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HOMESCHOOLING: PARENT RIGHTS ABSOLUTISM VS. CHILD RIGHTS TO EDUCATION & PROTECTION*

Elizabeth Bartholet**

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 because they want to isolate their children from ideas and values central to our democracy, determined to keep their children from exposure to views that might enable autonomous choice about their future lives. Many promote racial segregation and female subservience. Many question science. Abusive parents can keep their children at home free from the risk that teachers will 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. It recommends a presumptive ban on homeschooling, with the burden on parents to demonstrate justification for permission to homeschool.

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** Morris Wasserstein Professor of Law at Harvard Law School. Publications related to some of the issues in this Article appear at http://www.law.harvard.edu/faculty/bartholet/pubs.php. I want to thank the following colleagues who have been so very generous in sharing their wisdom in connection with prior drafts of this Article: John Affeldt, Paulo Barrozo, Manuel Cepeda, Rachel Coleman, Deborah Dentler, James Dwyer, Milton Gaither, William Fitzsimmons, Michael Gregory, Robert Kunzman, Frank Michelman, Martha Minow, Michael Rebell, Jeffrey Shulman, Laurence Tribe, Frank Vandervort, Katharine Young, and Emily Zackin. I also want to thank my truly extraordinary Research Assistant, Isabel Macquarrie, who has been an essential partner throughout this project. And finally, I want to thank my Faculty Assistant, Eleanor Topping, who has provided essential support.

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INTRODUCTION

Homeschooling is a realm of near-absolute parental power. This power is inconsistent with important rights supposedly guaranteed to 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. Every state has legislation requiring that children attend school in their elementary and high-school years and constitutional provisions supporting public education.[2] Every state has legislation imposing affirmative duties to protect children against parental maltreatment and a related child protection system. This system includes child protective 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.[3] 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.[4]

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—and no state does anything significant—to identify homeschooled children victimized by, or at high risk for, child maltreatment or to provide them with minimal protective attention.[5]

This homeschooling regime poses real dangers to children and to 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.[6] They are also at serious risk for ongoing abuse and neglect in the isolated

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1. *See infra* Section II.B.
2. *See infra* Subsection IV.B.2
3. *See* ELIZABETH BARTHOLET, NOBODY'S CHILDREN 35 (1999) ("Reporting laws were passed throughout the country mandating professionals who came in contact with children—police officers, teachers, physicians, and others—to report suspected maltreatment."); *see id.* at 61–65, 102–10 (describing CPS's role).
4. *See* Carmen Green, *Educational Empowerment: A Child's Right to Attend Public School*, 103 GEO. L.J. 1089, 1103 (2015).
5. *See infra* Section II.B.
6. *See infra* Section I.B.

families[7] that constitute a significant part of the homeschooling world.[8] 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.[9] 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. And unlike parents in many of our peer countries, they don't have to allow health practitioners into their homes during their children's infancy.[10]

Society loses out as well. Homeschooling presents both academic concerns and democratic concerns. Appropriate education helps give children the academic skills needed to participate productively in society as adults through employment. It also makes children aware of important cultural values and provides skills enabling children to participate productively in their communities and the larger society through various forms of civic engagement. Even homeschooling parents capable of satisfying the academic function of education are not likely to be capable of satisfying the democratic function.[11]

A recent book provides a chilling description of one homeschooling experience. In *Educated*,[12] Tara Westover describes growing up with her siblings in a home where the parents provided nothing resembling an education, but instead provided 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 and Harvard Universities. 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

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7. *See* BARTHOLET, NOBODY'S CHILDREN, *supra* note 3, at 163–75.

8. *See infra* Section I.C.

9. In 2016, education personnel made the highest percentage of child maltreatment reports (18.9%). *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMINISTRATION CHILDREN, YOUTH, AND FAMILIES, CHILD MALTREATMENT 2016, 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 (2019); BARTHOLET, NOBODY'S CHILDREN, *supra* note 3, at 35. See also education professor Mitchell L. Stevens's 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&.

10. Many of our peer countries have universal or near-universal home visiting systems. In the U.S., such systems exist only in a minority of locations, and they are entirely voluntary, with a significant percentage of parents opting not to participate. *See* BARTHOLET, NOBODY'S CHILDREN, *supra* note 3, at 163–75.

11. *See infra* Section I.B; Subsections I.D.1, IV.C.1.

12. TARA WESTOVER, EDUCATED (2018).

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.[13]

Tara represents the extraordinary success story—the magically resilient child, the child capable of escape, the child whose brilliance enabled her to overcome gross educational deficits. There is no way of knowing how many homeschooled children experience a childhood 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 school children, including on standard educational measures like college admission tests.[14] The legal claim is that parent rights are and ought to be absolute.[15]

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, the percentage whose progress is assessed by some objective testing system, or the percentage who graduate from high school or college, and thus no way of knowing how homeschoolers do on average. The only methodologically sound social science indicates that even the atypically 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.[16]

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.[17]

Also, academic success says nothing about success in terms of preparing students for civic engagement. Many homeschooled children miss out on exposure to others with different experiences and values. Most all miss out on extracurricular activities like student government. A very large proportion of homeschooling parents are ideologically committed to isolating their children from the majority culture and indoctrinating them in views and values that are 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

13. *See id.* at 63–66, 109–11, 115–17, 271, 306–10.
14. *See infra* Subsection I.D.2.
15. *See infra* Subsection III.C.1.
16. *See infra* Subsection I.D.1.
17. *See infra* Sections I.B, I.C.

scientific method, looking to the Bible instead as their source for understanding the world.[18]

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 have 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 help ensure that they will replicate the parents' views and lifestyle choices.

This legal claim is inconsistent with the child's right to what has been called an "open future"—the right to exposure to alternative views and experiences essential for children to grow up to exercise meaningful choices about their own future views, religions, lifestyles, and work. [19]

It is inconsistent with state laws and constitutional provisions guaranteeing child rights to education. It is inconsistent with state and federal laws guaranteeing children protection against abuse and neglect.

It is 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 rights.[20] 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.[21] These trends in the law reflect

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18. *See infra* Section I.B.

19. *See* MICHAEL A. REBELL, FLUNKING DEMOCRACY 86–90 (discussing how a range of political scientists stress the importance of exposing students to information and ideas that will enable them to make their own decisions about how to live their future lives, whether in conformance with their parents' views and values or not); DWYER & PETERS, *supra* note 9, at 128; Jeffrey Shulman, *Private School Regulation: Individual Rights and Educational Responsibilities*, *in* THE OXFORD HANDBOOK OF CHILDREN AND THE LAW 33 (James G. Dwyer ed., 2020) ("[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"); Rob Reich, *How and Why to Support Common Schooling and Educational Choice at the Same Time*, 4 J. PHIL. EDUC. 709, 721 (2007) (the state "must make it possible for children to make decisions about the kind of lives they wish to lead"); *see also* STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 238, 301–02 (2000) ("at the very least" children must "be provided with the intellectual tools necessary to . . . formulate their own convictions, and make their own way in life."); Rob Reich, *Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling*, *in* 43 MORAL & POL. EDUC. 275, 291–93 (Stephen Macedo & Yael Tamir eds., 2002) ("Children are owed as a matter of justice the capacity to choose to lead lives—to adopt values and beliefs, pursue an occupation, endorse new traditions—that are different from those of their parents.") [hereinafter Reich, *Testing the Boundaries*].

20. *See infra* Section IV & text accompanying note 344.

21. *See generally* Steven Mintz, *Placing Children's Rights in Historical Perspective*, 44 CRIM. L. BULL. 313 (2008); Andrew L. Yarrow, *History of U.S. Children's*

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 also inconsistent with an idea that has been central since the beginning of compulsory education—that the *state* has a powerful interest in educating children in ways that enable positive participation in the larger society.[22] "[P]reparation for citizenship," [23] including exposure to the values of tolerance and deliberative democracy,[24] has been seen as a primary goal of public education from its origins.[25] Based on both child rights and state rights, Rob Reich concludes that "at a bare minimum one function of any school environment must be to expose children to and engage students with values and beliefs other than those of their parents." [26]

Finally, the legal claim stands in contrast with human rights treaties and with the constitutional law of most other nations. These laws recognize that children have powerful rights both to education and to protection against maltreatment and that nations have duties to protect those rights.[27] They recognize the importance of an education exposing children to a variety of views and values and preparing them for civic engagement.

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.[28]

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.

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Part I of this Article, *The Reality*, describes the historical and current reality of homeschooling, including the nature of the homeschooling population, the connection between homeschooling and child maltreatment, and the social science

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Policy, 1900 – Present, FIRST FOCUS (2009), https://firstfocus.org/wp-content/uploads/2014/06/Childrens-Policy-History.pdf.

22. *See* REBELL, *supra* note 19, at 166–67; Reich, *Testing the Boundaries*, *supra* note 19, at 287 ("Schools would be the vehicles for turning children into able and participating citizens.").

23. *See* REBELL, *supra* note 19, at 16.

24. *See generally, e.g.*, AMY GUTMANN, DEMOCRATIC EDUCATION (1999); STEPHEN MACEDO, DIVERSITY AND DISTRUST (2009).

25. *See* JOHN DEWEY, DEMOCRACY AND EDUCATION 99–100 (1916) ("[I]solation makes for rigidity . . . for static and selfish ideals within the group. That savage tribes regard aliens and enemies as synonymous is not accidental.").

26. Reich, *Testing the Boundaries*, *supra* note 19, at 277.

27. *See infra* Section IV.A.

28. *See infra* Part III.

related to homeschooling's success and failure. Part II, *The Current Law*, describes the existing law on homeschooling, both the constitutional law that leaves states ample room to regulate, and the absence of meaningful regulation addressing either educational or child maltreatment issues. Part III, *The Politics*, describes the politics responsible for this absence of regulation, addressing the dominance of conservative Christians in the homeschooling movement, and the movement's positions and tactics promoting deregulation and resisting regulatory reform. Part IV, *The Way Forward*, argues that we should look to international law as a model for reform, noting that human rights treaties and other nations' constitutions provide children with strong positive rights to education and protection against maltreatment, and that other nations' legislatures impose very significant restrictions on homeschooling. It argues that there is a basis both in our federal constitution and in our state constitutions for finding the current homeschooling regime unconstitutional and for imposing a duty on legislatures to regulate to ensure that all children receive an adequate education and adequate protection against maltreatment. It outlines the restrictions that should be imposed on homeschooling—restrictions that would impose a burden on parents to justify permission to homeschool and that would condition any homeschooling allowed so as to ensure children's rights to education and protection. It concludes with emphasizing the importance of taking action on behalf of the quintessential politically powerless group that children represent.

I. THE REALITY

A. History and Trends[29]

Homeschooling as it exists in the United States 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-nineteenth century was broadly accepted as an advance for both children and society.[30] 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 circumstances of their birth.[31] It was supposed to help integrate immigrant groups into the community. It was supposed to expose children to a range of cultural values and enable them to become productive participants in society, in employment, and in other ways.

Homeschooling as we know it today began in the mid-twentieth century as the result of political movements that were very different in nature.[32] One was a left

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29. For descriptions of the history of homeschooling, see generally, e.g., DWYER & PETERS, *supra* note 9; MILTON GAITHER, HOMESCHOOL: AN AMERICAN HISTORY (2016).

30. GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 41, 69, 73, 83; REBELL, *supra* note 19, at 5–6, 36.

31. REBELL, *supra* note 19, at 36; JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 27 (2018) (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.").

32. *See generally* Milton Gaither, *Why Homeschooling Happened, 1945–1990* and *Three Homeschooling Pioneers*, *in* HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29.

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 religious beliefs. As time went on, the conservative Christian wing became the clear majority of all homeschoolers. Estimates of the number of homeschoolers who are religious, or for whom religion is a primary reason for homeschooling, range from over half to 90%.[33]

Homeschoolers represent a small but still significant percentage of the total population of school-age children—roughly 3–4% or close to 2 million, comparable to the number in charter schools and larger than the number in Catholic schools.[34] As many as 10% of all students spend some time being homeschooled.[35] And the trend in recent decades has been a dramatically rapid expansion.[36]

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33. *See* Kathryn Joyce, *The Homeschool Apostates*, AM. PROSPECT (Feb. 9, 2014), http://prospect.org/article/homeschool-apostates ("[R]esearchers estimate that between two-thirds and three-fourths are fundamentalists."); Jaweed Kaleem, *Homeschooling Without God*, ATLANTIC (Mar. 30, 2016), https://www.theatlantic.com/education/archive/2016/03/homeschooling-without-god/475953 ("[R]oughly two-thirds are Christian"); GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 142 (85–90%); JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 401 (2018) (best estimates indicate 90% homeschool for religious reasons); RAY PENNINGS & KATHRYN WIENS, CARDUS EDUCATION SURVEY: PHASE 1 REPORT (Aug. 16, 2011), https://www.cardus.ca/research/education/reports/cardus-education-survey-phase-i-report-2011/; DAVID SIKKINK & SARA SKILES, HOMESCHOOLING AND YOUNG ADULT OUTCOMES: EVIDENCE FROM THE 2011 AND 2014 CARDUS EDUCATION SURVEY 5 (June 22, 2015) (large randomly selected sample of homeschoolers reveals 70% in the religious category vs. the nonreligious category) [hereinafter HOMESCHOOLING AND YOUNG ADULT OUTCOMES]. In 2016, 16% of parents indicated to the National Center on Education Statistics ("NCES") that "religious instruction" was their "most important" reason for homeschooling, while 51% deemed religious instruction an "important" reason. *See* MEGHAN MCQUIGGAN ET AL., PARENT AND FAMILY INVOLVEMENT IN EDUCATION: RESULTS FROM THE NATIONAL HOUSEHOLD EDUCATION SURVEYS PROGRAM OF 2016: FIRST LOOK 19 (2017).

34. The 2016 NCES statistics indicate that 3.3% of all school-age children or 1.69 million are homeschooled. Some other estimates are higher. MCQUIGGAN ET AL., *supra* note 33, at 18 tbl.7; *see* Robert Kunzman & Milton Gaither, *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, *supra* note 9, at 1 (estimating that in 2018 two million children, or 4% of the school-age population, were homeschooled).

35. *See* Joseph Murphy, *The Social and Educational Outcomes of Homeschooling*, 34 SOC. SPECTRUM 244, 245 (2014).

36. *See* DRIVER, *supra* note 33, at 394, 401 (noting the "meteoric rise of homeschooling"); DWYER & PETERS, *supra* note 9, at 66–67, 88 (noting the "explosive growth" of homeschooling); Murphy, *supra* note 35, at 245 (stating the expansion of homeschooling is "nothing short of remarkable").

B. The Varied Nature of the Homeschooling Population[37]

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, denied disability accommodations, or bullied.[38] 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.[39] Some choose homeschooling, as did the original progressive wing, because of the flaws they see in traditional education, such as an overemphasis on rote learning and testing. Some believe that they can provide their children a superior education because of the limitations of their local schools or because of the parents' advanced qualifications, ability to engage superior tutors, or access to online learning opportunities.[40] Homeschool charters take advantage of the charter school movement to escape traditional school requirements while gaining access to state education funding.[41] Many homeschooling parents work cooperatively with each other both to provide a quality education and to ensure that their children have significant contact with other children. Many make efforts to enable their children to participate in certain school programs such as sports.[42]

The majority are, however, descendants of the original conservative Christian wing.[43] Estimates range, as discussed above, from a majority up to 90%.[44]

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37. For descriptions of today's homeschooling population, see DWYER & PETERS, *supra* note 9, at 84–107; MCQUIGGAN ET AL., *supra* note 33; see also MILTON GAITHER, THE WILEY HANDBOOK OF HOME EDUCATION 32–58, 86–268 (2016) [hereinafter THE WILEY HANDBOOK].

38. On race, see generally Cheryl Fields-Smith & Monica Wells Kisura, *Resisting the Status Quo: The Narratives of Black Homeschoolers in Metro-Atlanta and Metro-DC*, 88 PEABODY J. EDUC. 265 (2013); Cheryl Fields-Smith, *Homeschooling Among Ethnic-Minority Populations*, *in* THE WILEY HANDBOOK, *supra* note 37, at 207; Joseph Murphy et al., *The Calculus of Departure: Parent Motivations for Homeschooling*, *in* THE WILEY HANDBOOK, *supra* note 37, at 104–05. On bullying, see DWYER & PETERS, *supra* note 9, at 91. On disabilities, see Karen Hurlbutt-Eastman, *Teaching the Child with Exceptional Needs at Home*, *in* THE WILEY HANDBOOK, *supra* note 37, at 222.

39. *See* Murphy et al., *supra* note 38, at 86, 92, 109.

40. Elena Silva, *The State of Homeschooling in America*, PAC. STANDARD (Sept. 21, 2018), https://psmag.com/education/the-state-of-homeschooling-in-america.

41. Kristen Taketa, *Home-school Charters Let Families Use State Dollars for Disneyland, Horseback Riding Lessons and More*, SAN DIEGO UNION-TRIB. (June 16, 2019), https://www.sandiegouniontribune.com/news/education/story/2019-06-15/home-school-charters-let-families-use-state-dollars-to-buy-disneyland-tickets-private-lessons-and-more; *see also* Silva, *supra* note 40 (discussing homeschooling charter schools).

42. *See generally, e.g.*, *Homeschooling & Socialization*, CRHE, https://responsiblehomeschooling.org/homeschooling-101/homeschooling-socialization/ (last visited Feb. 27, 2020); Michael Atkinson, *Let Them Play: Why Kentucky Should Enact a "Tebow Bill,"* 43 J.L. EDUC. 433 (2014) (discussing and advocating for "Tebow bills" allowing homeschoolers to participate in public school sports).

