive although not necessarily suspect” nature of the class affected.368

While the Court held in a school financing case called San Antonio v. Rodriguez that education was not a “fundamental” right triggering strict scrutiny under equal protection, the case dealt only with the state’s approach to allocating funds for education, not with the state’s denial of education altogether to a class of children. It said that the case might be different if “an absolute denial of educational opportunities to any of [the State’s] children” were involved, as opposed to just relative differences in spending:369 “[In the present case] no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”370 The current homeschooling regime enables just such a denial of the fundamentals.

[T]he Court has recognized certain classes of children as quasi-suspect, triggering at least intermediate scrutiny, including those classified as illegitimate,371 and the children of illegal aliens.372 It emphasized the innocence of the children involved, saying they should not be penalized for the sins of their parents. These equal protection cases effectively gave children positive rights – the denial to them of certain economic and educational benefits was struck down, based on the state’s inability to justify granting these benefits to other children but not to them.

And the Court has found equal protection violated when important rights are involved, including education, even when they are not specifically grounded in language in the Federal Constitution. In Plyler v. Doe,373 the Court struck down legislation barring the children of undocumented parents from attending public schools, finding it “most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in

365 See Barholet, supra note X(CRC article), at 148 (citing, e.g., Troxel v. Granville, Justice Stevens concurring, 530 U.S. 57, 88-89 (2000).
366 See Tribe, supra note X, at § 16-6, 16-13, 16-23, 16-32; Yuracko, supra note X, at 140; Dwyer & Peters, supra note X, at 199; George Blum et al., 16B Am. Jur. 2D Constitutional Law, § 857 Standards of review, generally (Nov. 2018).
367 See Laurence Tribe, American Constitutional Law 1454 (2d ed. 1988).
368 Id. at § 16-33.
370 Id. at 36-37.
373 Id.
the Equal Protection Clause.” Constitutional scholar Laurence Tribe notes that the Court effectively applied heightened or intermediate scrutiny in this case.

The *Plyler* Court’s language is directly applicable to the situation of homeschooled children denied an adequate education:

> [M]ore is involved in these cases than the abstract question whether [this legislation] discriminated against a suspect class, or whether education is a fundamental right. [This legislation] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [this legislation], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

A homeschooling regime that denies large groups of children rights to education and to protection against maltreatment that other children enjoy, should be understood to fail this equal protection standard.

While the Federal Constitution is often described as providing only negative as opposed to positive rights, Michael Rebell makes a powerful argument that education qualifies as an exception. Also, state action allowing parents an exemption from compulsory education counts as action depriving children of rights otherwise guaranteed.

As discussed, education is a right guaranteed universally by state law. It is seen as a fundamental aspect of our democracy, providing poor children at least some opportunity to escape the socio-economic conditions of their birth, and providing all children some exposure to the values and culture of the larger society. The Supreme Court celebrated the importance of education in *Brown v. Board of Education*, stating:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities…. It is the very foundation of good citizenship. [I]t is a principal instrument in awakening the child to

374 *Id.* at 222; *see Tribe*, supra note X, at 1610-11.
375 *See Tribe*, supra note X, at 1454 n.6 (Court applies intermediate scrutiny to legitimacy classifications “properly, if not always consistently or coherently,” citing *Levy*, 391 U.S. 68; *Weber*, 406 U.S.; *Trimble*, 430 U.S. 762; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99, 109 (1973) (Marshall, J., dissenting) (arguing that the Court has often applied some version of intermediate scrutiny, regardless of whether rights are explicitly protected in the Constitution, and that it should do so “when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved”).
376 *Id.* at 223-24.
cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.379

Protection against abuse and neglect is similarly universally guaranteed. And the education system has always played a major role in providing such protection. Our child protection system has from its origins had as a central component mandatory reporting by officials with regular contact with children. One of the first major child abuse scandals – the discovery and publication by doctors of the “battered-child syndrome” – triggered creation of mandatory reporting.380 As discussed earlier, teachers and other school staff are defined as mandatory reporters, and responsible for a significant percentage of reports to CPS.381 The federal government requires such reporting systems, and has expanded reporting obligations over the years.382

Lawyers are mounting challenges in different federal courts throughout the country, with the goal of getting the Supreme Court to find that devastatingly inadequate public schools, and schools that fail to teach such core courses as government and civics, violate child rights to due process and equal protection.383 A similar campaign could be mounted challenging the current homeschooling regime.

However, while it is easy to argue for the direction that the Court should move in interpreting the Federal Constitution, it does not seem likely that the current Court will take us there in any near future. The majority on this Court does not seem enthusiastic about expanding individual rights under substantive due process or equal protection.384 The Court’s DeShaney case stands for now as a significant barrier to any federal litigation strategy, with the majority finding that the child had no right to state action providing protection against parents’ brutal abuse.385 So does the Court’s general interpretation of the Federal Constitution as a negative rather than positive rights constitution, and the emphasis in the language of the Constitution on protecting individual rights against state action.386 The best hope now for any litigation strategy lies in the state courts.

379 Id. at 493.
380 See, e.g., BARTHOLET, supra note X[NC], at 34-35.
381 See supra note X [Teachers as Mandatory Reporters].
384 See Bartholet, supra note X[Ratification Annals article], at 7 (Supreme Court’s enthusiasm about creating new constitutional rights for children in certain limited areas peaked in earlier years, with Court cutting back on such rights since).
385 DeShaney v. Winnebago County Dept. of Soc. Services, 489 U.S. 189 (1989); see discussion supra note X. DeShaney has been severely condemned by many. See, e.g., Bartholet, supra note X[Nobody’s Children] at 35-38; see also James G. Dwyer, The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents, 93 MINN. L. REV. 407, 411-415 (state creates parent rights making it responsible for parental abuse). The Deshaney majority acknowledges an argument undermining its reasoning, which it fails to confront, noting: “Petitioners also argue that the Wisconsin child protection statutes gave Joshua an ‘entitlement’ to receive protective services…. an entitlement which would enjoy due process protection against state deprivation….” DeShaney, 489 U.S. at 195 n.2. It declines to consider this argument on the grounds that it was not raised previously. Id.
386 See TRIBE, supra note X, § 18-1.
2. State Constitutions

State constitutions, by contrast to the federal constitution, have a powerful positive rights tradition. Emily Zackin documents in her book, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES, how state constitutions have established extensive positive rights over time in the areas of education, labor, and the environment. Some state constitutions recognize such rights in the areas of welfare, housing, health, and abortions.

All states provide in their constitutions support for child rights to education. Litigation in state courts based on these provisions has been very successful, both in challenging inequitable funding systems, and in challenging substantive inadequacy. Indeed these cases are impressive when compared to cases in other nations based on their positive rights provisions. Educational rights here have not been limited by principles that often restrict the radical potential of positive rights abroad. Courts here have on several occasions ordered massive financial remedies to redress inequitable funding systems. They have also ordered significant remedies to improve educational quality, and in at least some cases with impressive impact.

Michael Rebell writes that “the education clauses of virtually all the state constitutions contain language that requires the state to provide all its students ‘an adequate public education,’ ‘a thorough and efficient education,’ ‘a high quality system of free public schools,’ or a ‘sound basic education.’” He notes that in recent education adequacy cases, many state courts have given teeth to the right to an adequate education, specifying important academic and vocational capacities, and including civic understanding and preparation “to function productively as civil