43. *See* DRIVER, *supra* note 33, at 401 (the Holt liberal "demographic now accounts for a modest slice of the homeschooling phenomenon.").

44. *See* sources cited *supra* note 33.

These parents are committed to homeschooling largely because they reject mainstream, democratic culture and values and want to ensure that their children adopt their own particular religious and social views.[45] Many belong to 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 values they espouse and undermines their ability to inculcate in their children their beliefs in the sacred, absolute truth of the Bible."[46] Many use alternative textbooks that teach creationism instead of evolution.[47] Many seek to create for their children a system of "total socialization" aimed at negating the influence of competing socialization agents. [48] As Dwyer and Peters say in their recent comprehensive book on homeschooling, many religious homeschoolers object in principle to some core goals of public education:

> [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.[49]

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

> Unregulated homeschooling, therefore, badly compromises the development of capacities for autonomy in the children subjected to it . . . . [T]he 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.[50]

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45. DRIVER, *supra* note 33, at 401; GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 162.

46. REBELL, *supra* note 19, 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, and because of increasing racial integration, gender equality, sex education, and acceptance of gay and lesbian sexual orientations. *See* Robin West, Religious Rights as Protected Wrongs: The Case of Homeschooling 7–10 (2013) (unpublished manuscript) (on file with author).

47. *See* Jessica Huseman, *Small Group Goes to Great Lengths to Block Homeschooling Regulation*, PROPUBLICA (Aug. 27, 2015), https://www.propublica.org/article/small-group-goes-great-lengths-to-block-homeschooling-regulation.

48. Lee Garth Vigilant et al., *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 HUMAN. & SOC'Y 201, 201–02, 208, 218 (2013).

49. DWYER & PETERS, *supra* note 9, at 204.

50. West, *supra* note 46, at 17; *see also* Reich, *Testing the Boundaries*, *supra* note 19, at 300 ("[M]ajority of homeschooling parents are motivated by a desire to control the

Members of a variety of religious 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 conflicting cultural values.[51]

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."[52] The "Quiverfull" and "Stay at Home Daughter" 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.[53] Many homeschooling families pursue a "less rigorous version of female submission," limiting girls' educations by assigning them extensive household and child-rearing duties.[54]

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moral and spiritual upbringing of their children."); Rob Reich, *Why Home Schooling Should Be Regulated*, *in* HOMESCHOOLING IN FULL VIEW: A READER 115 (Bruce S. Cooper ed., 2005).

51. *See* DWYER & PETERS, *supra* note 9, at 87.

52. GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 255; *see also* Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 156–57 (2008).

53. *See* DWYER & PETERS, *supra* note 9, at 114–15; Lea, *Life in the Dollhouse: Stay at Home Daughters*, HOMESCHOOLERS ANONYMOUS (June 3, 2014), https://homeschoolersanonymous.org/2014/06/03/life-in-the-dollhouse-stay-at-home-daughters-by-lea/; Jennifer C. Martin, *Quiverfull of Shit: a Guide to the Duggars' Scary Brand of Christianity*, GAWKER (May 25, 2015), http://gawker.com/quiverfull-of-shit-a-guide-to-the-duggars-scary-brand-1706557073; *see also* Madalyn Doucet Vicry, *That Kind of Girl: Effects of Homeschooling on the Sexual Health of Women and Girls*, 18 GEO. J. GENDER & L. 103, 109–10, 123–26 (2017). Vision Forum, an advocate of "biblical patriarchy" until it was shut down by a scandal in 2014, encouraged young girls to forgo college and outside employment in favor of training as "keepers at home" until they marry. For an overview of Vision Forum's beliefs, see *The Tenets of Biblical Patriarchy*, VISION F. MINISTRIES, https://web.archive.org/web/20070626134919/http://www.visionforumministries.org/home/about/biblical_patriarchy.aspx (last visited Feb. 21, 2020); see also Gina McGalliard, *House Proud: The Troubling Rise of Stay-at-Home Daughters*, BITCH MEDIA (Nov. 4, 2010), https://www.bitchmedia.org/article/house-proud. Vision Forum was "dedicated to turning back the clock on gender equality" and "making sure women are not independent at any point in their lives, regardless of age . . . ." McGalliard, *supra*; *see* West, *supra* note 46, at 8 (in many homeschooling fundamentalist families, a wife's defining duties are to submit to her husband's authority, eschew paid labor, and have as many children as God will grant).

54. 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/ (last visited Jan. 13, 2020).

Some engage in homeschooling to promote racist ideologies and avoid racial intermingling.[55] A recent book describes a young leader of the white nationalist movement, Derek Black, seen as the leading light for the movement's future.[56] He was pulled out of school because his parents wanted to avoid the Haitians and Hispanics in West Palm Beach's school system.[57] 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 education included building a children's website for Stormfront, the largest racist community on the Internet.[58]

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.[59] In 11% of homeschooling families neither parent speaks English.[60] Some are mentally ill or disabled, or caught up in substance abuse.[61] Many homeschooling parents will be incapable of diagnosing and addressing the needs of students with disabilities.[62] Many homeschooling graduates complain about educational neglect.[63]

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. Some do so specifically to avoid child protection laws.[64]

An increasing number of parents are deciding to homeschool in order to avoid vaccination requirements as public authorities move to tighten up such

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55. *See* Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991, 1008–09 (2010) (homeschooling based on religiously-based belief in racial segregation); WHITE PRIDE HOMESCHOOL, http://www.whitepridehomeschool.com (last visited Feb. 21, 2020) (website designed to help parents educate their children in line with white nationalist values); Jonny Scaramanga, *White Supremacist Homeschooling*, LEAVING FUNDAMENTALISM (Aug. 26, 2014), https://www.patheos.com/blogs/leavingfundamentalism/2014/08/26/white-supremacist-home-schooling/) (some homeschooling textbooks depict segregated classrooms).

56. *See generally* ELI SASLOW, RISING OUT OF HATRED: THE AWAKENING OF A FORMER WHITE NATIONALIST (2018).

57. *Id*. at 10–11.

58. *Id*. at 11.

59. *See Homeschool Demographics*, CHRE, https://www.responsiblehome schooling.org/homeschooling-101/homeschool-demographics/ (last visited Feb. 21, 2020) (citing MCQUIGGAN ET AL., *supra* note 33, at 18).

60. MCQUIGGAN ET AL., *supra* note 33, at 18.

61. *Id*. Many are at the low end of the socioeconomic ladder, with 19% below the poverty line and 36% between poverty and 200% of poverty, significantly more than that of those in public and private schools. This is in contrast to the past when homeschoolers were relatively privileged in socioeconomic terms. *See infra* note 123.

62. Schools have an affirmative obligation to identify and serve such students, even if they sometimes fail to fulfill this obligation. *See* 20 U.S.C. § 1412(a)(3) (2016); *see also* 34 C.F.R. § 300.111 (2006).

63. *See* Green, *supra* note 4, at 1008–09.

64. *See infra* Section I.C.

requirements in order to address public health concerns.[65] Some parents choose to educate their children only in extraordinarily narrow and specific skills—one father, for example, has focused his son's entire education on preparation for competitive video gaming.[66]

The nature of the homeschooling population presents dangers for children and society. It means that many of the children involved will not be prepared for participation in employment and other 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 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 CPS, since teachers and other school personnel are "mandated reporters" required by law to report suspected child maltreatment.[67] 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.[68]

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65. *See* DWYER & PETERS, *supra* note 9, at 95, 104; *see* Gina Bellafante, *How Far Would You Go to Avoid Vaccinating Your Child?*, N.Y. TIMES (Sept. 13, 2019), https://www.nytimes.com/2019/09/13/nyregion/vaccination-homeschooling-new-york-city.html (after California implemented a strict vaccination law in response to public health concerns, the number of homeschooled kindergartners without shots jumped from 1,500 in 2016, to 5,000 in 2017, and just under 7,000 by 2018); Soumya Karlamangla, *Parents Who Won't Vaccinate Their Kids Turning to Home-Schooling in California, Data Show*, L.A. TIMES (July 22, 2019), https://www.latimes.com/california/story/2019-07-22/california-homeschool-strict-vaccination-laws; Bethany Mandel, *Parenting in the Time of Measles*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/opinion/parenting-vaccines-measles.html (homeschooling parent estimating that half of homeschooled children in her area did not vaccinate their children); Sharon Oterman, *Get Vaccinated or Leave School: 26,000 N.Y. Children Face a Choice*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/nyregion/measles-vaccine-exemptions-ny.html?login=email&auth=login-email (describing parents deciding to homeschool in resistance to New York's newly strict vaccination law).

66. Dugan Arnett, *With Dad's Support, One Teen is Playing 'Fortnite' Instead of Going to High School*, BOSTON GLOBE (July 6, 2019), https://www.bostonglobe.com/metro/2019/07/06/father-son-all-teen-bid-for-esports-stardom/EhZCdGUDYouhT2DEkilhCL/story.html.

67. *See* Green, *supra* note 4, at 1097–98 ("[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.").

68. *See* BARTHOLET, NOBODY'S CHILDREN, *supra* note 3, at 163–75.

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.[69]

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.[70] States' failure to connect their child protection systems with their homeschooling systems further limits information about the risk of maltreatment.[71]

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.[72] One of the most serious and informed scholars of homeschooling, Milton Gaither, 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,"[73] and voices his own concern about this risk.[74]

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.[75] It 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

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69. *See infra* Section II.B.

70. *See supra* note 9 and accompanying text.

71. *See infra* Subsection II.B.3.

72. *See* DWYER & PETERS, *supra* note 9, at 95–96 (citing HOMESCHOOLING'S INVISIBLE CHILDREN, SOME PRELIMINARY DATA ON HOMESCHOOL CHILD FATALITIES (2016), http://hsinvisiblechildren.org/commentary/some-preliminary-data-on-homeschool-child-fatalities/) ("[W]atchdog organizations believe fatality rates are higher among homeschoolers than in the general population"); *see also* Green, *supra* note 4, at 1097; Joyce, *supra* note 33; Arianna Prothero, *How Homeschooling Is Sometimes Used to Conceal Child Abuse*, EDUC. WK.: CHARTERS & CHOICE (Jan. 17, 2018, 5:42 PM), http://blogs.edweek.org/edweek/charterschoice/2018/01/how_homeschooling_is_used_to_conceal_child_abuse.html.

73. *See* Milton Gaither, *Two Brief Articles on Homeschooling and Child Abuse*, INT'L CTR. HOME EDUC. RES. R. (Mar. 29, 2013), http://icher.org/blog/?p=638.

74. *See* Milton Gaither, *Child Torture as a Form of Child Abuse: Homeschooling's Role*, INT'L CTR. HOME EDUC. RES. R. (Mar. 16, 2015), https://icher.org/blog/?p=1487.

75. STATE OF CONN.: OFFICE OF THE CHILD ADVOCATE, EXAMINING CONNECTICUT'S SAFETY NET FOR CHILDREN WITHDRAWN FROM SCHOOL FOR THE PURPOSE OF HOMESCHOOLING—SUPPLEMENTAL INVESTIGATION TO OCA'S DECEMBER 12 2017 REPORT REGARDING THE DEATH OF MATTHEW TIRADO 1–2 (Apr. 26 2018), http://www.ct.gov/oca/lib/oca/OCA.Memo.Homeschooling.4.25.2018.pdf [hereinafter OFFICE OF THE CHILD ADVOCATE].

maltreatment and one-fourth lived in families with multiple prior reports.[76] (Prior reports are known to be the best predictors of future maltreatment, regardless of whether those reports are substantiated.[77]) A similar study in a different state, to date unpublished, produced comparable results.[78]

The Connecticut study was triggered by the death of Matthew Tirado at his mother's hands. The mother eventually pled guilty to first-degree manslaughter. Matthew 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, the parents were able to remove his younger sister from school for alleged homeschooling.[79]

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."[80] 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.[81]

In another study, child abuse pediatricians from five U.S. medical centers focused on a sample of cases involving horrific child torture.[82] They found a powerful connection with homeschooling. Out of the school-age children, 29% were never allowed to go to school and another 47% were withdrawn for homeschooling.[83] They concluded that this "homeschooling" typically occurred after closure of a previously opened CPS case and appeared designed to further isolate the child.[84]

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76. *See id*. at 2, 7.

77. *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, 163, 171–72 (2011) (a "prior allegation to CPS" found "the strongest independent risk factor for injury mortality before the age of five").

78. This study only looked 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).

79. *See* OFFICE OF THE CHILD ADVOCATE, *supra* note 75, at 1.

80. *See* Meggan Goodpasture et al., *Invisible Children*, 74 N.C. MED. J. 90, 91 (2013).

81. *See id*.

82. *See* Barbara Knox et al., *Child Torture as a Form of Child Abuse*, 7 J. CHILD & ADOLESCENT TRAUMA 37, 38 (2014).

83. *Id*. at 39.

84. *Id.*; *see also id*. at 46 ("Older children were removed from school under the guise of homeschooling . . . . [T]hese children show no evidence of receiving any education.

Anecdotal evidence is alarming. Several investigative journalists have pointed to risks for abuse and neglect in homeschooling.[85] 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.[86] One such case involved the Hart parents who drove their six children off a California cliff to their death.[87] They had been allowed to homeschool despite repeated allegations of child abuse across three states. In 2008, after one child complained to a teacher about physical abuse, 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 about 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 13 Turpin children, discovered only when one escaped through a window and called 911.[88] The children, registered as homeschooled, had been living for many years in what authorities called "horrific" conditions, subject to desperate malnutrition and torture.[89]

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*, a database operated by the

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Their removal from school appears to have been motivated by the need to keep the children hidden.").

85. *See, e.g.*, Michelle Goldberg, *The Sinister Side of Homeschooling*, DAILY BEAST (Sept. 20, 2013, 5:45 AM), 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 47 (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 (Apr. 16, 2018), https://time.com/5233406/california-cliff-crash-homeschool-child-abuse/ ("Child-welfare experts say it can be harder to identify abuse . . . if children don't regularly come into contact with teachers.").

86. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 95 nn.209–11, 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 EDUC. & L.J. 341, 341 n.3 (2013).

87. *See generally* Reilly, *supra* note 85.

88. *See* Cleve R. Wootson, Jr., *Parents Accused of Torturing Their 13 Children Face New Charges*, WASH. POST (Feb. 24, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/24/parents-accused-of-torturing-their-13-children-face-new-charges/?noredirect=on.

89. The parents pled guilty to 14 felony charges including torture, false imprisonment, cruelty to adult dependents, and willful child cruelty. *See* Alejandra Reyes-Velarde & Paloma Esquivel, *Perris Couple Plead Guilty to Torturing Their 13 Children*, L.A. TIMES (Feb. 22, 2019), https://www.latimes.com/la-bio-alejandra-reyes-velarde-20181204-la-bio-alejandra-reyes-velarde-staff.html. They were sentenced to 25 years to life. Anemona Hartocollis, *Couple Who Tortured 12 Children in Their California Home Are Sentenced to Life*, N.Y. TIMES (Apr. 19, 2019), https://www.nytimes.com/2019/04/19/us/turpin-family.html. Prosecutors initially filed 50 charges against the parents, 49 of which the judge deemed supported by evidence. Reyes-Velarde & Esquivel, *supra*.

Coalition for Responsible Home Education ("CRHE"), provides comprehensive information about known cases of severe and fatal abuse in homeschooling.[90] CRHE founder Rachel Coleman concludes, based on the available evidence: "home schooling is clearly overrepresented" in such cases.[91]

CRHE published an Issue Brief in 2017 documenting evidence of the connection between child maltreatment and homeschooling and making recommendations for policy reform.[92] It states: "A growing body of data points to the need for lawmakers to create protections for at-risk homeschooled children."[93] CRHE's most recent research firms up the connection between homeschooling and serious abuse. [94]

Homeschool Alumni Reaching Out ("HARO") was formed with a special focus on abuse in homeschooling families.[95] Their website states: "Due to a lack of 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."[96] HARO, in consultation with CRHE, conducted a

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90. *See* Prothero, *supra* note 72; HOMESCHOOLING'S INVISIBLE CHILDREN, http://hsinvisiblechildren.org/ (last visited Jan. 4, 2020). As of December 2018, the database included over 380 cases.

91. *See* Prothero, *supra* note 72.

92. *See* COALITION FOR RESPONSIBLE EDUCATION ("CRHE"), AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF 2–4 (May 2017), https://www.responsiblehomeschooling.org/wp-content/uploads/2017/05/CRHE-At-Risk-Children-Brief.pdf [hereinafter AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF].

93. *Id*. at 1.

94. *See* HOMESCHOOLING'S INVISIBLE CHILDREN, *supra* note 72 ("Our preliminary research suggests that homeschooled children are at a greater risk of dying from child abuse than are traditionally schooled children. 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.").

95. HARO created a website in 2013 for homeschoolers to share their stories, called "Homeschoolers Anonymous." *See About*, HOMESCHOOLERS ANONYMOUS, https://homeschoolersanonymous.org/about/ (last visited Jan. 4, 2020) [hereinafter *About Haro*]. Some representative samples follow. In January 2013, two homeschooled children ran away from home where they had been beaten with an electrical cord, locked in their rooms for up to 12 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,'* DAILY MAIL (Jan. 24, 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.

96. *About Haro*, *supra* note 95.

survey of 3,700 homeschool graduates and found a high percentage—42%—reported experiencing abuse or neglect.[97].

Some homeschooling leaders openly promote what should be understood as child abuse. One very popular book recommends a spanking regimen beginning in infancy.[98] Other popular books recommend severe physical punishment, teaching parents how to inflict it without leaving marks.[99] Many leaders make clear their opposition to the child protection system.[100]

Officials in several other countries have expressed concern with the risks homeschooling poses for child abuse and neglect.[101] 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, discussing whether it was being used to conceal abuse and neglect.[102] A leading child rights organization commissioned a similar report, which

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97. *A Complex Picture: Results of a 2014 Survey of Adult Alumni of the Modern Christian Homeschool Movement*, CRHE & HARO 1, 27 (Dec. 2, 2014), https://hareachingout.files.wordpress.com/2014/12/survey1.pdf. This survey was, as the report authors admit, not a representative sample of the homeschooler population, but a self-selected group. *Id.* at 4.

98. *See* MICHAEL PEARL & DEBI PEARL, TO TRAIN UP A CHILD (1994). The Pearls claim to have sold nearly 700,000 copies of their publication. *See* Jeff Hodson, *Did Hana's Parents 'Train' Her to Death?*, SEATTLE TIMES (Nov. 27, 2011, 9:00 PM), https://web.archive.org/web/20120229033208/http://seattletimes.nwsource.com/html/localnews/2016875109_hana28m.html.

99. Telephone Interview with Rachel Coleman, *supra* note 78. A full description of this interview can be found in Isabel Macquarrie, Homeschooling Follow-Up 12 (Nov. 5, 2018) (unpublished research memorandum) (on file with author).

100. Telephone Interview with April Duvall, *supra* note 54 (describing HSLDA's militant anti-CPS position). *See generally* MARY PRIDE, THE CHILD ABUSE INDUSTRY: OUTRAGEOUS FACTS ABOUT CHILD ABUSE & EVERYDAY REBELLIONS AGAINST A SYSTEM THAT THREATENS EVERY NORTH AMERICAN FAMILY (1986). For a list of disturbing quotations in this book about child abuse and protective services, see R.L. Stollar, *The 10 Best (AKA, Worst) Quotations from Mary Pride's "The Child Abuse Industry" (with GIFS)*, HOMESCHOOLERS ANONYMOUS (June 2, 2014), https://homeschoolersanonymous.org/2014/06/02/the-10-best-aka-worst-quotations-from-mary-prides-the-child-abuse-industry-with-gifs/.

101. INTERNATIONAL PERSPECTIVES ON HOME EDUCATION: DO WE STILL NEED SCHOOLS? 6–8, 91–92 (Paula Rothermel ed., 2015); Roger Jennens, *Professional Knowledge and Practice in Health, Welfare and Educational Agencies in England in Relation to Children Being Educated at Home: An Exploratory Review*, 17 CHILD CARE IN PRACTICE 143, 154 (Apr. 2011).

102. *See* Polly Curtis, *Parents Who Home Educate Children to be Forced to Register*, GUARDIAN (June 10, 2009), https://www.theguardian.com/education/2009/jun/11/home-education-parents-register; Sophia Moss, *Home Education: Can We Really Trust Parents to Know What's Best for Their Children?*, PROSPECT (July 10, 2018), https://www.prospectmagazine.co.uk/politics/home-education-can-we-really-trust-parents-to-know-whats-best-for-their-children. For the resulting report, see generally GRAHAM BADMAN, REPORT TO THE SECRETARY OF STATE ON THE REVIEW OF ELECTIVE HOME EDUCATION IN ENGLAND (June 2009), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/328186/Review_of_Elective_Home_Education_in_England.pdf.

found that in the 800 serious or fatal cases reviewed, homeschooling emerged as a major theme.[103] In Wales, a notorious child abuse case triggered a report on homeschooling that found, after extensive investigation: "where there *is* abuse or neglect home education can and does lead to children being hard to identify, monitor and assess."[104]

D. The Social Science Research on Homeschooling Success & Failure[105]

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, and families can simply not register even if theoretically required to.[106] It is therefore impossible to capture the entire group of homeschoolers to assess how they perform on average.

As a result, studies that 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 some researchers are only looking for positive results.[107] 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.[108] This is not true social science. It is advocacy masked as social science. Below I first discuss the relatively good research, and then the policy advocacy research.

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103. MARIAN BRANDON ET AL., NEGLECT AND SERIOUS CASE REVIEWS: A REPORT FROM THE UNIVERSITY OF EAST ANGLIA COMMISSIONED BY NSPCC MARIAN UNIVERSITY OF EAST ANGLIA/NSPCC 46 (2013), https://lscb-live.storage.googleapis.com/upload/www.cambslscb.org.uk/other/neglect-serious-case-reviews-report.pdf?inline=true.

104. DONALD FORRESTER ET AL., CHILDREN'S SOCIAL CARE RESEARCH AND DEVELOPMENT CENTRE, AN EVIDENCE BASED REVIEW OF THE RISKS TO CHILDREN AND YOUNG PEOPLE WHO ARE EDUCATED AT HOME FINAL REPORT 49 (2017), http://safeguardingboard.wales/wp-content/uploads/sites/8/2017/11/2017-11-14-Home-Education-Report-Final-13.10.17.pdf.

105. *See generally* Sandra Martin-Chang & Kyle Levesque, *Academic Achievement: Making an Informed Choice About Homeschooling*, *in* THE WILEY HANDBOOK, *supra* note 37, at 121–34; Milton Gaither, *Homeschooling in the United States: A Review of Select Research Topics*, 28 PRO-POSIÇÕES (2017), http://dx.doi.org/10.1590/1980-6248-2015-0171.

106. *See infra* Section II.B.

107. *See* discussion *infra* Subsection I.D.2.

108. *See* discussion *infra* Subsection I.D.2. Milton Gaither notes that the research is almost entirely qualitative and "much of it is politically motivated." Gaither, *Homeschooling in the United States: A Review of Select Research Topics*, *supra* note 105; *see* Murphy, *supra* note 35, at 247 (noting that "rigorous empirical research on the effects of homeschooling remains scarce" and "studies on homeschooling effects suffer from major, interconnected problems.").

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.[109] 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 regarding even the most successful homeschoolers. The Cardus Education Survey[110] 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 significant study because it involves a large and randomly selected sample.[111] It found that the homeschoolers were less likely to enter college[112] and obtained slightly less post-secondary education than public schoolers.[113] Homeschoolers who did pursue post-secondary education attended less prestigious universities than their non-

109. *See, e.g.*, Christian P. Wilkens et al., *Are Homeschoolers Prepared for College Calculus?*, 9 J. SCH. CHOICE 30, 40–42 (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.

110. The results of the Cardus surveys, conducted in 2011 and 2014, are presented in three reports. *See generally, e.g.*, PENNINGS & WIENS, *supra* note 33; HOMESCHOOLING AND YOUNG ADULT OUTCOMES, *supra* note 33; DAVID SIKKINK & SARA SKILES, CARDUS EDUCATION, MAKING THE TRANSITION: THE EFFECT OF SCHOOL SECTOR ON EXTENDED ADOLESCENCE (Apr. 17, 2018). The study drew from a nationally representative sample of over 3,000 U.S. high school graduates, and controlled for many key variables. *See* SIKKINK & SKILES, CARDUS EDUCATION, *supra*, 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. RES. R. (Feb. 1, 2019), http://icher.org/blog/?p=4128 [hereinafter Gaither, *Making the Transition*].

111. *See* Gaither, *Making the Transition*, *supra* note 110; Robert Lyon, *Homeschooling and Young Adult Outcomes: Evidence from Cardus 2011 and 2014*, INT'L CTR. HOME EDUC. RES. R. (Sept. 28, 2015), http://icher.org/blog/?p=2214.

112. HOMESCHOOLING AND YOUNG ADULT OUTCOMES, *supra* note 33, at 2 (describing findings in PENNINGS & WIENS, *supra* note 33).

113. *Id.* at 8; PENNINGS & WIENS, *supra* note 33, at 34.

homeschooled peers.[114] Homeschoolers were far less likely to obtain a four-year college or a graduate degree and reported lower incomes than other young adults.[115]

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 less politically engaged.[116] They reported significantly lower levels of well-being and social trust.[117] They reported having a less strong direction in life or sense of purpose and a greater sense of helplessness in dealing with life problems.[118] They divorced at higher rates.[119] 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.[120]

The Cardus reports are situated somewhere between "good social science" and advocacy research, making every effort to explain away the negative findings:

> The authors try very hard to avoid the obvious conclusions of their own data. . . . 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.[121]

Other methodologically sound studies of the more successful subsets of homeschoolers also reveal problems. 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. [122] Those receiving unstructured education, as many homeschoolers do, scored significantly lower than public schoolers.

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 been atypically privileged in socioeconomic

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114. HOMESCHOOLING AND YOUNG ADULT OUTCOMES, *supra* note 33, at 9; PENNINGS & WIENS, *supra* note 33, at 33 (homeschoolers attend universities with lower average SAT scores and are more likely to attend open-admission universities).

115. *See* Gaither, *Making the Transition*, *supra* note 110.

116. *Id*. at 11.

117. HOMESCHOOLING AND YOUNG ADULT OUTCOMES, *supra* note 33, at 10.

118. *Id*. at 10, 13.

119. Gaither, *Making the Transition*, *supra* note 110.

120. HOMESCHOOLING AND YOUNG ADULT OUTCOMES, *supra* note 33, at 6–7.

121. Gaither, *Making the Transition*, *supra* note 110. 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 111.

122. *See* Sandra Lyn Martin-Chang et al., *The Impact of Schooling on Academic Achievement: Evidence From Homeschooled and Traditionally Schooled Students*, 43 CANADIAN J. BEHAV. SCI. 195, 195 (2011).

terms,[123] and since socioeconomic status is a predictor of academic success,[124] 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 more 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.

Subsets matter. Our child protection system operates on this principle. We could say that because 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 systems 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 homeschooling parents are capable of and interested in providing such an education and that few would abuse or neglect their children when free from any surveillance in the privacy of their homes.

And in any event, we know that a substantial percentage of homeschoolers are being deprived of the kind of education we should think of as minimally adequate. As discussed above, many religious homeschoolers object in principle to some core goals of public education.[125]

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123. Until relatively recently, and likely during the time reflected in these studies, homeschooled 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, *supra* note 34, 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/ (last visited Jan. 6, 2020). For 2016 data, see MCQUIGGAN ET AL., *supra* note 33, at 18 tbl.7; 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*, NAT'L CTR. EDUC. STATS., https://nces.ed.gov/programs/digest/d11/tables/dt11_040.asp (last visited Feb. 27, 2020). For the current socioeconomic picture see *supra* Section I.B.; see also *supra* note 61.

124. *See* Christopher Lubienski, Tiffany Puckett & T. Jameson Brewer, *Does Homeschooling "Work"? A Critique of the Empirical Claims and Agenda of Advocacy Organizations*, 88 PEABODY J. EDUC. 378, 383 (2013).

125. *See supra* Section I.B.

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").[126] It is regularly deployed by those same leaders in legislative and court battles, helping shape the law and policy that define homeschooling today.[127]

Much of this policy advocacy research has been conducted by Dr. Brian D. Ray and the National Home Education Research Institute ("NHERI") he founded in 1990.[128] Ray has consistently denied any affiliation between NHERI and HSLDA,[129] and technically NHERI operates as an independent legal entity. However, the two organizations have collaborated closely since NHERI's inception. HSLDA funded and provided participants for NHERI's first-ever study.[130] In total, Ray conducted "five major research projects" for HSLDA between 1990 and 2008, constituting "the great majority of his published work" in this period.[131]

Ray generally publishes his studies through NHERI and its quarterly journal, the Home School Researcher.[132] Many of his studies purport to show that homeschoolers' academic performance is at least as strong as that of their public school peers.[133] He has also published work claiming that there is no relation between the level of homeschooling regulation and the prevalence of child

126. DWYER & PETERS, *supra* note 9, at 99; Martin-Chang & Levesque, *supra* note 105, at 122 ("[T]he majority of the work investigating the academic impact of homeschooling has been commissioned by the homeschooling groups themselves."); Martin-Chang et al., *supra* note 122, at 195.

127. Isabel Macquarrie, Homeschooling Research 17 n.76 (Sept. 30, 2018) (unpublished research memorandum) (on file with author). Brian Ray's work is frequently cited by the HSLDA. *See id.* at 17; *see, e.g.*, Mike Smith & Roy Hanson, *New Tragedy Could Revive Criticism of Homeschooling*, HSLDA (2018), https://contentsharing.net/actions/email_web_version.cfm?message_id=15560970&user_id=HSLDA.

128. *See* Milton Gaither, *Brian D. Ray and NHERI, Part 1*, HOMESCHOOLING RES. NOTES (Sept. 30, 2008), https://gaither.wordpress.com/2008/09/30/brian-d-ray-and-nheri-part-1/.

129. *See, e.g.*, Milton Gaither, *Brian D. Ray and NHERI, Part 2*, HOMESCHOOLING RES. NOTES (Oct. 7, 2008), https://gaither.wordpress.com/2008/10/07/brian-d-ray-and-nheri-part-2/.

130. *See generally* HSLDA, HOME SCHOOL COURT REPORT (Summer 1990).

131. *Id.*

132. *See generally Home School Researcher Journal*, NAT'L HOME EDUC. RES. INST., https://www.nheri.org/home-school-researcher-journal/ (last visited Jan. 6, 2020).

133. *See, e.g.*, Brian D. Ray, *Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study*, 8 ACAD. LEADERSHIP 1, 27 (2010). *See generally Homeschooling Research, Studies and Scholarship*, NAT'L HOME EDUC. RES. INST., https://www.nheri.org/homeschooling-research-studies-and-scholarship/ (last visited Jan. 6, 2020).

maltreatment,[134] and no evidence that homeschoolers are at greater risk of maltreatment than other children.[135]

Ray's research has been persuasively debunked by many reliable scholars, who have demonstrated its methodological issues and other problems.[136] These include the fact that almost all of 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.[137] 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.[138] They describe it as generally "politically motivated," noting the predominance of research sponsored by the HSLDA and conducted by Ray and detailing the "design flaws" characterizing this work.[139] 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.[140]

Other education scholars have similarly found this body of research filled with unsubstantiated claims and "methodologically flimsy," concluding that it

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134. *See* Brian D. Ray, *The Relationship Between the Degree of State Regulation of Homeschooling and the Abuse of Homeschool Children (Students)*, NAT'L HOME EDUC. RES. INST. (Mar. 15, 2018), https://www.nheri.org/degree-of-homeschool-regulation-no-relationship-to-homeschool-child-abuse/.

135. Brian D. Ray, *Child Abuse of Public School, Private School, and Homeschool Students: Evidence, Philosophy, and Reason*, NAT'L HOME EDUC. RES. INST. (Jan. 23, 2018), https://www.nheri.org/child-abuse-of-public-school-private-school-and-homeschool-students-evidence-philosophy-and-reason/.

136. DWYER & PETERS, *supra* note 9, at 97–99; Martin-Chang et al., *supra* note 122, at 196; *see, e.g.*, Gaither, *Brian D. Ray and NHERI, Part 1*, *supra* note 128; Lubienski et al., *supra* note 124, at 388 (lack of empirical evidence supporting claim that homeschooling causes better academic outcomes); *see also* Wilkens et al., *supra* note 109, at 31 ("Work on the performance of homeschoolers . . . has remained largely anecdotal, subject to bias, and highly politicized (including experimental or quasi-experimental work).").

137. *See, e.g.*, DWYER & PETERS, *supra* note 9, 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) 2 (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 34, at 17.

138. Kunzman & Gaither, *supra* note 34, at 4 (covering "virtually the entire universe of English-language academic texts on the topic.").

139. *Id.* at 5, 16–21, 36.

140. *Id.* at 16, 36; *see, e.g.*, Ray, *supra* note 134; Ray, *supra* note 135.

serves simply as an "empirical cover" for advocacy and is "just a very useful marketing mechanism."[141] 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."[142]

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 in this area.[143] 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.[144]

The Ray studies purporting to address child maltreatment rates[145] are similarly flawed. As discussed above,[146] there is no way to assess maltreatment rates among homeschoolers given our inability to take representative samples of the total community.[147] Moreover, Ray relies on official maltreatment rates, which are misleadingly low in families isolated from the larger community and away from observation by those who might report to CPS, including the school personnel who are mandated reporters.[148] Accordingly, his claims that there is no connection between homeschooling and maltreatment are totally groundless.

This corrupt research/policy merger exists generally in the child protection area, and it has had a devastating impact, regularly persuading policymakers to adopt programs that favor parent rights to control children over child rights to protection.[149] The funding is there for the advocacy research. The studies are dressed up to look like true social science. And policymakers may have trouble telling good from bad science, particularly when subject to overwhelming pressure by advocacy forces with a parent rights perspective.

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141. Lubienski et al., *supra* note 124, at 379, 388; *see also id.* at 390 ("There is essentially no scientific evidence on the effectiveness of homeschooling.").

142. Milton Gaither, *Introduction to the Wiley Handbook of Home Education*, *in* THE WILEY HANDBOOK, *supra* note 37, at 2.

143. *About ICHER*, INT'L CTR. HOME EDUC. RES., http://www.icher.org/icher.html (last visited Jan. 13, 2020). ICHER keeps a database of homeschooling research and a chart of homeschooling regulations by state.

144. *Id.*

145. *See supra* notes 134–35.

146. *See supra* Section I.C.