387 EMILY J. ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 1-17 (2013) (while the U.S. Constitution is largely negative, simply prohibiting the government from intervening, state constitutions contain both negative and positive rights).
388 See generally Chapters 5–7 in ZACKIN, supra note X; see also SUTTON, supra note X, at 35 (explaining that “state constitutions not only identify limits on government; they also impose obligations on government”).
389 See Ezer, supra note X, at 5.
391 See generally Michael A. Rebell, The Right to Education in the American State Courts, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 137, supra note X.
392 See id. at 139 (“the American right to education is not qualified by concepts of ‘progressive realization’ or of enforcing only a ‘minimum core’ of the right”), 156 (not limited by concepts such as available resources or progressive realization).
393 See, e.g., Jeff King, Two ironies about American exceptionalism over social rights, 12 J. CONST. L. 572, 583-84 (2014) (New York Court of Appeals directed State to spend additional $1.93 billion per year to remedy educational inadequacy in New York City’s public school system); see id. at 585 (discussing other cases involving orders for the expenditure of very significant amounts).
394 See also Young, supra note X[Introduction], at 19-20; King, supra note X, at 572 (2014) (U.S. judges “have often enforced positive duties to provide social services in a manner that is… strikingly interventionist by international comparison”).
395 Rebell, supra note X[Chapter 5 in Young book], at 141.
participants.\textsuperscript{396} Courts in almost half the states have held that their educational provisions guarantee the right to an adequate education, and that a primary purpose of education is to prepare students for civic participation, including employment.\textsuperscript{397} Zackin discusses the rationale for these constitutional provisions in similar terms:

While constitutional education rights were often described as vehicles though which individual children could be protected from poverty, … advocates of public education generally justified their support for these rights by arguing that education is necessary to maintain a republican government….It is important to realize that public education in America has long been, and continues to be, understood not only as a means of elevating the individual and preparing him for the responsibilities of citizenship, but also of protecting the republic itself.\textsuperscript{398}

Rebell notes that in many states “public education is the only service that the constitution definitely requires the state to provide.”\textsuperscript{399}

This provides a strong basis for state constitutional challenges to the homeschooling regime. It also provides the basis for finding education the kind of fundamental right protected under the substantive due process and equal protection clauses that are contained in state as well as federal constitutions.\textsuperscript{400} State decisions based on state constitutions can eventually provide evidence of the kind of national consensus that often helps the Supreme Court find new meaning in the Federal Constitution.\textsuperscript{401}

Jeffrey Sutton’s recent book, 51 IMPERFECT SOLUTIONS, makes a convincing case that state constitutions may provide the most promising source of rights in the education and other arenas.\textsuperscript{402} He bases this in part on their positive rights, including their education provisions, and on the state courts’ ability to interpret their own constitutions’ equal protection and due process clauses more liberally than the Federal Constitution.\textsuperscript{403} He points convincingly to the fact that, while the funding reallocation litigation failed in the Supreme Court in the \textit{Rodriguez} decision, it succeeded dramatically in the years following in the state courts.\textsuperscript{404} Sutton’s book concludes that there are many reasons to look to state courts as “the lead change agents going forward.”\textsuperscript{405}

\textsuperscript{396} See id. at 143, 144 (quoting Campaign for Fiscal Equity, Inc. v. State, 100 N.Y. 2d 893, 907 (N.Y. App. Div. 2003)).

\textsuperscript{397} See REBELL, supra note X[book?], at 4, 49, 52; see also Rebell, supra note X[Chapter in Young Book] at 138 (since 1989 plaintiffs have prevailed in more than 60% of final liability decisions in adequacy cases); SUTTON, supra note X, at 30 (since 1989, plaintiffs have won nearly two-thirds of lawsuits challenging state school funding allocations).

\textsuperscript{398} ZACKIN, supra note X, at 74.

\textsuperscript{399} REBELL, supra note X, at 147[book].

\textsuperscript{400} See REBELL, supra note X, at 49. States are free to interpret their constitutional clauses differently from the federal, even when the language is identical. See Ramsey and Braveman, supra note X, at 1628-31.

\textsuperscript{401} SUTTON, supra note X, at 211-12.

\textsuperscript{402} See generally id.

\textsuperscript{403} See id. at Chapters 3, 7. States are free to interpret their constitutional clauses differently from the federal, even when the language is identical. See Ramsey and Braveman, supra note X, at 1628-31.