147. *See* AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF, *supra* note 92, 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.").

148. *See* discussion *supra* Section I.C.

149. *See, e.g.*, Elizabeth Bartholet, *Thoughts on the Liberal Dilemma in Child Welfare Reform*, 24 WM. & MARY BILL RTS. J. 725, 726–28, 730–32 (2016); Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, 13 WHITTIER J. CHILD & FAM ADVOC. 1, 8–17 (2014).

II. THE CURRENT LAW[150]

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.[151] 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, courts have occasionally struck down restrictions and have occasionally indicated that strict scrutiny is or might be the appropriate standard.

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.[152] But it did make clear in the cases that first established parents' rights, *Meyer v. Nebraska*[153] and *Pierce v. Society of the Sisters*,[154] that these rights are limited by the state's right to impose "reasonable" regulations ensuring an adequate education.

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150. For descriptions of the development and current state of homeschooling law, see Antony Barone Kolenc, *Legal Issues in Homeschooling*, *in* THE WILEY HANDBOOK, *supra* note 37, at 59–85; DWYER & PETERS, *supra* note 9, at 51–66; GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 207–40.

151. *See* DWYER & PETERS, *supra* note 9, 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.").

152. 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 was 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 9, at 58 (discussing the Court's summary dismissal of Turner v. California, 347 U.S. 972 (1954), in which the California Supreme Court upheld the state compulsory education law).

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

154. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

The Court struck down the regulations at issue as unreasonable.[155] 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. *Meyer* simply struck down a state law forbidding the teaching of foreign languages until eighth grade. *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 *Meyer* the Court said:

> [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 . . . .[156]

In *Pierce*, the Court said:

> 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.[157]

A later Supreme Court case summarized subsequent law as follows:

> Since *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.*[158]

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

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155. *See Meyer*, 262 U.S. at 402–03; *Pierce*, 268 U.S. at 534–35.

156. *Meyer*, 262 U.S. at 400, 402.

157. *Pierce*, 268 U.S. at 534.

158. Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245–47 (1968) (citation omitted, emphasis added) (upholding the constitutionality of a New York law requiring public funding for books).

nation."[159] Commentators agree that the Court's cases support the state's right to promote important public values. [160]

The Court's decision in *Prince v. Massachusetts*[161] 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."[162] It explained:

> 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.[163]. . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . . Parents may be free to become martyrs themselves. But it does not follow 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.[164]

In more recent cases, the Supreme Court has developed constitutional doctrine more specifically defining parent rights as part of the liberty protected by substantive due process.[165] 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.[166]

The Court applied a balancing approach in *Meyer*, *Pierce*, and *Prince*, indicating that parental interests should be weighed against potentially conflicting child and state interests in deciding what regulation was reasonable. And *Troxel v.*

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159. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting historians).

160. Martha Minow, *Before and After Pierce: A Colloquium on Parents, Children, Religion and Schools*, 78 UNIV. DET. MERCY L. REV. 407, 413, 418 (2001) (*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); Shulman, *supra* note 19, at 8–9, 20 (private schools "can be required to provide an education equivalent to that of the public schools," and the Court's decisions "do little to limit the scope of legitimate state regulation"); REBELL, *supra* note 19, at 46 (the Court has in recent decades regularly referred to the schools' "critical role in educating for citizenship").

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

162. *Id.* at 166.

163. *Id.* at 165.

164. *Id*. at 167, 170.

165. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000).

166. *See* LAURENCE H. 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); *see also* David D. Meyer, *Family Law Equality at a Crossroads*, 2013 MICH. ST. L. REV. 1231, 1237–41 (2013) (discussing constitutional standards of review in family law cases).

Granville,[167] the Court's most recent case addressing such a conflict, seemed to reject the strict scrutiny standard, instead applying 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 balances the interests, effectively applying an intermediate scrutiny standard.[168]

The Court's *Yoder* decision[169] 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.[170] 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."[171] 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 few other religious groups or sects could make."[172] 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,[173] by contrast to much of what goes on in homeschooling. Since children

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167. *See Troxel*, 530 U.S. at 70.

168. *See* Meyer, *Family Law Equality at a Crossroads*, *supra* note 166, at 1245 ("[S]trict 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."); *id.* at 1245–46 ("[T]he 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) ("[T]he 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* Meyer, *Family Law Equality at a Crossroads*, *supra* note 166, at 1236–37 ("[D]espite 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."). *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. *See Troxel*, 530 U.S. at 80.

169. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

170. *Id.* at 234–36.

171. *Id.* at 213.

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

173. *See id.* at 230 ("[T]his 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:

> [T]he 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.

were not formally represented, nor any conflict between parent and child interests raised, *Yoder* is limited on these grounds also. Additionally, Professor Ira Lupu points out:

> *Yoder*, *Meyer*, and *Pierce* all concern affirmative [parental] choices to involve the child in an educational community larger than the family itself. These cases should not be read as authority for a parental right to exclude all but themselves from the educational process.[174]

Yoder is, in any event, 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.[175] 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.[176] It vindicates parent and group control over children without regard to child rights.

A subsequent Supreme Court case[177] significantly undermined *Yoder*, holding that religious objections to neutral, generally applicable laws did not trigger heightened scrutiny.[178] While this case suggested in dicta that cases involving a hybrid claim linking the religious right to another right, as in *Yoder*, might warrant different treatment,[179] 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.[180]

Id. at 234.

174. Ira Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1357 (1994).

175. *See Yoder*, 406 U.S. at 241–46 (Douglas, J., dissenting); TRIBE, *supra* note 166, at 1299 ("[T]he 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.").

176. 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. *Yoder*, 406 U.S. at 218; *see* TRIBE, *supra* note 166, at 1193 ("*Yoder* exempted the Amish from Wisconsin's law . . . because the law would have gravely jeopardized the religion's very survival.").

177. Emp't Div. v. Smith, 494 U.S. 872, 884–85 (1990).

178. *Id.*; *see also* Holt v. Hobbs, 574 U.S. 352, 356–57 (2015) (citing *Smith*, 494 U.S. at 878–82) ("[N]eutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment.").

179. *See Smith*, 494 U.S. at 881–82.

180. *See* DRIVER, *supra* note 33, at 409–10 ("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 9, 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."); JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND ENFRANCHISEMENT OF THE CHILD 118–23 (2014) (federal courts have either read hybrid rights theory out of existence or left it little room to apply); Zalman

In sum, Supreme Court doctrine fails to support homeschooling advocates' claim that strict scrutiny should apply in this area. 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 other courts and for legislators to decide 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 priority 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 parent's 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 case involving a child grievously injured by his father, *DeShaney v. Winnebago County Department of Social Services*, 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.[181] 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.[182]

Rothschild, *Free Exercise's Outer Boundary: The Case of Hasidic Education*, 199 COLUM. L. REV. F. 200, 218 (2019). 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* Kolenc, *supra* note 150, at 72 ("[L]ower courts have applied the hybrid rights doctrine inconsistently . . . ."). *See* related discussion *infra* Subsection II.A.2. State courts often limit *Yoder* to the Amish or similar groups. *See* DWYER & PETERS, *supra* note 9, at 58 n.77 (collecting cases).

181. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989).

182. *See* Teri Dobbins Baxter, *Private Oppression: How Laws That Protect Privacy Can Lead to Oppression*, 58 U. KAN. L. REV. 415, 458 (2010) ("Constitutional challenges to statutes such as Pennsylvania's generally have not been successful."); GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29; DWYER & PETERS, *supra* note 9, at 58. For cases discussing this issue, 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 an outlier case, see *Perchemlides v. Frizzle*, No. 16641 (Hampshire Cty. Sup. Ct. Nov. 13, 1978) (holding a school superintendent had gone too far by requiring that

As of the 1980s, the courts had concluded that outright bans on homeschooling were constitutional.[183] 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,[184] and generally upheld such restrictions as the states imposed.[185] 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.[186] Most appear to apply a rational relationship standard, upholding restrictions they find "reasonable."[187] The courts have upheld requirements related to parent qualifications[188] (including prior certified instructor status[189]), curriculum,[190] annual reporting,[191] instructional time, portfolio

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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").

183. *See* DRIVER, *supra* note 33, at 400 (citing TYLL VAN GEEL, THE COURTS AND AMERICAN EDUCATION LAW 21–22 (1987)); *see also, e.g.*, State v. Edgington, 663 P.2d 374 (N.M. Ct. App. 1983) (upholding statutory ban on homeschooling).

184. *See* 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] (1999).

185. *See id.* ("[C]ourts 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).

186. *See, e.g.*, Baxter, *supra* note 182, at 458–61.

187. *See* Kolenc, *supra* note 150, at 66 (noting that strict scrutiny "rarely" applies, and that "[s]everal lower court cases" have "applied the deferential rational basis review instead"); *see, e.g.*, Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 462 (2d Cir. 1996) (under rational basis review, a 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, 179 (4th Cir. 1996) (same); Ohio Ass'n of Indep. Schs. v. Goff, 92 F.3d 419, 423–24 (6th Cir. 1996) (statute requiring charter schools to administer certain standardized tests, and prohibiting awarding diplomas to students who failed to achieve a certain score, did not violate parents' Fourteenth Amendment rights because it 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, 462 (N.D. Ill. 1974); *Hanson v. Cushman*, 490 F. Supp. 109, 115 (W.D. Mich. 1980); *People v. Bennett*, 501 N.W.2d 106,111–12 (Mich. 1993).

188. *See, e.g.*, Crites v. Smith, 826 S.W.2d 459, 466–67 (Tenn. Ct. App. 1991) (upholding requirement that parents have baccalaureate degree or equivalent).

189. *E.g.*, *Hanson*, 490 F. Supp. at 115–16; *Bennett*, 501 N.W.2d at 324; State v. Patzer, 382 N.W.2d 631, 633, 639 (N.D. 1986) (upholding the teacher certification requirement).

190. *See, e.g.*, Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 252–53 (3d Cir. 2008).

191. *E.g.*, State v. Rivera, 497 N.W.2d 878, 880–81 (Iowa 1993).

review,[192] minimum performance on standardized tests,[193] and home visits to assess compliance.[194]

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.[195] The Michigan Supreme Court *DeJonge* case stands as the one significant exception.[196]

One important federal court decision illustrates the general readiness to uphold education rules against religious freedom challenges.[197] 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.[198] The court noted that *Yoder* rested on "such a singular set of facts that we do not believe it can be held to

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192. *See, e.g.*, *Combs*, 540 F.3d at 252–54 (upholding instructional time and portfolio review requirements).

193. *See, e.g.*, Murphy v. Arkansas, 852 F.2d 1039, 1040, 1044 (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, 717 N.E.2d 1020, 1021 (Mass. App. Ct. 1999) (upholding standardized tests and portfolio review requirements).

194. *See, e.g.*, Blackwelder v. Safnauer, 689 F. Supp. 106, 113, 130 (N.D.N.Y. 1988) (upholding home visits as well as requirements that parents submit detailed plan of instruction, curriculum materials and textbooks, description of teacher qualifications); *In re* 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 education to public school). For case law generally upholding state requirements, see generally Miller, *supra* note 184, at § 2[a].

195. *See* Miller, *supra* note 184, § 3; discussion of *Yoder supra* Subsection II.A.1; *see, e.g.*, Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1385 (Me. 1988) (upholding prior approval of homeschooling, and various instructor requirements).

196. The Michigan Supreme Court held in *DeJonge* that a requirement that 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. 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. People v. Bennett, 501 N.W.2d 106, 120 (Mich. 1993). However, the Sixth Circuit subsequently rejected the hybrid rights theory under the U.S. Constitution, finding that rational basis review applied. Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); DWYER & PETERS, *supra* note 9, 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*, 852 F.2d at 1041–43 (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* SUTTON, *supra* note 31, at 205–07; *see also* discussion of *Smith supra* Subsection II.A.1.

197. *See generally* Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

198. *Id.* at 1069.

announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden."[199]

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 struck down apparently reasonable regulation.[200] Some have indicated that strict scrutiny or some other very demanding standard might be appropriate.[201]

One example is the notorious *Jonathan L.* case in California.[202] 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.[203]

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, because 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.[204]

In response, the homeschooling movement kicked into gear, helping create a "national outcry."[205] Public statements were issued by several California officials, including the Governor[206] and the state superintendent of schools,[207] all opposing this straightforward interpretation of state law. The outcry focused on condemning restrictions on homeschooling and entirely ignored the risks that children might be subject to serious maltreatment in the absence of restrictions.

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199. *Id.* at 1067.

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

201. *See* Kolenc, *supra* note 150, at 68–69.

202. Jonathan L. v. Super. Court, 81 Cal. Rptr.3d 571 (Ct. App. 2008).

203. *Id.* at 576, 578–81.

204. *In re* Rachel L., 73 Cal. Rptr. 3d 77, 82, 86–87 (Cal. Ct. App. 2008).

205. Homeschooling organizations released a Joint Statement Regarding Homeschooling in California. *Coming Together in California: Joint Statement Regarding Homeschooling in California*, HSLDA (Mar. 26, 2018), https://hslda.org/content/hs/state/ca/200803260.asp.

206. Then-Governor Arnold Schwarzenegger called for *In Re Rachel L*'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.

207. *See* Seema Mehta, *Court Reverses Home-School Ruling*, L.A. TIMES (Aug. 9, 2008), https://www.latimes.com/archives/la-xpm-2008-aug-09-me-homeschool9-story.html.

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, supporting the parents, and a lonely few amicus briefs opposing.[208] The HSLDA helped represent the parents.[209]

The appellate court reversed its original ruling and overruled its prior precedent.[210] It read the apparently restrictive California law—in a legally dubious change of interpretation—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.[211]

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 would not be unconstitutional.[212] 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 actually 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 safety concerns *necessitated* the removal.[213]

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 appellate court to reverse a sensible reading of homeschooling legislation and to impose a relatively strict constitutional standard.

A case decided by the influential Supreme Judicial Court of 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*, the court struck down a home visit requirement

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208. *See Jonathan L.*, 81 Cal. Rptr. 3d at 577 n.3. Fourteen of the 16 amicus briefs argued California law permitted homeschooling. *See Home-schooling: California Court Reverses Decision*, WASH. TIMES (Sept. 7, 2008), https://www.washingtontimes.com/news/2008/sep/07/california-court-reverses-decision/; *see also Homeschool Freedom & the California Case Timeline*, HSLDA (2008), http://nche.hslda.org/courtreport/V24N6/V24N603.asp (last visited Jan. 14, 2020). The congressional brief stated that "California, like the rest of the country, should protect this fundamental right of parents to direct the education of their children by continuing to promote homeschool instructional programs." Brief for Members of the United States Congress as Amici Curiae Supporting Respondents, Jonathan L. v. Super. Court, 81 Cal. Rptr. 3d 571 (Ct. App. 2008) (No. B192878), 2008 WL 2328760, at *2.

209. *See Homeschool Freedom & the California Case Timeline*, *supra* note 208.

210. *See Jonathan L.*, 81 Cal. Rptr. 3d at 576.

211. *Id.* at 589–92 (concluding homeschooling falls under private school exemption).

212. *Id.* at 594.

213. *See id.* at 593–94. 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 were never removed from the homeschooling situation. *Homeschool Freedom & the California Case Timeline*, *supra* note 208.

designed as a check on whether the approved homeschooling plan was actually being implemented.[214] It did so based on reading the legislation "carefully in light of constitutional considerations," looking to both the state and federal constitutions, and asserted that the issue was whether the home visit requirement was "*essential*."[215]

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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.[216]

However, it is unclear whether courts would generally be likely to uphold significant restrictions on homeschooling such as the presumptive ban proposed in this Article.[217] And even less restrictive requirements, 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.

This is why it is important, as discussed in Section IV.B. below, that the building blocks exist in current federal law for the creation of child constitutional rights to education and protection and related state duties, and that state constitutions provide a basis for such rights and duties separate and apart from the federal constitution.

B. State Legislation Imposes Few Restrictions on Homeschooling

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 restrictive regulations, many of which were proposed in response to child abuse scandals.

This legislative 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.[218] Homeschooling requirements that used to be

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214. *See* Brunelle v. Lynn Pub. Schs., 702 N.E.2d 1182, 1183 (Mass. 1998).

215. *Id.* at 1186–87. 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 found that school officials had satisfied those requirements. *See id.* at 1183.

216. Dwyer and Peters sum it 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." DWYER & PETERS, *supra* note 9, at 59.

217. *See infra* Section IV.C.

218. *See* DWYER & PETERS, *supra* note 9, at 82–83; GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 175, 179–95; Timothy B. Waddell, *Bringing it all Back Home: Establishing a Coherent Constitutional Framework for the Re-Regulation of*

common are now rare: for example, meaningful requirements that parents submit planned curricula and have certain educational credentials, and that students be tested.[219] The pace of this transformation has been breathtaking.[220]

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."[221]

Jeffrey Shulman recently conducted a 50-state survey, and a review of other key sources, on state regulation of homeschooling.[222] His research supports the above claim:[223]

> [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.[224] 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 guarantee of teacher competency may be bypassed by affiliation with an umbrella school, in response

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Homeschooling, 63 VAND. L. REV. 541, 543 (2010). State court interpretations of arguably ambiguous legislation have contributed to this transformation.

219. *See, e.g.*, *Brunelle*, 702 N.E.2d at 516 n.7 (noting that at that time "many [states] require[d] compliance with State time and curriculum mandates," "[m]any States focus[ed] on teacher qualifications," and "[a]lmost all States require[d] periodic assessment of . . . academic progress.").

220. *See* sources cited *supra* note 36.