\textsuperscript{404} See id. at Chapter 4.

\textsuperscript{405} Id. at 216.
A variety of other existing state constitutional provisions provide an opportunity to expand rights for children to protection, as well as education. Two-thirds of state constitutions guarantee the right to pursue happiness, and some provide the right to safety.406 Many state constitutional provisions provide rights related to care of the needy and protection of health.407 Some of these provide for “legal, social and economic justice,” and “opportunity for the fullest development of the individual;” some provide rights for those of “immature age, and others “unable to provide or care for themselves.”408 Interpretation of such provisions to provide special protection to children seems appropriate.409

Positive rights have been added to state constitutions over the years often in response to the needs of groups with relatively limited political power – groups which have failed to achieve their goals in state legislatures.410 They have sought these constitutional amendments specifically to force the hand of recalcitrant legislators,411 including in cases involving children.412

Child advocates might buttress a litigation campaign relying on current constitutional provisions, with a strategy to strengthen constitutional protection through constitutional amendments. Ratification of the CRC would serve to encourage positive constitutional rulings as well as amendments to strengthen current constitutional protection.413

C. Recommended Restrictions

States should impose significant restrictions on homeschooling. Legislatures should do this on their own initiative. But courts must make clear that the current regime violates children’s constitutional rights, and that restrictions along the lines described below are required.

1. General Presumption Against Homeschooling with Burden on Parents to Justify Exceptions

The new regime should deny the right to homeschool, subject to carefully delineated exceptions for situations in which homeschooling is needed and appropriate. Parents should have a

407 Id. at 4 (regarding care of the needy); Ramsey & Braveman, supra note X, at 1622-24 (1995) (at least twenty state constitutions have language regarding care of needy and protection of health). Frank Michelman was a leading proponent in earlier times for interpreting the federal Constitution to provide rights to assistance. See Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13 (1969).
408 Ramsey & Braveman, supra note X, at 1623.
409 Id. at 1631-35 (state parens patriae doctrine obliges state to protect children under these provisions): ZACKIN, supra note X, at 106 (protective rights particularly appropriate in the case of children, as recognized by the ubiquity of state constitutional provisions supporting educational rights).
410 ZACKIN, supra note X, at 14, 16, 79, 199.
411 Id. at79, 102.
413 See Bartholet, supra note X [CRC article].
significant burden of justification for a requested exception. There is no other way to ensure that children receive an adequate education or protection against maltreatment at all comparable to the protection provided public school children.

Exceptions might include situations in which gifted artists or athletes want to pursue careers that demand flexibility inconsistent with normal schooling. They might include situations in which the local schools are seriously inadequate to serve children’s needs, as where children are at risk for bullying or racism, or where children with disabilities cannot receive needed services. They might include situations where parents can demonstrate they would provide a significantly superior quality education to that available at the public school.

When exceptions are granted, children should still be required to attend some courses and other programs at school, including, for example, civic education, arts and physical education, and extra-curricular activities, to ensure exposure to alternative views and values, a broad range of activities, socialization, and contact with mandated reporters.

This approach seems the only one that will ensure an adequate education for most children. The goal is not to indoctrinate children in one “majority culture” perspective, but to expose children to the wide range of views characteristic of our democracy, and the wide range of abilities and learning needed to function in this democracy. It is to give children the kind of exposure that will enable them to grow up to exercise meaningful choices about their own future views, religions, lifestyles and work.

Parents who are ideologically committed to raising children in isolation from the mainstream, with views and values counter to much of the education provided in public schools, are not going to be willing or able to provide an education comparable to what schools provide. Parents who are committed to raising their children so that they will stay within the parents’ culture and community, are not going to educate their children so that they can exercise choice about their future including the choice to exit. Requiring submission of proposed curricula, or academic testing, will not solve these problems.

Also, as Michael Rebell argues in FLUNKING DEMOCRACY, the education needed to prepare students to function as citizens includes not just knowledge of certain course content, but civic experiences like participation in student government, active learning in extracurricular activities including community service, education in civic skills like the ability to engage in respectful discussion with those holding opposing views, and civic values including respect for the rule of law and for basic democratic institutions.414 A variety of political scientists who have thought deeply about education describe the importance of teaching tolerance, and of exposing students to information and ideas that will enable them to make their own decisions in the future about how to live their lives, whether in conformance with their parents’ views and values or not.415

While some homeschooling parents might be able to provide some of these things, many clearly could not and would not. A large percentage of homeschooling parents are committed to

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414 See Chapters 4 and 5 in REBELL, supra note X, at 69, 98.
415 See discussion in REBELL, supra note X, at 86-90.
teaching their children that these kinds of democratic views and values are wrong, and to raising their children so that they will stay true to their parents’ beliefs and lifestyle.\textsuperscript{416}

Moreover, there is no way that school authorities could effectively monitor how parents were performing in these terms. And a legal rule that puts state authorities in the position of judging which parents’ ideological views are too extreme, or whether parents have demonstrated that they will expose their children adequately to alternative views and values, would invite constitutional challenge and for good reason. State authorities would inevitably be judging the rights and wrongs of parents’ ideas and religious beliefs. This would constitute the kind of “excessive entanglement” of government officials with religious institutions that the Supreme Court has found unconstitutional.\textsuperscript{417}

Ira Lupu finds this problem central to concluding that the “middle ground” between absence of regulation and a ban on homeschooling cannot work.\textsuperscript{418} She argues, accordingly, that an “enduring solution” to the homeschooling problem may require a choice between the extremes of very limited regulation in the form of periodic testing of student progress, and a ban on homeschooling for all cases where children are physically capable of leaving the home.\textsuperscript{419} Lupu chooses the near-total ban, finding it more consistent with child rights and with our constitutional values:

\begin{quote}
The path out of the constitutional morass generated by the question of home education can best be found in the model of power separation. We have learned as a people to be distrustful of despotic power. The federal Constitution, and all of our state constitutions as well, proceed from the premise that dividing governmental power over adults will help safeguard their liberty. Not surprisingly, we have developed analogous mechanisms to protect the liberty of children. The division of power and influence over them among parents, school employees, and others in the community reduces the risk of tyrannical treatment and domination of children. … Parents should have substantial power to choose their children’s teachers, but there is reason to be troubled, and sufficient constitutional warrant for states to act, when parents choose only themselves.\textsuperscript{420}
\end{quote}

2. Restrictions Governing Any Homeschooling Allowed Under Exceptions to the General Presumption

\textsuperscript{416} See supra Section II.B.
\textsuperscript{417} See Ira C. Lupu, \textit{Home Education, Religious Liberty, and the Separation of Powers}, 67 B.U. L. REV. 971, 984–85 (1987); See id. at 983 n. 50, n.51; see also Shulman, supra note X[chapter], at 38.
\textsuperscript{418} As Ira Lupu explains: “Approval of teacher competence, curriculum, or textbooks may each create situations of conflict between secular educational goals and religious norms. If, for example, school officials require instruction in science, should they approve or disapprove a home education program which includes only “creation science?”… [T]he statutory requirement that schools teach ‘the duties of citizenship’ may well produce conflict with a program of home instruction based on claims of devotion to God and ‘exclusive parental jurisdiction’ over children. Parents who reject the concept of citizenship duties are hardly likely to teach such duties effectively, and official policing of the manner in which parents teach about duty to God, family, and country respectively seem highly likely to place officials in a constitutional danger zone.” Lupu, supra note X, at 984-85.
\textsuperscript{419} Id. at 987.
\textsuperscript{420} Id. at 989-90; see AMY GUTMANN, DEMOCRATIC EDUCATION: REVISED EDITION xiv (1999) (“children… would not be well served by ceding comprehensive authority to any single educational agent – parents, citizens, or professional educators…”).
To the degree that parents are granted exceptions to the general presumption against homeschooling, the following rules should apply.