221. *See* Joyce, *supra* note 33 (emphasis added).

222. Jeffrey Shulman, 50-State Survey: Home School Regulations: Notification, Certification, Curriculum and Assessment Requirements (Dec. 20, 2018) (unpublished manuscript) (on file with author).

223. Shulman, *supra* note 19, at 25–26 (citations omitted).

224. Acceptance is automatic in every state except Massachusetts and Rhode Island. *See Homeschool Notification*, CRHE, https://www.responsiblehomeschooling.org/policy-issues/current-policy/notification/ (last visited Jan. 4, 2020).

to religious objection, or at the discretion of local education officials.[225]

* In at least fourteen states there are no curricular requirements, either because states fail to impose them or otherwise exempt homeschoolers.[226] 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.[227] In other states, parents may submit student portfolios in lieu of more objective test scores.[228] Even where state law requires that homeschooling parents demonstrate adequate academic progress through annual assessments, it may take

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225. DWYER & PETERS, *supra* note 9, 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. CAL. EDUC. CODE § 48222 (West 2018); KAN. STAT. ANN. § 72-3120(a)(2) (2017); Kan. Op. Att'y Gen. 75-409 (1975); N.Y. EDUC. LAW § 3204(2)(i) (McKinney 2018). 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. *E.g.*, WASH. REV. CODE § 28A.200.010(4)(a), (c) (2019). In one state, educational qualifications are only required to homeschool high-school students. TENN. CODE ANN. § 49-6-3050(2)(B), (3) (2016).

226. Several states have laws exempting parents from teaching anything that conflicts with their religious 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/ (last visited Jan. 4, 2020).

227. 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/ (last visited Jan. 4, 2020).

228. 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. *Id.*

> years before school officials can take remedial action to terminate deficient home education.[229]

Homeschooling laws and regulations often provide special exemptions for religious homeschoolers, providing additional immunity from restrictions, given how many homeschoolers are religious.[230] Although these exemptions are constitutionally questionable under doctrines governing the ban on establishment of religion, no significant constitutional challenge has been made.[231]

CRHE, a homeschooling graduate group discussed above,[232] maintains a comprehensive overview of state laws on its website.[233] Its 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.[234] Some states that set requirements for credentials, subjects taught, or instructional hours fail to require that parents submit the requisite information;[235] others fail to review, or check the accuracy of, information submitted.[236] Parents may simply have to submit a letter saying they will teach certain subjects, and then they are free to do whatever they want. Assessment requirements are characterized by similarly lax enforcement.[237] Dwyer and Peters' recent book on homeschooling concludes that enforcement and related problems result in effectively no restrictions: "[T]here is today in the vast majority

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229. 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 id.*

230. *See* Shulman, *supra* note 19, at 29–30. Virginia allows religious parents who opt out of public schooling to do so completely free of state regulation, with no need to show their children "are being home-schooled or otherwise educated." *Id.* at 29 (citing Susan Svrluga, *7,000 Use Religious Opt-Out of Schools*, WASH. POST, September 11, 2012, at B1); *see also* VA. CODE ANN. § 22.1-254-1(B)(1) (2018).

231. By comparison see Rothschild, *supra* note 180, at 203 (discussing a constitutional challenge to exemptions for yeshivas).

232. *See supra* Section I.C.

233. *See Current Homeschool Law*, CRHE, https://www.responsiblehomeschooling.org/policy-issues/current-policy/ (last visited Jan. 14, 2020) (discussing the state of regulation as reported by CRHE in December 2018).

234. *See* Robin L. West, *The Harms of Homeschooling*, 29 PHIL. AND PUB. POL'Y Q. 7, 8 (2009); Rachel Coleman, *Homeschool Law & Truancy*, CRHE, https://www.responsiblehomeschooling.org/policy-issues/abuse-and-neglect/homeschool-law-truancy/ (last visited Jan. 14, 2020) ("[A] wide variety of anecdotal accounts . . . indicate the existence of a problem.").

235. *Assessment & Intervention*, *supra* note 227.

236. *Id.*

237. *See id.* ("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.").

of states no real legal obstacle to parents' withholding their children from school and doing whatever they want in terms of instruction at home."[238]

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."[239]

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.[240] 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.[241] But Pennsylvania relies on homeschooling parents to provide accurate information rather than conducting an independent background check.[242] 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.[243] Parents can petition to have this restriction waived.[244] Georgia

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238. DWYER & PETERS, *supra* note 9, at 67. They elaborate:

> 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. . . . [I]n 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. 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 . . . . 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.

Id. at 67–68; *see also id.* at 70–72.

239. *Id.* at 2.

240. *See* AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF, *supra* note 92, at 5.

241. 24 PA. STAT. AND CONS. STAT. ANN. § 13-1327.1(b)(1) (2019).

242. *See* AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF, *supra* note 92, at 5.

243. *Id.*

244. *Id.*

recently passed a very limited bill in response to the horrific torture and murder of two homeschooled students, providing only that child protective services be notified of homeschooling parents who fail to fill out a required declaration of intent to homeschool.[245]

No state has a system requiring that homeschooling families be screened or monitored based on past or present CPS involvement and related evidence of maltreatment.

When scandals have erupted, involving horrific abuse suffered by children supposedly being homeschooled, the homeschooling movement has successfully fought off attempts to impose protective regulation. Thus, while some say that these scandals may finally trigger regulation, this has not occurred. Examples abound of legislators proposing modest protective regulation only to be overwhelmed by the movement's lobbying force, as discussed below.[246] The Georgia law noted above represents the only example in recent years of regulation being increased, and this involved a very modest restriction.[247]

4. Trends in the Law

The trend over the past few decades has been overwhelmingly in the direction of legitimation and deregulation.[248] 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.[249]

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245. *See* 2019 Ga. Laws 224; Rachel Coleman, *Victory for Homeschooled Students in Georgia!*, CRHE (June 7, 2019), https://www.responsiblehomeschooling.org/victory-for-homeschooled-students-in-georgia/. For a description of the case, see Joshua Sharpe, *How Systems Failed to Protect Effingham Kids Before Death*, ATLANTA J.-CONST. (Mar. 8, 2019), https://www.ajc.com/news/crime--law/exclusive-how-systems-failed-protect-effingham-kids-before-death/NZHqr3maIIpdRoei8TOodL/ (describing this as "the most shocking and sordid child abuse case in recent Georgia memory").

246. *See* discussion *infra* Subsection III.C.2(b).

247. 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 245; *see also* D.C. Mun. Regs. tit. 5-E, § 5200–5210 (2017).

248. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 108–09; GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 207–40; Green, *supra* note 4, at 1106 (noting "the massive homeschooling deregulation campaign that spanned the past thirty years"); Waddell, *supra* note 218, at 543; Motoko Rich, *More Pupils, Less Regulation*, N.Y. TIMES (Dec. 29, 2015), https://www.nytimes.com/2015/01/05/education/home-schooling-more-pupils-less-regulation.html; Carolyn Thompson, *Case of Shackled Kids Revives Home-School Regulation Debate*, CTV NEWS (Jan. 29, 2018), https://www.ctvnews.ca/world/case-of-shackled-kids-revives-home-school-regulation-debate-1.3779816 (quoting Professor Joseph Murphy: "In recent years, the trend in state laws has been toward loosening government oversight of home-schooling."). CRHE publishes a timeline of homeschool legislation on their website detailing this move. *See An Outline of Homeschooling Legislation*, CRHE, https://www.responsible homeschooling.org/an-outline-of-homeschooling-legislation/ (last visited Jan. 14, 2020).

249. DWYER & PETERS, *supra* note 9, at 108–09; GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 179–200; Waddell, *supra* note 218, at 543.

In 1985, seven states reduced restrictions; in 1988, five more states reduced restrictions.[250] In 2014, Pennsylvania reduced assessment requirements,[251] and Utah declared that "the homeschooling parent assumes sole responsibility" for children's education, and eliminated the requirements that parents teach subjects mandatory in public schools and teach for the same amount of time.[252] In 2015, Arkansas eliminated assessment requirements.[253] In 2016, West Virginia relaxed annual notice and assessment requirements and lowered the threshold for "acceptable progress" for homeschoolers.[254]

Efforts to increase regulation have been successfully fought off, with the HSLDA's aggressive tactics playing a major role.[255] Two of the most comprehensive recent studies of homeschooling similarly sum up the trend. 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.[256]

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.[257]

III. THE POLITICS

A. Ideological Nature of the Homeschooling Movement

It is the religious ideologues who dominate the homeschooling movement.[258] And they dominate overwhelmingly. They founded the extraordinarily powerful HSLDA, which has played the leading role fighting against regulation. The different political strains and variety of populations represented within the homeschooling population are not reflected in the political leadership of HSLDA. Nor is there any other significant advocacy organization designed to represent the views of the highly educated nonreligious homeschoolers, the

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250. *See* DWYER & PETERS, *supra* note 9, at 65.

251. 24 PA. STAT. AND CONS. STAT. ANN. § 13-1327.1 (2019); 2014 Pa. Laws. 196.

252. Green, *supra* note 4, at 1118; *see also* 2014 Utah Laws 374.

253. ARK. CODE ANN. § 6-15-504 (2017); 2015 Ark. Acts 832.

254. 2016 W. Va. Acts 93 (specifically stating that homeschoolers are no longer required to provide notice or assessment results annually).

255. *See infra* Section III.C.2.

256. *See* DWYER & PETERS, *supra* note 9, at 88–89.

257. GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 233.

258. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 85–86; Waddell, *supra* note 218, at 586.

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, or for other secular reasons.[259]

B. Political Dominance of the Homeschooling Movement

The HSLDA is a Christian non-profit organization founded in 1983,[260] which grew at a phenomenal pace in the next years as it established leadership in the homeschooling advocacy world.[261] 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 . . . .[262]

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.[263]

The conservative Heritage Foundation supports the HSLDA's anti-regulatory position,[264] and the conservative Rutherford Institute played an important early role in homeschooling advocacy.[265]

Many students of homeschooling have remarked on the extraordinary power of the homeschooling lobby.[266] This power is illustrated by the overall

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259. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 87–88 (observing that the movement "shifted over time 'from pedagogy to ideology'"); *see id.* at 88 (quoting GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, 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.'").

260. DWYER & PETERS, *supra* note 9, at 63–64; *HSLDA FAQ*, HSLDA, https://hslda.org/content/docs/faqs/ (last visited Feb. 6, 2020).

261. GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 186–89.

262. *Our Mission*, HSLDA, https://hslda.org/content/about/mission.asp (last visited Feb. 20, 2020).

263. *See, e.g.*, Nathan Field, *Protecting Parental Rights in the UK*, HSLDA (Oct. 5, 2018), https://hslda.org/content/hs/international/unitedkingdom/20181005-protecting-parental-rights-in-the-UK.aspx (homeschooling and parental rights under "serious" threat); Karin Van Oostrum, *Legal Changes in South Africa*, HSLDA (Oct. 5, 2018), https://hslda.org/content/hs/international/SouthAfrica/20181005-Legal-Changes-in-South-Africa.aspx (inviting HSLDA members to conference to discuss threat to parent rights posed by South African government's new Draft Home Education Policy).

264. *See* Dan Lips & Evan Feinberg, *Homeschooling: A Growing Option in American Education*, HERITAGE FOUND. (2008), http://www.heritage.org/research/reports/2008/04/homeschooling-a-growing-option-in-american-education.

265. DWYER & PETERS, *supra* note 9, at 63; GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 158–59.

266. *E.g.*, DWYER & PETERS, *supra* note 9, at 64 (remarking that a legislative aide in Michigan stated about the homeschool lobby, "I've never seen a lobby more powerful and scary."); Huseman, *supra* note 47; Yuracko, *supra* note 52, at 128 (remarking that a

legitimation and deregulation accomplished, as described above,[267] and by some of the specific successes detailed below.[268]

There is 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 comes 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 CRHE, which constitutes the main advocacy organization for concerned homeschooling graduates.[269] CRHE advocates for "sensible oversight."[270] It has developed a set of detailed reform recommendations. [271]

Many homeschooling graduates speak out on the CRHE and other websites.[272] Many maintain blogs giving voice to their own and other

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congressional representative called homeschoolers "the most effective educational lobby on Capitol Hill").

267. *See supra* Section II.B.

268. *See infra* Subsection III.C.2.

269. *See* discussion *supra* Section I.C.

270. *See* CRHE, POL'Y RECOMMENDATIONS (Jan. 15, 2014), http://www.responsiblehomeschooling.org/wp-content/uploads/2013/09/Policy-Recommendations.pdf.

271. Its 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; and
- Students must meet the same medical requirements as public schoolers, and parents must submit immunization records. *Id.* at 6–9.

Its recommended reforms related to child maltreatment include:

- Bar parents from homeschooling if they have committed a crime that would prevent them from teaching in a public school;
- Bar parents from homeschooling if they or anyone in the household have previously had a founded abuse or neglect report;
- Conduct risk assessments when parents begin to homeschool after a recent child abuse report or concerning history of reports; and
- Ensure that homeschooled children are seen by mandatory reporters via academic assessments, medical visits, or other means. *Id.* at 5–6.

272. *See* Joyce, *supra* note 33 ("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.").

homeschoolers' concerns. 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."[273] "Homeschoolers Anonymous" is a blog operated by former homeschoolers with the goal of raising awareness of problems including isolation, abuse, and neglect.[274] "Recovering Grace" provides support for homeschoolers and publishes stories of young people raised in the cultish Advanced Training Institute.[275] "Love, Joy, Feminism" is a blog by Libby Anne documenting her critical reflections on being raised in a Quiverfull homeschooling family.[276]

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.[277] And it says that *if* permitted, licensing, curriculum, and testing requirements should apply.[278] 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. 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.[279]

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273. *Frequently Asked Questions*, HOMESCHOOL ALUMNI REACHING OUT, https://hareachingout.wordpress.com/2677-2/ (last visited Jan. 15, 2020).

274. *See About Haro*, *supra* note 95.

275. Jenna Tracy, *My Childhood in a Cult is Hard to Imagine - But My Survival is Truly Unbelievable*, 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 INST. INT'L, https://atii.org/about/ (last visited Jan. 15, 2020).

276. *See* Libby Anne, *Who is Libby Anne?*, LOVE JOY FEMINISM, http://www.patheos.com/blogs/lovejoyfeminism/about (last visited Jan. 15, 2020). Libby Anne is the author's pen name. *Id.*

277. NAT'L EDUC. ASS'N, 2017-2018 NEA RESOLUTIONS 37 (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.").

278. *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.").

279. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 203–06; Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1496, 1522–23 (2018); John Scott Gray, *Dewey and the American Movement to Homeschooling*, 46 EDUC. 3-13, 441, 442 (2018) (religious homeschool education may prevent fostering a "permeating social spirit," sense of collective responsibility and "effective moral training."); Reich, *Testing the Boundaries*, *supra* note 19; Reich, *Why Home Schooling Should Be Regulated*, *supra* note 50, at 137 ("[T]he capacity of children to 'exit' their parents' way of life is undermined and they

They make a range of arguments based on the importance, for both children and society, of an education that teaches 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.

Most call for reforms designed to better ensure that homeschoolers receive an adequate education.[280] These include such requirements as 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.[281]

Some academic critics propose a total ban on homeschooling.[282] Others propose a ban after the elementary grades.[283] Some question whether regulation short of a ban could succeed in ensuring that children are exposed to a range of

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run the risk of becoming 'ethically servile.'"); Ross, *supra* note 55, at 1013–14 (homeschooling denies children a proper civic education, and fails to expose them to constitutional norms like tolerance and diversity, which impacts the fabric of democracy); 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) ("[S]erious tensions may develop between parents' rights of control and children's liberty interests in receiving an education that fits their needs and aspirations."); Yuracko, *supra* note 52, at 123 (states are abdicating their responsibility, to ensure children are educated); West, *supra* note 46, at 10 (noting that homeschooling sacrifices children's "exposure to diverse ideas, cultures, and ways of being"); Rob Reich, *More Oversight is Needed*, N.Y. TIMES (Dec. 2, 2015), https://www.nytimes.com/roomfordebate/2011/01/04/do-home-schoolers-deserve-a-tax-break/more-oversight-is-needed (criticizing and calling for greater regulation). A few scholars and lawyers have argued against 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, 87 (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 RES. NOTES (July 1, 2011), https://gaither.wordpress.com/2011/07/01/three-lawyers-praise-homeschooling/.

280. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 229–30 (parents required to possess a high school diploma or GED, prove they had successfully educated their child in the past, and perform regular assessments of educational progress and interpersonal personal skills, with underperformance triggering remedial measures); Reich, *Why Home Schooling Should Be Regulated*, *supra* note 50, at 142 (homeschoolers should have to register and take all tests required for public schoolers); Yuracko, *supra* note 52, at 132; West, *supra* note 46, at 12 (suggesting "curriculum, content, visitation, and testing requirements").

281. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 229–30 (recommending background checks for all adults in the household, and investigation if any have felony or child maltreatment history); Woodhouse, *supra* note 279, at 490 (recommending private interviews with children to explore any evidence of abuse as part of the process for permitting homeschooling).

282. *See* Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children's Interests*, 46 U. BALT. L. REV. 57, 98 (2016).

283. *See* Dailey & Rosenbury, *supra* note 279, at 1453; Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1134 (2010).

viewpoints and values, given that many parents choose homeschooling precisely in order to keep their children from exposure to alternative views.[284]

Some propose conditioning any financial support for homeschooling on compliance with state oversight.[285] 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 calls for reform.[286] Scholars and physicians knowledgeable about child maltreatment have noted the risks to children in homeschooling[287] and advocated for related reforms.[288] International academics have united to counter the policy advocacy research put out by the homeschooling movement and to promote methodologically sound research.[289]

But it is the conservative religious homeschoolers that engage aggressively in the courts and legislatures and overwhelmingly dominate policy advocacy. They are well financed, 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

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284. *See* DWYER & PETERS, *supra* note 9, at 220; Ross, *supra* note 55, at 1013 ("[R]equiring homeschoolers to teach lessons about tolerance is largely hortatory, and may even be illusory."); *see* Fineman & Shepherd, *supra* note 282, 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 also* discussion *infra* Subsection IV.C.1.

285. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 227.

286. *See, e.g.*, Paul A. Alarcón, *Recognizing and Regulating Home Schooling in California: Balancing Parental and State Interests in Education*, 13 CHAPMAN L. REV. 391, 415–16 (2010); Alicia Kreh, *Where Do We Belong?: A Call for Consistency in Homeschooling Regulation*, 36 U. LA VERNE L. REV. 237, 272–73 (2015) (suggesting Congress create a regulatory scheme requiring notification, school district approval of the proposed curriculum, and yearly assessment tests with minimum standards); Waddell, *supra* note 218, at 596–97 (arguing for increased assessment requirements to ensure children are adequately educated); *see also* Noah Aleshire, *Defining the New "Species": Recommendations for California Homeschool Legislation After Jonathan L. v. Superior Court*, 246 EDUC. L. REP. 607, 623–35 (2009) (recommending that the legislature require notice and curriculum guidelines, high school education for parents, assessments, removal of children from homeschooling when in their best interests, and ban on homeschooling in homes of registered sex offenders).

287. *See supra* Section I.C.

288. DWYER & PETERS, *supra* note 9, at 226 (proposing at minimum "a meaningful prequalification procedure and subsequent periodic assessment of basic well-being"); Barnett, *supra* note 86, at 348 (proposing mandatory notification and home visits when progress is inadequate or parent has prior record of abuse); Baxter, *supra* note 182, at 465–71 (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); Goodpasture et al., *supra* note 80, at 91 (recommending consideration of a home visit requirement, increased monitoring, and creation of a formal system of collaboration between the educational system and the child protective system).

289. *See* discussion of ICHER, *supra* Subsection I.D.2.

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.[290] It relies on both natural law and on constitutional theory.[291] 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.[292] Some see policies providing homeschoolers access to school sports and other programs their parents want them to participate in as possibly tolerable supportive regulation, but others oppose even that as opening the door to restrictive regulation.[293]

In the name of parent rights, the movement has gone beyond simply opposing homeschooling regulation to oppose virtually all 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

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290. *See* Yuracko, *supra* note 52, 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 9, 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.").

291. *E.g.*, Fineman & Shepherd, *supra* note 282, at 91 (noting the belief that parent rights "are rooted in natural law and reaffirmed by both common law and the United States Constitution.").

292. *Id.*; *see, e.g.*, William A. Estrada, *4 Ways That HR 610 Will Threaten Your Rights*, HSLDA (Feb. 14, 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 only reasonable regulation. *See, e.g.*, Gross, *supra* note 9 (quoting HSLDA Senior Counsel Christopher Klicka to this effect).

293. *See, e.g.*, Bryan Toporek, *Wisc. Bill Allowing Home-Schoolers in Public School Sports Drawing Opposition*, EDUC. WK. (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 (noting that the homeschooling group Wisconsin Parents Association opposed a bill which would allow homeschoolers to participate in public school extracurricular activities); Nicki Truesdell, *Why UIL Access (Tebow Bill) is Not Freedom for Texas Homeschoolers*, NICKI TRUESDELL (Mar. 25, 2015), https://nickitruesdell.com/2015/03/uil-access-tebow-bill-not-freedom-texas-homeschoolers/ (opposing the "Tebow Bill" in Texas which would give homeschoolers access to extracurriculars); *see also HSLDA FAQ*, *supra* note 260 ("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.").

Federal Constitution to further expand and entrench parental power.[294] Its proposed amendment would effectively establish a strict scrutiny standard governing all state intervention in the family on behalf of children, except where the government interest "is of the highest order and not otherwise served." [295] The extremes of its 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."[296]

The homeschooling movement has, for related reasons, opposed U.S. ratification of the Convention on the Rights of the Child ("CRC").[297] 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.[298] 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 maltreatment area. For example, it engages in advocacy challenging CPS efforts to protect children.[299]

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294. *See* Lubienski et al., *supra* note 124, at 389; *Protecting Children by Empowering Parents*, PARENTALRIGHTS.ORG, https://parentalrights.org/ (last visited Feb. 20, 2020). 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, and Steve G. Oberlander, Chief Financial Officer and also the CFO of HSLDA and of the Home School Foundation. *See ParentalRights.org Board & Staff*, PARENTALRIGHTS.ORG, https://parentalrights.org/about/ (last visited Jan. 15, 2020).

295. *The Amendment*, PARENTALRIGHTS.ORG, https://parentalrights.org/amendment/ (last visited Jan. 15, 2020).

296. *Id.*

297. *See, e.g.*, *Parental Rights Amendment*, HSLDA, https://hslda.org/content/docs/nche/Issues/P/Parental_Rights_Amendment.asp (last visited Feb. 20, 2020) ("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.").

298. *See infra* Subsection IV.A.1; *see also* Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 85–94 (2011) [hereinafter Bartholet, *Ratification*].

299. Founded in 2014, the Parental Rights Foundation's ("PRF") mission is to "educate and inform the public and policymakers regarding parental rights with a goal of 'securing the blessings of liberty.'" *About Us*, PARENTAL RIGHTS FOUNDATION, https://parentalrightsfoundation.org/about/ (last visited Feb. 21, 2020). The Foundation filed an amicus brief in the ongoing Tenth Circuit case *Doe v. Woodard*. *See* Brief of Amici Curiae Parental Rights Foundation et al. in Support of Appellant and Support of Reversal, Doe v. Woodard, 912 F.3d 1278 (2019) (No. 18-1066) (opposing CPS's search of child). PRF also provides legal assistance to families. *See also Legal News & Help*, PARENTAL RTS. FOUND., https://parentalrightsfoundation.org/legal/ (last visited Jan. 15, 2020) (challenging actions of the Mississippi CPS); *see also Legal Help*, PARENTAL RTS. FOUND., https://parentalrightsfoundation.org/legal/ (last visited Jan. 15, 2020). Finally, PRF publishes

"Love, Joy, Feminism" 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 opposes restrictions on excessive corporal punishment; and (4) it opposes any homeschooling regulation that might provide a check on maltreatment.[300]

The evidence supports her claims. HSLDA has long opposed mandatory reporting laws.[301] 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 Child Abuse Prevention and Treatment Act ("CAPTA") 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.[302] 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.[303]

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.[304] This would seriously hamper efforts to monitor homeschooling as well as 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 abuse. It opposed one bill

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annual reports on the "State of Parental Rights." *See State of Parental Rights in 2017*, PARENTAL RTS. FOUND. (Feb. 20, 2017), https://parentalrightsfoundation.org/sopra_17/.

300. *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.

301. *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.

302. *Id.*

303. *See, e.g.*, *S. 1879—Child Abuse Reporting Enforcement Act*, HSLDA (Jan. 27, 2012), https://hslda.org/content/Legislation/National/2012/S1879/default.asp.

304. Summer A. Duke, *Standard Bearers of the Fourth Amendment: The Curious Involvement of Home School Advocates in Constitutional Challenges to Child Abuse Investigations*, 73 UMKC L. REV. 137, 138 (2004) ("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.").

forbidding the use of "implements" to beat children[305] and another forbidding beating that results in "significant welts and bruises."[306]

As discussed in the next section, 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 to all members.

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.[307] Every state has at least one active homeschooling organization. Several of these are extremely active. [308]

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. [309]

HSLDA founded a Political Action Committee in 2003, "dedicated to providing support and services to pro-family, pro-homeschooling candidates running for federal office."[310] HSLDA maintains an online "Legislative Action Center," and encourages its members to get involved in lobbying on local and national homeschooling issues.[311] 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.[312]

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305. *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.").

306. Libby Anne, *HSLDA's Defense of Child Abuse*, LOVE, JOY, FEMINISM (Apr. 22, 2013), https://www.patheos.com/blogs/lovejoyfeminism/2013/04/hsldas-defense-of-child-abuse.html.

307. *See HSLDA FAQ*, *supra* note 260; Home Sch. Legal Def. Ass'n, I.R.S. Form 990, Return of Organization Exempt From Income Tax 1 (2017).

308. *See, e.g.*, HOMESCHOOL ASS'N CAL., http://www.hsc.org/home-page.html (last visited Dec. 23, 2019).

309. *See* Macquarrie, *supra* note 127, at 5–6.

310. *About*, HSLDA ACTION PAC, https://www.hsldaactionpac.org/about.asp (last visited Dec. 23, 2019).

311. *Legislative Action Center*, HSLDA, https://hslda.org/content/legislation/ (last visited Dec. 23, 2019); Macquarrie, *supra* note 127, at 5 n.17, 6 n.18.

312. William Estrada, *HSLDA and DeVos Talk Homeschool Freedom*, HSLDA (May 18, 2017), https://nche.hslda.org/docs/news/2017/201705240.asp.

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. Opposing 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.[313] HSLDA families flooded legislators' offices with calls. The bill gained only one vote in committee.[314]

HSLDA killed a 2013 bill in South Carolina that would have required mandatory testing for homeschooled students and tightened recordkeeping requirements.[315]

A 2009 bill in Illinois would have required parents to give notice of their intent to homeschool. It was tabled after pressure from 4,000 homeschoolers mobilized by HSLDA.[316]

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.[317]

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.[318]

HSLDA helped defeat ratification of an international treaty designed to protect children with disabilities, based on concern that the proposed "best interests

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313. H.R.J. Res. 92, 40th Cong., 1st Sess., 2017.

314. *See* Green, *supra* note 4, at 1116.

315. *Id*.

316. *Id.* at 1116–17.

317. Milton Gaither, *The Changing of the Guard, 1983–1998*, *in* HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 192.

318. *See* West, *supra* note 46, at 11; *No Child Left Behind*, HSLDA, https://hslda.org/content/docs/nche/Issues/F/Federal_El_Sec_Ed_Act.asp (last visited Dec. 27, 2019) ("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."). The Act as a result provides: "Nothing in this chapter shall be construed to affect a home school . . . nor shall any student schooled at home be required to participate in any assessment referenced in this chapter." 20 U.S.C. § 7886 (2018).

of the child" standard might interfere with parents' ability to determine the education of their special needs children.[319]

b. Opposing 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.[320] These have been overwhelmingly rejected as a result of massive pressure by the homeschooling movement.[321] Some examples follow of legislators proposing modest protective regulation only to be beaten back by the movement's lobbying force.[322]

A California bill was introduced in 2018 in response to the infamous Turpin case discussed above.[323] This bill initially proposed annual homeschool inspections, but it 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.[324] This bill then died after homeschoolers flooded the committee hearing.[325]

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.[326] This bill would have required background

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319. *See* Lubienski et al., *supra* note 124, at 389.

320. *See* GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 233–40. For a list of recent reform attempts, see AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF, *supra* note 92, at 5–11.

321. 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." GAITHER, HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 218; *see also The Homeschooling Movement and the Return of Domestic Education, 1998–2016*, *in* HOMESCHOOL: AN AMERICAN HISTORY, *supra* note 29, at 241; Joyce, *supra* note 33. CRHE's 2017 Issue Brief lists current legislation and recent attempts at regulation related to child maltreatment. AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF, *supra* note 92, at 5–11.

322. 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).

323. *See* discussion *supra* Section I.C.

324. *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-mails from John Affeldt, Managing Attorney, Public Advocates, to Isabel Macquarrie, J.D. Candidate, Harvard Law School (Oct. 5, 2018, 19:22 EST & Oct. 6, 2018, 18:13 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.

325. *See* e-mail from Isabel Macquarrie to John Affeldt, *supra* note 324; Jonathan Keller, *Defeat of AB 2756: Huge Victory for California Homeschoolers*, CAL. FAM. COUNCIL (Apr. 27, 2018), https://californiafamily.org/2018/defeat-of-ab-2756-huge-victory-for-california-homeschoolers/.

326. *See* S.B. 2323, 29th Leg. (Haw. 2018); *Statement from Sen. Kahele on Senate Bill 2323*, HAW. SENATE MAJORITY (Feb. 14, 2018), https://www.hawaii

investigations for every individual living in a proposed homeschooling household and would have disqualified households based on prior histories of child maltreatment.[327] HSLDA members flooded the legislative committee hearing, and the bill's author asked that it be withdrawn.[328]

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.[329] 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.[330]

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.[331] HSLDA and the Iowa Christian Home Educators opposed the bill and contacted all members of the key committee. The bill never moved out of committee.[332]

A bill was introduced in West Virginia in March 2017[333] that would have provided that students could not be homeschooled if they had ten or more unexcused absences from school until an investigation was conducted. The investigation could trigger reports to appropriate authorities of maltreatment or inadequate education. HSLDA opposed the bill, and it was pulled from the Education Committee's agenda.[334]

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senatemajority.com/single-post/2018/02/14/STATEMENT-FROM-SEN-KAHELE-ON-SENATE-BILL-2323.

327. Haw. S.B. 2323.

328. *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 (last visited Jan. 15, 2020).

329. The Senate refused to hear the bill to avoid getting "involved in the sensitive subject of home-schooling." *See generally* John Cheves, *Republican Senators Block Bill to Keep Abused Children Enrolled in School*, LEXINGTON HERALD-LEADER (Mar. 1, 2017), https://www.kentucky.com/news/politics-government/article135781683.html.

330. *Id.*

331. H. File 268, 87th Gen. Assemb. (Iowa 2017).

332. *See* Lee Rood, *Are Abusive Parents Hiding Behind Iowa's Home-school Laws?*, DES MOINES REG. (Jan. 21, 2017), https://www.desmoinesregister.com/story/news/investigations/readers-watchdog/2017/01/21/weak-home-school-laws-can-make-children-targets-abuse-experts-say/96551352/; Scott Woodruff, *Responding to Natalie Finn's Death*, HSLDA (Jan. 26, 2017), https://contentsharing.net/actions/email_web_version.cfm?message_id=13901766&user_id=HSLDA.

333. *See* S.B. 528, 2017 Reg. Sess. (W.Va. 2017).

334. Mike Donnelly, *Proposed Bill Would Treat Homeschooling as Abuse*, HSLDA (Mar. 10, 2017), https://hslda.org/content/hs/state/wv/201703100.asp; Senator Kenny Mann, FACEBOOK (Mar. 13, 2017), https://www.facebook.com/kennymannwvsenate/posts/779798815511128.

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.[335] The homeschooling movement lobbied against the proposed bill, and it never moved forward.[336]

A bill was introduced in Michigan in 2015 in response to the death of two children found in a freezer.[337] 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. HSLDA and the Michigan Freedom Fund, a conservative advocacy organization, criticized the bill.[338] It never moved out of committee.[339]

Legislators in several states have tried to enact legislation monitoring homeschooling families with CPS histories and run into similar roadblocks.[340]

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A recent comprehensive book on homeschooling credits HSLDA'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."[341] A recent

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335. *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.

336. *See* Beth Dalbey, *Hidden Torture: 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.").

337. *After 2 Kids Found in Freezer, Bill Proposed to Check in on Homeschooling Families*, FOX 2 DET. (Apr. 17, 2015), http://www.fox2detroit.com/news/after-2-kids-found-in-freezer-bill-proposed-to-check-in-on-homeschooling-families; *Michigan Legislator Proposes Onerous New Legislation*, HSLDA (Apr. 16, 2015), https://hslda.org/content/elert/archive/elertarchive.aspx?7491.

338. *See* Chad Livengood, *Detroit Freezer Killings Prompt Proposed Michigan Registry of Home-schooled Kids*, DET. NEWS (Apr. 17, 2015), https://www.detroitnews.com/story/news/politics/2015/04/17/kids-freezer-case-prompts-home-school-registry-idea/25950081/.

339. *See* Carolyn Thompson, *Case of Shackled Kids Revives Homeschool Regulation Debate*, U.S. NEWS (Jan. 28, 2018), https://www.usnews.com/news/best-states/california/articles/2018-01-28/case-of-shackled-kids-revives-home-school-regulation-debate; Phil Pavlov, *Open Letter to Michigan Parents*, OPEN LETTER (July 28, 2015), https://www.opnlttr.com/letter/open-letter-michigan-parents/.

340. *See* AT-RISK HOMESCHOOLED CHILDREN: AN ISSUE BRIEF, *supra* note 92, at 5–11.

341. DWYER & PETERS, *supra* note 9, at 65.

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."[342]

IV. 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, and arithmetic; not to teach them science, history, and 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 with nontraditional 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, or chain them up, free from scrutiny by any who are required to report suspected abuse and neglect. Parents 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. This would mean a radical transformation of law governing homeschooling. The homeschooling movement's claim that the current regime is justified by absolute parent rights is morally wrong and inconsistent with growing recognition 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 future choice about their religion.

The new legal regime should impose a presumptive ban on homeschooling, allowing an exception for parents who can satisfy a burden of justification. And it should impose significant restrictions on any homeschooling allowed under this exception.[343]

Given the current politics of homeschooling, legislatures are not likely to enact this new legal regime on their own initiative. As described above, in recent

342. *See* Huseman, *supra* note 47; *see also* Yuracko, *supra* note 52, at 128 (a congressional representative called homeschoolers "the most effective educational lobby on Capitol Hill").