**a. Guiding Principles**

Regulation should be designed to guarantee that all homeschoolers receive an adequate education, roughly equivalent to public school education in term of knowledge and skills taught, and exposure to varied views and values. It should be designed to further children’s rights to future autonomous decision-making with regard to employment and lifestyle. It should be designed to guarantee that all homeschooled children receive roughly the same protection against abuse and neglect as children in public schools. The burden of proof should be on parents to demonstrate that their educational plan will accomplish these goals, and they are fit to implement the plan.

Regulation should be designed with a view to effective enforcement. Policymakers must structure systems that are easy to implement, with clear rules leaving limited room for resistance.

Financial incentives must be restructured to encourage enforcement. Today schools are often financed on a per-pupil, enrolled-student basis, so that devoting resources to enforcing homeschooling requirements may seem inconsistent with responsibilities to enrolled students.

Resources must be provided for legal representation of those responsible for enforcement. Efforts now to enforce even limited restrictions on homeschooling trigger resistance and litigation, discouraging enforcement.

**b. Specific Requirements to Ensure an Adequate Education**

- Annual demonstration by parents of justification for exception to presumption against homeschooling;
- Submission by parents of intended curriculum and education plan (including hours of instruction) for approval in advance of school year, with approval conditioned on demonstration parents will provide essentials of public school education;
- Submission by parents of education credentials and other evidence of ability to provide essentials of education provided public schoolers for approval in advance of school year; presumptive minimum credentials are high school degree for lower grades and bachelor’s degree for older grades; approval conditioned on proof of minimum credentials, unless waiver granted based on other persuasive evidence of fitness;
- Testing of homeschoolers on a regular basis, at least annually, to assess educational progress, with tests selected and administered by public school authorities; permission to continue homeschooling conditioned on adequate performance, with low scores triggering order to enroll in school.
- Home visits by school authorities to assess educational environment and check on child welfare, a minimum of two times per year, with more visits or
order to enroll in school triggered by evidence of problems. If deemed appropriate based on suspected problems, visits shall be without prior warning and without consent.

- Parents must satisfy basic vaccination and other health–related requirements.
- School authorities charged with enforcement of above requirements, including by orders transferring children to public school based on inadequate compliance, inadequacy of education, low test scores, or other problems.

c. **Specific Requirements to Ensure Adequate Protection Against Abuse and Neglect**

- School officials with mandatory reporting responsibilities should be designated for the required home visits noted above. If deemed appropriate based on suspected maltreatment, including any prior CPS history, such visits shall be made without prior warning and without consent, and on a more frequent basis.
- CPS must notify school authorities of homeschooled children whose parents have been reported for suspected maltreatment.
- School authorities must conduct background checks of homeschooling parents and other adults in the household, to assess any CPS and relevant criminal involvement, past or present, prior to granting permission to homeschool and on an annual basis thereafter.
- When there is a problematic CPS or criminal history, or other reason to suspect maltreatment, the strong presumption should be against any permission to homeschool; if homeschooling is permitted, the children should be monitored regularly to ensure they are not at risk.

D. **Costs of the Proposed Restrictive Regime**

There would be costs associated with the proposed regime. Many parents have legitimate reasons to homeschool. Many will do better by their children than would the available schools. Public schools in this country, especially those serving the most disadvantaged children, are plagued with problems, triggering reform efforts that regularly fail to provide cures. Many schools provide little in the way of civic preparation or exposure to alternative perspectives.

Theoretically parents with legitimate needs to homeschool, who have the commitment and capacity to provide their children with a superior education, should be able to satisfy the burden of demonstrating this so as to win permission to homeschool. However, problematic school authorities may use their discretion to implement the proposed restrictive regime wrongfully. This danger could be minimized by delegating the decision as to whether to grant exceptions to a higher school authority than the local school district, or by providing an appeal mechanism. But mistakes will be made in any system. Some parents who should be allowed to homeschool will be denied this opportunity.