343. *See* discussion *infra* Section IV.C.

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. And 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 human rights, and related political and litigation campaigns.

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 all state action to protect children in the education and child welfare context at risk. Parents can always claim that state action violates their constitutionally protected rights. Courts generally assess whether protective efforts satisfy the kind of scrutiny 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 parent responsibilities over rights, and emphasized the state's own responsibility for children and for ensuring that parents fulfilled their responsibilities.[344] It is inconsistent with international law, with the way other countries think,[345] the way

344. *See generally* Shulman, *supra* note 19, 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 & PETERS, *supra* note 9, at 10 ("[T]he earliest references to individual rights in connection with schooling in America were rights of children, not of parents," citing Horace Mann insisting that it was a "great, immutable principle of natural law" that every person possessed an "absolute right" to an education).

345. *See, e.g.*, Fineman & Shepherd, *supra* note 282, at 91 ("The focus on parental rights . . . reflects our cultural obsession with autonomy.").

they structure constitutional rights and duties regarding education and child protection, and the way they regulate homeschooling.

A. International Law Provides a Model for the United States

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—rights to be free from state intervention—are particularly inadequate for children, most of whom are incapable by virtue of their youth of the kind of autonomy that negative rights protect. The key rights for children are positive rights—rights to be nurtured by parents and provided for and protected by government so that they can grow up to enjoy autonomy and other adult rights.

The U.S. Constitution's focus on negative rights represents an older western constitutional tradition, "increasingly out of step with emerging constitutional norms . . . in the rest of the world."[346] Almost all other countries provide positive rights.[347] Human rights treaties show this same trend.[348] 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.[349]

A dramatic example of the significance of positive rights in the international law picture, is a recent Dutch court decision ordering the government to take action to cut the nation's greenhouse gas emissions by 25% from 1990 levels by the end of 2020.[350] The decision relied partly on human rights theories rooted in

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346. 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., Cambridge Univ. Press, 2019). Colombia's 1991 Constitution is illustrative of the trend, exemplifying "transformative constitutionalism aiming to overcome entrenched economic and social inequalities," going "well-beyond the liberal constitutionalism" of the earlier constitution. MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW ix, 6 (2017).

347. *See* Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 9 (2004) ("[M]ost other liberal democracies enshrine affirmative government obligations in their constitutions.").

348. Katharine G. Young, *Introduction*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 346, at 6 (citing G.A. Res. 2200A(XXI) (Jan. 3, 1976)); Rosevear et al., *supra* note 346, at 37.

349. Katharine Young sums up this international trend in her recent book, THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 346, at 1:

> [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.

See also Rosevear et al., *supra* note 346, at 37 (stating economic and social rights are now "so commonly enshrined that they may reasonably be seen as a defining characteristic of third wave constitutions"); *id.* at 40 (stating that economic and social rights are "more present" and "more likely to be justiciable than ever before"); *id.* at 62 (finding this trend continues today).

350. John Schwartz, *In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html.

the European Convention on Human Rights. The lawsuit was one of several similar suits challenging national governments in Europe as well as the European Union.[351]

1. Human Rights Treaties

The Convention on the Rights of the Child demands that nations honor child human rights equally with adult human rights.[352] It imposes a *duty* on nations to provide education and protection against maltreatment.[353] Thus, Article 28(1) provides that nation states shall recognize the child's right to education, and Article 29(1) makes clear that this right includes the right to be educated in ways that enable the child to respect societal values and to participate fully in society.[354]

Article 29(2) recognizes the right to establish private schools, but specifies that this right is "subject always to the . . . principle set forth in [Article 29(1)] and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."[355]

Regarding the right to protection against maltreatment, Article 19(1) provides that nation states "shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."[356]

Other human rights treaties also provide children significant rights to education and protection.[357] The International Covenant on Economic, Social and

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351. *Id.*

352. United Nations Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

353. *See* Bartholet, *Ratification*, *supra* note 298, at 88, 91–93.

354. *See* CRC art. 29, which provides:

> States parties agree that the education of the child shall be directed to:
> (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
> (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
> (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin . . . .

355. CRC, art. 29(2).

356. CRC, art. 19(1).

357. *See* Ezer, *supra* note 347, 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 & 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), the 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

Cultural Rights ("ICESCR"), broadly ratified even if not by the United States, provides a wide range of positive rights and requires that nation states ensure their full realization.[358] It recognizes a broad right to education that includes the right to full development and the right to participate meaningfully in society with appreciation of societal values.[359] This treaty recognizes the right to private education, but only to the degree it conforms to minimum standards established by the state.[360]

The International Covenant on Civil and Political Rights, which the United States has ratified, provides extensive positive rights and imposes related duties on states to ensure them to individuals, including by adopting legislative or other measures necessary.[361] These rights include protection against private violence and private deprivation of liberty.[362]

International law thus provides strong support for the child's positive rights to both education and child protection, rights violated by the current homeschooling regime in the U.S.

2. Other Nations' Domestic Laws

a. Constitutional Mandates to Provide Education and Protect Children

Child rights to education and to protection against maltreatment are two of the four most popular positive social and economic rights in other countries' constitutions.[363] A full two-thirds of all countries today embody these rights in their constitutions.[364] They are considered "standard features of new constitutions."[365]

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exploitation), and the 1959 Declaration of the Rights of the Child (right to special protection and 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 Ramsey & Braveman, *supra*, at 1639–47.

358. *Id.* at 1636.

359. International Covenant on Economic, Social and Cultural Rights (ICESCR) art. 13(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] ("The States Parties . . . recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.").

360. *Id.* at art. 13(3), (4).

361. *See* Gerald Neuman, The "Right to Effective Governance" and the Human Rights Baseline (May 2, 2019) (unpublished manuscript, submitted to Harvard Law School Workshop on Constitutionalism and Effective Government) (on file with author).

362. International Covenant on Civil and Political Rights arts. 9, 10, 18, 20, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

363. *See* Young, *supra* note 348, at 5.

364. *Id.*; Rosevear et al., *supra* note 346.

365. Rosevear et al., *supra* note 346, at 39.

The right to education now exists in 81% of national constitutions and is justiciable in 59%.[366]

Some of the more recent constitutions have given strikingly powerful recognition to child rights.[367] The Colombian Constitution[368] reflects this modern trend:

> *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.*
>
> *The rights of children take precedence over the rights of others*.[369]

While some constitutions embrace positive rights in largely aspirational terms, the clear trend is in the direction of making such rights enforceable.[370] While the results may be mixed to date, some progress is evident in making these rights meaningful.[371] Given the challenge of making rights real, especially for the most powerless in society, even mixed results demonstrate the significance of positive constitutional rights.

b. Homeschooling Law

The United States 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.[372] In no European country, even the

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366. *Id.* at 50.

367. Ezer, *supra* note 347, at 9, 27 (describing 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.).

368. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], *translated in* COLOMBIA'S CONSTITUTION OF 1991 WITH AMENDMENTS THROUGH 2005, CONSTITUTE PROJECT (2018), https://www.constituteproject.org/constitution/Colombia_2005.pdf.

369. 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 & LANDAU, *supra* note 346, at 7; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

370. *See* Young, *supra* note 348, at 3–8.

371. *See id.* at 10, 13, 17–19.

372. *See generally* Chapters 12 through 20, *in* THE WILEY HANDBOOK, *supra* note 37.

most permissive, does homeschooling exist at anything like the scale it does in the United States.[373]

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 and governments having reciprocal *duties*, both under the CRC[374] and other human rights treaties 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.[375] European countries have a variety of legal approaches to homeschooling ranging from restrictive to relatively permissive.[376] On the restrictive end, some countries, like Germany, ban it altogether and enforce the ban strictly.[377] Germany's Federal Constitutional Court upheld the ban based partly on "the general interest of society in avoiding the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society," as well as the importance of exposing children to those with different backgrounds and beliefs.[378] The court noted that even if homeschooling could meet children's academic needs, the social integration required for a tolerant society could only be achieved through attendance at public or private schools.

The European Court of Human Rights upheld Germany's ban 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

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373. *See* Henk Blok et al., *The Legal Situation of Home Education in Europe*, *in* THE WILEY HANDBOOK, *supra* note 37, at 414; Kunzman & Gaither, *supra* note 34, at 31.

374. *See* Blok et al., *supra* note 373, at 395–421 (discussing the CRC's relevance to the European approach to homeschooling regulation).

375. *See generally HSLDA International*, HSLDA, https://hslda.org/content/hs/international/ (last visited Jan. 7, 2020).

376. Colin Koons, *Education on the Home Front: Home Education in the European Union and the Need for Unified European Policy*, 20 IND. INT'L & COMP. L. REV. 145, 148 (2010) (describing homeschooling regulation in E.U. countries); Henk Blok & Sjoerd Karsten, *Inspection of Home Education in European Countries*, 46 E.U. J. EDUC. 138, 150 (2011) (describing homeschooling regulation in fourteen European countries). For a discussion of post-communist countries, see generally Yvona Kostelecká, *The Legal Status of Home Education in Post-communist Countries of Central Europe*, 58 INT'L REV. EDUC. 445 (2012) (noting homeschooling is strictly regulated with schools having responsibility for supervising families, children evaluated every six months or every year, and Slovakia allowing only certified teachers to homeschool).

377. *See* Blok et al., *supra* note 373, at 401 tbl.16.2, 407–08, 413; Michael P. Donnelly, *The Human Right of Home Education*, 10:3 J. SCH. CHOICE 283, 284 (2016) ("[H]ome education is not allowed in Germany . . . fines, criminal prosecution, and loss of custody of children are possible state actions against families who persist in home-schooling."); *Germany*, HSLDA (2019), https://hslda.org/content/hs/international/germany/default.asp (last visited Jan. 16, 2020).

378. *See* Daniel Monk, *Home Education: A Human Right?*, *in* INTERNATIONAL PERSPECTIVES ON HOME EDUCATION: DO WE STILL NEED SCHOOLS?, *supra* note 101, at 171–72 (discussing the German Constitutional Court's decision in *Konrad v. Germany*).

role of the State in education as well as the right of parents."[379] It cited approvingly the reasoning of the German Constitutional Court described above.[380] 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."[381]

Sweden effectively bans homeschooling, allowing it only in "special circumstances;" religious or philosophical convictions are not valid reasons for homeschooling.[382] Some countries, like Bulgaria, the Netherlands, and Spain, provide no affirmative right to homeschooling, though they may permit some to take place.[383] France 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 the same standard by age 16 as one educated in school. A negative assessment of educational progress triggers an early second assessment, and if that is also negative then the parents must enroll the child in school.[384] 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.[385]

European countries on the permissive end generally have far more restrictions than exist in the United States.[386] 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.[387] Most require parents to follow the standard school curriculum.

In Africa, homeschooling is not common. 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."[388] While homeschooling is still fairly rare in South Africa, there are concerns that racism could be contributing to its growth,[389] posing "a significant potential for social crisis in South Africa if left unchallenged and uncontested":

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379. *See* Konrad v. Germany, (No. 35504/03), 2006-V Eur. Ct. H.R. 6.

380. *Id*. at 7.

381. *Id.*

382. Blok et al., *supra* note 373, at 401 tbl.16.2, 412–13.

383. *Id*. at 413.

384. *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 406.

385. *Id*. at 410.

386. *Id*. at 414; *see* Blok & Karsten, *supra* note 376, at 150.

387. Blok & Karsten, *supra* note 376, at 142–43; Koons, *supra* note 376, at 149–55.

388. Michael Olalekan Olatunji, *Contemporary Homeschooling and the Issue of Racism: The Case of South Africa*, *in* THE WILEY HANDBOOK, *supra* note 37, at 497–98.

389. *Id.* at 507.

> There is a need, therefore, for South Africa to redouble its efforts in combating racism in all its forms head-on. Other African nations would also do well to learn from the Republic of South Africa how to safeguard themselves against racism and xenophobia so that these issues do not become part of the factors that inform, sustain or promote homeschooling in their countries if and when it is embraced.[390]

Israel allows homeschooling only under significant restrictions: parents must demonstrate they will provide an adequate education, including academic skills; that they will enable the child to interact with their age group; that the child "will develop values relating to life in society;" and that they will provide for adequate evaluation of learning success. Approval is conditioned on an adequate educational plan, and a home visit 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.[391] 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.[392]

Regulation in other countries is not moving systematically in the direction of deregulation. Many European countries have instead been increasing homeschooling restrictions.[393]

The current approach to homeschooling in the United States is out of sync with global views on the importance of child rights and the importance of a broad civic education. It is anomalous in terms of global regulation of homeschooling.

B. Developing a Constitutional Duty to Educate and Protect Children in the United States

The building blocks already exist for developing appropriate constitutional doctrine guaranteeing children's affirmative rights to education and protection against maltreatment.[394]

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390. *Id.* at 515.

391. Arnon Gutfeld & Yoram Rabin, *Homeschooling in the U.S. and Its Lesson for Israel*, 47 ISR. Y.B. ON HUM. RTS. 175, 215–17 (2017).

392. A minority of two justices ruled that it would be unconstitutional even if legislation allowed it. *See* e-mail from Luís 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.

393. *See* Blok et al., *supra* note 373, at 414–15; *see* Rothermel, *Introduction* to INTERNATIONAL PERSPECTIVES ON HOME EDUCATION: DO WE STILL NEED SCHOOLS?, *supra* note 101, at 6–7.

394. A number of scholars have argued that a proper understanding of substantive due process and equal protection under the Federal Constitution, and under state constitutional provisions governing education, support such rights. *See, e.g.*, REBELL, *supra* note 19, at 124–74, 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 & PETERS, *supra* note 9, at 199, 227–28; Dailey & Rosenbury, *supra* note 279, at

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. One lies in the due process clause of the Fourteenth Amendment. The Court created parent rights as part of what became known as 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 the right to raise their children free from undue state intervention.[395] Former U.S. Supreme Court Justice Stevens and some bold state court judges have moved in the direction of finding that children have substantive due process rights to nurturing parental relationships.[396]

Equal protection doctrine provides that states cannot deny certain classes of individuals important rights, unless the denial can be justified under a heightened scrutiny standard.[397] The Court applies strict scrutiny when a suspect class like race is involved or when fundamental rights specified in the Constitution are involved.[398] The Court has found that heightened or intermediate scrutiny is appropriate in a number of situations based both on the importance of the interest at stake—even if not specified in the Constitution—and the "sensitive although not necessarily suspect" nature of the class affected.[399]

While the Court held in *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.[400] The Court 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:[401] "[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

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1457–67; Jeffrey Shulman, *Toward Constitutional Parenthood*, *in* THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD, *supra* note 180; Yuracko, *supra* note 52, at 133 ("[A]s 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 by homeschooling parents who believe in female subordination"); *see also* Ezer, *supra* note 347, at 1 (arguing for "a positive right to protection for children, rooted in dignity").

395. *See* Troxel v. Granville, 530 U.S. 57, 65, 75 (2000).

396. *See* Bartholet, *Ratification*, *supra* note 298, at 148 (citing *Troxel*, 530 U.S. at 88–89 (Stevens, J., concurring)).

397. *See* DWYER & PETERS, *supra* note 9, at 199; TRIBE, *supra* note 166, §§ 16-6, 16-13, 16-23, 16-32; Yuracko, *supra* note 52, at 140; GEORGE BLUM ET AL., 16B AM. JUR. 2D CONSTITUTIONAL LAW, § 857 *Standards of Review, Generally* (Nov. 2018).

398. *See* TRIBE, *supra* note 166, at 1454.

399. *Id.* § 16-33.

400. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

401. *Id.* at 37.

necessary for the enjoyment of the rights of speech and of full participation in the political process."[402] The current homeschooling regime enables just such a denial of these fundamentals.

The Court has recognized certain classes of children as quasi-suspect, triggering at least intermediate scrutiny, including those classified as illegitimate,[403] and the children of illegal aliens.[404] It emphasized the innocence of the children involved, saying they should not be penalized for the sins of their parents.[405] This reasoning applies of course to homeschooled children, who bear no responsibility for their parents' decision to keep them from school. Constitutional scholar Laurence Tribe has suggested that children as a category—not just homeschooled children—should be recognized as a quasi-suspect class.[406]

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 Constitution. In *Plyler v. Doe*,[407] 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 the Equal Protection Clause."[408] Laurence Tribe notes that the Court effectively applied heightened or intermediate scrutiny in this case. [409]

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

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402. *Id.*

403. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972); Trimble v. Gordon, 430 U.S. 762, 767 (1977).

404. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982).

405. *See id.* at 220; *Weber*, 406 U.S. at 175; *Trimble*, 430 U.S. at 770.

406. *See* TRIBE, *supra* note 166, at 1592, §§ 16-6, 16-31.

407. Plyler v. Doe, 457 U.S. 202 (1982).

408. *Id*. at 222; *see* TRIBE, *supra* note 166, at 1610–11.

409. *See* TRIBE, *supra* note 166, at 1454 n.6 (determining that the Court applies intermediate scrutiny to legitimacy classifications "properly, if not always consistently or coherently"); *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").

> account its costs to the Nation and to the innocent children who are its victims.[410]

A homeschooling regime that denies large groups of children rights to education and protection against maltreatment that other children enjoy should be understood to fail this equal protection standard. A significant percentage of all homeschooled children are at serious risk in terms of their rights to educational opportunity and to protection against maltreatment. And the importance of these rights is universally acknowledged.