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421 See supra Section II.B.
422 See generally REBELL, supra note X[Flunking Democracy].
Nonetheless, the costs for children in a system of restrictive regulation are limited. Most children will do all right in public schools, even if some of them might do better if homeschooled. And parents will be free to make up at home what their children are not getting at school.

Also, to the degree public schools are seriously deficient, our society has to work on improving them, rather than simply allowing some parents to escape. This provides no solution for the children condemned to attend inadequate schools.

There are also arguable costs in terms of the values at the heart of the historic Meyer and Pierce cases. The Supreme Court spoke in these cases of the danger of allowing too much state control over the raising of children, alluding to the value of diverse communities within the larger society and the dangers of totalitarian regimes.

But the restrictions on homeschooling suggested here pose no such dangers. Parents would retain enormous control over children, even if children were required to attend regular school throughout the period of compulsory education. Parents would still raise these children at home with total control over their lives from infancy until kindergarten. They would still dominate the lives of children enrolled full-time in school, with total control during a huge proportion of their waking hours. Dwyer & Peters note that mandatory school time would take up less than one-fourth of a child’s waking hours in a year, assuming that school took up seven hours per day.

They argue that the demand for freedom from restrictions amounts to a demand for the state to give parents “monopoly control over the mind of a child…. Jeffrey Shulman notes in his powerful book, The Constitutional Parent:

> The state as educator does not replace the parent as educator. The parent remains a private source of intellectual and moral authority, as do a host of private players and entities. Indeed, against these private sources, ‘the state is normally at a disadvantage.’

Monopoly control by parents or by religious groups is very different from freedom to resist monopoly control by the state. Religious and cultural groups that deserve to survive, will survive, even if their children are exposed to the larger society’s views and values.

In sum, the costs of the proposed restrictive regime don’t begin to compare to the costs of the current unrestricted regime.

E. Private School Reform

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423 See discussion of Pierce and Meyer supra, pp. XX-XX.
424 See Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (warning against regulations like those in Sparta, designed to “submerge the individual and develop ideal citizens); Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (1925) (emphasizing “the child is not the mere creature of the state and rejecting a “general power of the state to standardize its children”).
425 See Dwyer & Peters, supra note X, at 192.
426 Id. at 128.
427 Shulman, supra note X, at 161 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940)).
Some private schools pose problems of the same nature as homeschooling. Religious and other groups with views and values far outside the mainstream operate private schools with very little regulation ensuring that children receive adequate educations. “Regulatory deference” leaves “a significant number of schools, especially those with church affiliation, [to] operate as they wish with little, if any, state restriction or oversight.”

Policy-makers should consider imposing significant restrictions on private schools for many of the same reasons that they should restrict homeschooling. Moreover it would be deeply unfair to allow those who can afford private schools to isolate their children from public values in private schools reflecting the parents’ values, while denying this possibility to those unable to afford such schools.

However, this topic is beyond the scope of this article. Private schooling is a large and complicated world, with some important differences from homeschooling, both factually and legally.

Deregulation in private schooling is not as extreme as with homeschooling. Many states impose more requirements on private schools with respect to teacher qualifications, curriculum requirements, testing, and protection for the rights of students with disabilities. State rules often screen out teachers with criminal backgrounds relevant to child safety. And private schools are at least subject to some minimal regulation providing protections that don’t exist in homeschooling, such as health and safety rules and anti-discrimination laws. State regulations often impose requirements related to vaccinations and medical examinations.

Private school teachers are mandated reporters for suspected child maltreatment. Corporal punishment is often prohibited by state law. And unlike parents, who can choose to keep their children in total isolation, teachers in private schools operate in an environment where there are other teachers and school officials who may provide healthy peer pressure. Children in private schools are at least exposed to a number of different adults and children, likely to provide at least some range of alternative views, and some protection against egregious maltreatment.

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428 See generally Shulman, supra note X[chapter], at 23-24; REBELL, supra note X, at 41-42 (describing limited regulation of private schools and lax enforcement of regulation); DWYER & PETERS, supra note X, at 201-05.
429 See Eliza Shapiro, Do Children Get a Subpar Education in Yeshivas? New York Says It Will Finally Find Out, NEW YORK TIMES (Dec. 3, 2018) (describing claims made by graduates from ultra-Orthodox Jewish private schools called yeshivas that students are taught little about nonreligious topics like science and history, and graduate unprepared for work or higher education).
430 See Shulman, supra note X[chapter], at 24.
431 One legal difference is that the Supreme Court has clearly held that private schools are protected by the Federal Constitution. See Pierce v. Soc’y of the Sisters of the Holy Names of Mary and Jesus, 268 U.S. 510 (1925).
432 See Shulman, supra note X[chapter], at 25.
434 See, e.g., Shulman, supra note X[chapter], at 23-24.
435 See Shulman, supra note X[chapter], at 22.
436 See Huseman, supra note X[propublica]; West, supra note X, at 30 (vaccinations); see also Bethany Mandel, Parenting in the Time of Measles, NEW YORK TIMES (Apr. 3, 2019) (homeschooling parent estimating that half of homeschooled children in her area did not vaccinate their children).
Courts upholding differential treatment of homeschooling as compared to private schools have relied on a range of indicators that private schools might more reliably provide an adequate education,\textsuperscript{437} including the fact that states can supervise private schools far more easily and at far less expense than homeschooling.\textsuperscript{438}

**F. A New Political and Legal Reality**

Regulatory reform along the lines sketched above should be possible, if legislators made decisions based on weighing the pros and cons of homeschooling and balancing the interests at issue. But the reality is that regulatory reform along these lines will not happen without a political and legal sea change. Even severe critics of homeschooling express pessimism about their recommendations for more limited regulatory reform being adopted.\textsuperscript{439}

Legislative action has all been in the opposite direction from that here proposed. It has all been in the direction of legitimation, deregulation, and rejection of proposed restrictions. The homeschooling movement has grown ever-more powerful. It has grown ever-more expansive in reach, now combining forces with other parental rights groups in the child protection area and beyond.

There are many thoughtful critics of homeschooling, who have called for significant reform, as discussed above. But as also discussed, they exercise no real power. They have formed no organizations capable of resisting the organized political force of the homeschooling movement.

And there seems limited political potential in these groups. Academics don’t generally get involved in policy advocacy beyond writing articles. Homeschooling graduates don’t have the same kind of motivation that members of other groups often have to protest and advocate for change. By definition they have graduated out of homeschooling status. While some may be strongly motivated to fight against the regime they felt victimized by, most will want instead to move on with their lives. Education professionals are likely to focus their energies on the area that they have been given jurisdiction over – public education. No existing groups have the motivation that homeschooling parents have to fight the regulatory battle.

What’s needed is a true child rights movement. But creation of such a movement has always been a challenge. Children are by definition powerless, totally powerless in infancy and early childhood, and disenfranchised until adulthood. They are thus in the end dependent on adults to protect their interests. We need adults to step up and create the legal regime that will provide that protection. We need adults to create the political movement to advance child rights through political and litigation campaigns.

\textsuperscript{437} See, e.g., Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988).


\textsuperscript{439} See, e.g., Dwyer & Peters, supra note X, at 225 (“Our analysis of what oversight states should exercise might be pointless politically. Defenders of unsupervised homeschooling are among the more powerful political forces in America, whereas there is no advocacy organization pushing in the other direction that has substantial heft and makes homeschool regulation a central concern”).

Page 70 of 71
The courts may be essential to move things forward. Here children are also dependent on adults – judges – to vindicate their rights. But courts can at least operate somewhat more freely than legislatures from political pressure. Constitutions are supposed to protect the rights of the politically powerless, those who have no potential for protecting themselves through political systems. Children are the quintessential politically powerless group.