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 socioeconomic 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*,[411] 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 cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[412]

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.[413] Teachers and other school staff are defined as mandatory reporters, and are responsible for a significant percentage of reports to CPS.[414] The federal government requires such reporting systems and has expanded reporting obligations over the years.[415]

Lawyers have recognized the potential in the Constitution for achieving educational reform. They are mounting challenges in different federal courts throughout the country with the goal of getting the Supreme Court to find that

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410. *Plyler*, 457 U.S. at 223–24.

411. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

412. *Id*. at 493.

413. *See, e.g.*, BARTHOLET, NOBODY'S CHILDREN, *supra* note 3, at 34–35.

414. *See id.* at 35, 61–65.

415. *See generally id.* and accompanying text. *See also* Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5119 (2012)); CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, § 106, 124 Stat. 3459, 3470 (2010) (codified as amended in 42 U.S.C. § 5106a(b)(2)(B)(ii) (2019)).

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.[416] 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 Constitution, it does not seem likely that the current Court *will* so move in any near future. The majority on this Court is not enthusiastic about expanding individual rights under substantive due process or equal protection.[417] 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 constitutional right to state action providing protection against the father's brutal abuse.[418] Other barriers are the Court's general interpretation of the 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.[419] The best hope now for any litigation strategy lies in the state courts.

2. State Constitutions

State constitutions, by contrast to the federal constitution, have a powerful positive rights tradition.[420] 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.[421] Some state constitutions recognize such rights in the areas of welfare, housing, health, and abortions.[422]

Jeffrey Sutton's recent book, *51 Imperfect Solutions*, makes a convincing case that state constitutions may provide the most promising source of rights in

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416. *See generally Chapter 7: Advancing Civic Preparation Through the Federal Courts*, *in* FLUNKING DEMOCRACY, *supra* note 19, at 151. *See also* Dana Goldstein, *Are Civics Lessons A Constitutional Right? This Student is Suing for Them*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/us/civics-rhode-island-schools.html?smtyp=cur&smid=tw-nytimes.

417. *See* Bartholet, *Ratification*, *supra* note 298, at 86 (noting that the Supreme Court's enthusiasm about creating new constitutional rights for children in certain limited areas peaked in earlier years, with the Court cutting back on such rights since).

418. DeShaney v. Winnebago Cty. Dep't of Soc. Serv's., 489 U.S. 189, 195, 197 (1989); *see* discussion *supra* Subsection II.A.1. *DeShaney* has been severely condemned. *See, e.g.*, BARTHOLET, NOBODY'S CHILDREN, *supra* note 3, at 35–38; Lupu, *The Separation of Powers and the Protection of Children*, *supra* note 174, at 1372, 1372 n.150.

419. *See* TRIBE, *supra* note 166, § 18-1.

420. EMILY J. ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 1–17 (2013) (concluding that, while the U.S. Constitution is largely negative, simply prohibiting the government from intervening, state constitutions contain both negative and positive rights); *see also* SUTTON, *supra* note 31, at 35 (explaining that "state constitutions not only identify limits on government; they also impose obligations on government.").

421. *See generally* Chs. 5–7 in ZACKIN, *supra* note 420. *See also* SUTTON, *supra* note 31, at 35 (explaining that "state constitutions not only identify limits on government; they also impose obligations on government.").

422. *See* Ezer, *supra* note 347, at 8.

education and other arenas.[423] 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.[424] He points to the fact that, while the funding reallocation litigation failed in the Supreme Court in the *Rodriguez* decision, it succeeded dramatically in the years following in the state courts.[425] Sutton's book concludes that there are many reasons to look to state courts as "the lead change agents going forward."[426]

All states provide in their constitutions support for child rights to education.[427] Litigation in state courts based on these provisions has been very successful, both in challenging inequitable funding systems and in challenging substantive inadequacy.[428] Indeed these cases are impressive when compared to cases in other nations based on positive constitutional rights. Educational rights here have not been limited by principles that often restrict the radical potential of positive rights abroad.[429] Courts here have on several occasions ordered massive financial remedies to redress inequitable funding systems.[430] They have also ordered significant remedies to improve educational quality,[431] and in some cases with impressive impact.[432]

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423. *See generally* SUTTON, *supra* note 31.

424. *See id.* at Ch. 3, 7. States are free to interpret their constitutional clauses differently from the federal constitution, even when the language is identical. *See* Ramsey & Braveman, *supra* note 357, at 1628–31.

425. SUTTON, *supra* note 31, at Ch. 4.

426. *Id.* at 216.

427. *See* MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 17–18 (2013); REBELL, *supra* note 19, at 51; ZACKIN, *supra* note 420, at 67; EMILY PARKER, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1, (Mar. 2016 ed. 2016), https://www.ecs.org/ec-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf (describing education provisions in state constitutions); Green, *supra* note 4, at 1093 n.23; E-mail from Michael A. Rebell, Professor, Columbia Law School, to Author (Dec. 26, 2018, 23:27 EST) (on file with author).

428. *See* Michael A. Rebell, *The Right to Education in the American State Courts*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 346, at 137, 140–46.

429. *See id.* at 139 ("[T]he American right to education is not qualified by concepts of 'progressive realization' or of enforcing only a 'minimum core' of the right."); *see also id.* at 156 (acknowledging that the US state right-to-education constitutional provisions are not limited by concepts such as available resources or progressive realization).

430. *See id.* at 138; Dana Goldstein, *How Do You Get Better Schools? Take the State to Court, More Advocates Say*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/school-segregation-funding-lawsuits.html.

431. *See, e.g.*, Jeff King, *Two Ironies About American Exceptionalism Over Social Rights*, 12 INT'L J. CONST. L. 572, 583–84 (2014) (noting that the 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).

432. *See also* Young, *supra* note 348, at 19–20; King, *supra* note 431, at 572 (U.S. judges "have often enforced positive duties to provide social services in a manner that is . . . strikingly interventionist by international comparison.").

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.'"[433] Rebell notes that in many states "public education is the only service that the constitution definitely requires the state to provide."[434] He points out that in recent education adequacy cases, many state courts have given teeth to the right to an adequate education, specifying that it includes important academic and vocational capacities, and includes civic understanding and preparation "to function productively as civil participants."[435] Courts in almost half the states have held that their constitutions' 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.[436]

Zackin discusses the rationale for these constitutional provisions as follows:

> . . . [A]dvocates 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.[437]

These state constitutional provisions on education provide a strong basis for challenges to the homeschooling regime. They also provide a basis for finding education to be 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.[438] State court 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.[439]

A variety of other existing state constitutional provisions provide an opportunity to expand child rights to protection, as well as education. Two-thirds of state constitutions guarantee the right to pursue happiness, and some provide the

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433. Rebell, *The Right to Education in the American State Courts*, *supra* note 428, at 141.

434. *Id.* at 147.

435. *See id.* at 143–44 (quoting Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.S. 2d 893, 907 (N.Y. App. Div. 2003)).

436. *See* REBELL, *supra* note 19, at 4, 49, 52; *see also* Rebell, *The Right to Education in the American State Courts*, *supra* note 428, at 138 (since 1989 plaintiffs have prevailed in more than 60% of final liability decisions in adequacy cases); SUTTON, *supra* note 31, at 30 (since 1989, plaintiffs have won nearly two-thirds of lawsuits challenging state school funding allocations).

437. ZACKIN, *supra* note 420, at 74–75.

438. *See* REBELL, *supra* note 19, at 49.

439. SUTTON, *supra* note 31, at 211–12.

right to safety.[440] Many state constitutional provisions provide rights related to care of the needy and protection of health.[441] 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."[442] Such provisions could be interpreted to provide special protection to children.[443]

Positive rights have often been added to state constitutions over the years in response to the needs of groups with relatively limited political power—groups that have failed to achieve their goals in state legislatures.[444] They have sought these constitutional amendments specifically to force the hand of recalcitrant legislators,[445] including in cases involving children.[446]

Child advocates might buttress a litigation campaign relying on current state constitutional provisions, with a strategy to strengthen protection through constitutional amendments. Ratification of the CRC would serve to encourage positive constitutional rulings as well as such constitutional amendments.[447]

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

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440. Carol N. Chodroff, *Children's Need for Safe Housing*, 24 CHILD. LEGAL RTS. J. 2, 3–4 (2004).

441. *Id.* at 4 (regarding care of the needy); Ramsey & Braveman, *supra* note 357, at 1622–24 (at least 20 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).

442. Ramsey & Braveman, *supra* note 357, at 1623.

443. *Id.* at 1631–35 (state parens patriae doctrine obliges state to protect children under these provisions); ZACKIN, *supra* note 420, at 106 (protective rights particularly appropriate in the case of children, as recognized by the ubiquity of state constitutional provisions supporting educational rights).

444. *See* ZACKIN, *supra* note 420, at 14, 16, 79, 199.

445. *Id.* at 79, 102.

446. For an example of a state constitution being amended to protect child rights in the face of legislative action limiting such rights, see Thomas Conklin, Note, *People v. Fitzpatrick: The Path to Amending the Illinois Constitution to Protect Child Witnesses in Criminal Sexual Abuse Cases*, 26 LOY. U. CHI. L. J. 321, 323 (1995) (amendment reinstating court decision protecting child sex abuse victims by allowing closed-circuit television testimony).

447. *See generally* Bartholet, *Ratification*, *supra* note 298, at 86–94.

appropriate. Parents should have a significant burden of justification for a requested exception. There is no other way to ensure that children receive an education or protection against maltreatment at all comparable to that provided to 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 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. This is important 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 provide them with what Michael Rebell characterizes as essential education to prepare them to function as citizens—not just knowledge of certain course content, but civic experiences (like participation in student government, active learning in extracurricular activities, and education in civic skills like the ability to engage in respectful discussion with those holding opposing views), and exposure to civic values including respect for the rule of law and for basic democratic institutions.[448] And it is to give children the kind of education that will enable them to grow up to exercise meaningful choices about their own future views, religions, lifestyles, and work.[449]

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 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.[450] Parents who are ideologically committed to raising children in isolation from the larger society, 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. These problems will not be solved by requiring submission of proposed curricula or academic testing.

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448. *See* REBELL, *supra* note 19, at 69, 98.
449. *See supra* note 19.
450. *See supra* Section I.B.

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 likely constitute the kind of "excessive entanglement" of government officials with religious institutions that the Supreme Court has found unconstitutional.[451]

Ira Lupu finds this problem central to concluding that some of the popular proposals for limited regulatory reform cannot work.[452] He proposes that parents not be the exclusive teachers of their own children,[453] grounding this recommendation on a persuasive claim for "separation of powers":

> 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.[454]

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451. *See* Ira Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971, 984–85 (1987); *see id*. at 983 nn.50–51; *see also* Shulman, *supra* note 222, at 38.

452. *See* Lupu, *The Separation of Powers and the Protection of Children*, *supra* note 174, at 1359 (warning against "the minimalist regime of annual progress testing"); *see also* Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, *supra* note 451, at 984–85 ("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.").

453. Lupu, *The Separation of Powers and the Protection of Children*, *supra* note 174, at 1359.

454. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, *supra* note 451, at 989–90. Lupu further develops this separation of powers theory in Lupu, *The Separation of Powers and the Protection of Children*, *supra* note 174, at 1323–30, 1353–59; *see also* AMY GUTMANN, DEMOCRATIC EDUCATION: REVISED EDITION xiv (1999) ("[C]hildren . . . would not be well served by ceding comprehensive authority to any single educational agent–parents, citizens, or professional educators . . . .").

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

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, one roughly equivalent to public school education in terms 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 that they are capable of implementing 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 should be restructured to encourage enforcement. Today, schools are often financed on a per-pupil, enrolled-student basis,[455] so devoting resources to enforcing homeschooling requirements may seem inconsistent with responsibilities to enrolled students.

Resources should 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 an exception to the presumption against homeschooling.
- Submission by parents of intended curriculum and education plan (including hours of instruction) for approval in advance of each school year, with approval conditioned on demonstration that parents will provide the essentials of public school education.
- Submission by parents of education credentials and other evidence of ability to provide the essentials of education provided to public schoolers for approval in advance of each school year; presumptive minimum credentials are high school degree for lower grades and bachelor's degree for higher 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

455. CONGRESSIONAL RESEARCH SERVICE, STATE AND LOCAL FINANCING OF PUBLIC SCHOOLS 10 (Aug. 26, 2019), https://fas.org/sgp/crs/misc/R45827.pdf.

adequate performance, with low scores triggering an order to enroll in school.

- Home visits by school authorities to assess educational environment and child welfare a minimum of two times per year, with more visits or an 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.
- School authorities must be charged with enforcement of above requirements, including by orders transferring children to public school based on inadequate compliance, inadequacy of education, 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, without consent, and on a more frequent basis.
- CPS must notify school authorities of parents who 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 permission to homeschool; if homeschooling is permitted, the children should be monitored regularly to ensure they are not at risk.
- Parents must satisfy basic vaccination and other health-related requirements.

D. Costs of the Proposed Restrictive Regime

There would be costs associated with the proposed regime. Many parents have legitimate reasons to homeschool.[456] Many will provide better educations 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.[457] Some schools teach views and values that mirror those of conservative Christian homeschoolers.[458]

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456. *See supra* Section I.B.

457. *See generally* REBELL, *supra* note 19.

458. *See* Elizabeth Podrebarac Sciupac & Philip Schwadel, *For a Lot of American Teens, Religion Is a Regular Part of the Public School Day*, PEW RES. CTR. (Oct. 3, 2019), https://www.pewforum.org/2019/10/03/for-a-lot-of-american-teens-religion-is-a-regular-

Theoretically, parents with legitimate needs to homeschool, who have the commitment and capacity to provide their children with a quality 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 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.

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 should work on improving them, rather than simply allowing some parents to escape. This provides no solution for the children condemned to attend inadequate schools.

Some would say there are also costs in terms of the values at the heart of the historic *Meyer* and *Pierce* cases.[459] 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.[460]

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 could still raise these children at home with total control over their lives from infancy until kindergarten. They could still dominate the lives of children enrolled full-time in school, with total control during a huge proportion of their waking hours. Dwyer and 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.[461] 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."[462] 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

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part-of-the-public-school-day/; Katherine Stewart, *Conservative Christians Are on a Mission in Public Schools*, SLATE (Jan. 6, 2016), https://slate.com/technology/2016/01/conservatives-are-on-a-mission-in-public-schools.html.

459. *See* discussion of *Pierce* and *Meyer supra* Subsection II.A.I.

460. *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.").

461. *See* DWYER & PETERS, *supra* note 9, at 192.

462. *Id.* at 124.

players and entities. Indeed, against these private sources, 'the state is normally at a disadvantage.'"[463]

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

Some private schools pose problems of the same nature as homeschooling.[464] 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 or exposure to alternative perspectives.[465]

Policymakers should impose greater 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.[466]

Deregulation in private schooling is not as extreme as with homeschooling.[467] States generally impose more requirements on private schools with respect to teacher qualifications, curriculum requirements, testing, and protection for the rights of students with disabilities.[468] State rules generally screen

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463. SHULMAN, *supra* note 180, at 161 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940)).

464. *See generally* Shulman, *supra* note 19; REBELL, *supra* note 19, at 41–42 (describing limited regulation of private schools and lax law enforcement of regulation); DWYER & PETERS, *supra* note 9, at 201–05.

465. *See* Eliza Shapiro, *Do Children Get a Subpar Education in Yeshivas? New York Says It Will Finally Find Out*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/nyregion/yeshivas-new-york-schools-education.html (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); Rothschild, *supra* note 180, at 200–14 (describing the counter-cultural education provided in Hasidic yeshivas); *see* Shulman, *supra* note 19, at 24 ("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."). New York State is currently engaged in a struggle to impose some control over yeshiva education. *See generally* Rothschild, *supra* note 180.

466. One legal difference is that the Supreme Court has clearly held 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, 535–36 (1925).

467. *See* Shulman, *supra* note 19, at 21–25.

468. *Id.* at 24.

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.[469] State regulations often impose requirements related to vaccinations and medical examinations.[470]

Private school teachers are mandated reporters for suspected child maltreatment. State law often prohibits corporal punishment by school personnel.[471] 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 in connection with both education and child protection. Children in private schools are at least exposed to a number of different adults and children, who are likely to provide at least some range of alternative views.

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,[472] including the fact that states can supervise private schools far more easily and at far less expense than homeschooling.[473]

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 stake. But the reality is that regulatory reform along these lines will not happen without a political and legal sea change. Severe critics of homeschooling regularly express pessimism about their recommendations for far more limited regulatory reform being adopted.[474]

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 evermore powerful. It has grown evermore 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.

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469. *Id.* at 22–24 nn.85–86.

470. *See* Huseman, *supra* note 47; West, *supra* note 46, at 30 (vaccinations); *see also supra* Section I.B. (discussing parents deciding to homeschool to avoid vaccination requirements).

471. See Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, 30 SOC. POL'Y REP. 1, 3 (2016).

472. *See, e.g.*, Murphy v. Arkansas, 852 F.2d 1039, 1044 (8th Cir. 1988).

473. *See, e.g.*, Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452, 461–62 (1974).

474. *See, e.g.*, DWYER & PETERS, *supra* note 9, at 225 ("Our analysis of what oversight states should exercise might be pointless politically.").

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 homeschooler 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 clear jurisdiction over—regular schools. No existing groups have the motivation that homeschooling parents have to fight the regulatory battle.

What is 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.

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.[475] Children are the quintessential politically powerless group.

475. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).