

Child Advocacy Program Art of Social Change: Child Welfare, Education, & Juvenile Justice

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ASSIGNMENT PACKET for Session #5
February 28, 2019

Education: Homeschooling: Pros, Cons and Future Directions

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Meira Levinson, Professor of Education,
Harvard Graduate School of Education

**Session #5
February 28, 2019**

Assignment

Speaker Biographies

Session Description

Readings:

Pages

James Dwyer

- James G. Dwyer and Shawn F. Peters, *HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE* (U Chicago Press, will publish April 2019)
You can skim/read quickly the historical part, which is roughly the first twenty pages 1-54

Elizabeth Bartholet

- Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection* (Draft 1/22/19) 55-83
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Session #5
February 28, 2019

Speaker Biographies

Professor Dwyer has been on the faculty at William & Mary School of Law since 2000. He teaches Family Law, Youth Law, Law & Social Justice, and Trusts & Estates. His early scholarship was devoted to children's rights in connection with education; he authored two books about the state's stance toward private schools, especially religious schools—in particular, whether the state ought to regulate and oversee such schools to a greater extent in order to prevent educational deprivation and psychological or physical abuse (*Religious Schools v. Children's Rights*, Cornell University Press 1998), and whether and on what conditions the state may, or even must, financially support religious schools (*Vouchers Within Reason: A Child-Centered Approach to Education Reform*, Cornell University Press 2002). Professor Dwyer returns to the realm of education with his latest book, a co-authored work entitled *Homeschooling: Historical and Philosophical Perspectives* (University of Chicago Press, forthcoming 2019). In the interim, Dwyer has focused his attention on preventing child maltreatment in the home, making a number of bold child-centered proposals that he pulled together in a book released this year, *Liberal Child Welfare Policy and Its Destruction of Black Lives* (Routledge 2018).

Meira Levinson is Professor of Education at Harvard. After earning her doctorate in political theory from Nuffield College, Oxford, but prior to joining the Harvard faculty, Meira spent nearly a decade as an eighth grade teacher in the Atlanta and Boston Public Schools. In part as a consequence, she is interested in youth empowerment, civic and multicultural education, educational ethics, urban schools, and race. She is the author or co-editor of six books, including *Making Civics Count*, *No Citizen Left Behind*, *Dilemmas of Educational Ethics*, and *Democratic Discord in Schools*. Meira's current research combines case studies and philosophical analysis to develop a new field of educational ethics. Modeled after bioethics, educational ethics is intended to give educators and policy makers tools for making ethical decisions in their own work, and also to push political theorists to develop theories of justice that are robust enough to address complex dilemmas that arise in classrooms, schools, and systems.

In addition to conducting research resulting in academic articles and books, Meira is committed to making research findings and tools accessible to educators, policymakers, parents, and other members of the general public. Her website justiceinschools.org features numerous open-access ethical case studies, articles, discussion protocols, and other resources. In the area of civic education, Meira has contributed to numerous policy and practice initiatives in civics, including youthinfront.org, an online learning initiative designed to support student activists and adult allies, and the "College, Career,

and Civic Life (C3) Framework for Social Studies State Standards,” which has guided state standards revisions in over a dozen states. She also spearheads Instructional Moves, an open access initiative which aims to help college and university educators learn and refine high-leverage teaching practices. These projects, as with her own research, reflect Meira’s commitment to achieving productive cross-fertilization—without loss of rigor—among scholarship, policy, and practice.

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Session Description

Homeschooling has grown dramatically in recent decades and today involves as many children as charter schools. While education generally is heavily regulated, homeschooling is largely free of regulation. There is, for example, little in the way of requirements that parents be qualified to teach, or that any particular subject matter be covered. Many states don't even require that parents give notice or register their children for homeschooling. What regulation exists is generally characterized by lax enforcement. Nor is there any system to protect homeschooled children from parental abuse and neglect. Schools provide significant protection because teachers are mandated reporters in the child protection system, with a duty to report suspected maltreatment. Homeschoolers may never see a mandated reporter.

The legal trend has been in the direction of deregulation, largely as a result of the powerful advocacy by homeschooler organizations. These organizations take the position that there should be virtually no restrictions on parent power in this or related areas. They have joined with other parent rights organizations to oppose child protective services intervention in the family.

This class brings experts in law and education to discuss their perspectives on homeschooling, their sense for the pros and cons, and their recommendations for the future. Professor Dwyer is the author of a forthcoming book that discusses the history and current reality of homeschooling, and his ideas about child rights, their grounding in the federal Constitution, and what this should mean for regulation in this area. Professor Levinson is a former public school teacher who now teaches at the Harvard Graduate School of Education. Her research and writing address issues of civic education, multiculturalism, youth empowerment, and educational ethics. She will discuss her thoughts on the goals of public education and the implications for both private schools and homeschooling.

Homeschooling

*The History and Philosophy of a
Controversial Practice*

JAMES G. DWYER AND
SHAWN F. PETERS

THE UNIVERSITY OF CHICAGO PRESS

CHICAGO AND LONDON

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Early Homeschooling

It is a challenge to find a culture or era in which family-based learning has not been an essential and irreplaceable element of the education of children. Indeed, in many cultural and historical contexts, families (both nuclear and extended) have provided the bulk of children's educational training. Sometimes this has been the only way for children to receive sustained instruction in the skills required to attain social status or long-term socioeconomic security.¹

Children received home instruction for literacy from virtually the first moment of European settlement in North America. Whether the households were affluent or impoverished, ideological goals were paramount with this learning in the home. Parents taught the fundamentals of reading and writing so that children might be properly—and repeatedly—instructed in the tenets of religious orthodoxy. Children's book learning in the colonial period was not for the sake of acquiring critical thinking skills or developing core competencies of democratic citizenship. It was, rather, fundamentally religious training. If literacy was essential, it was to appreciate the enduring lessons of Christian scriptures, the only written texts of real significance in colonial homes.² In homogeneous communities with an economy that was, by modern standards, quite primitive, this, along with basic math skills acquired from everyday life, sufficed.

For the most part, parents directed this inherently nonsecular book learning; only the elite might have employed tutors. Children in colonial New England pored over catechisms and bibles in their homes, under the tutelage of their mothers and fathers. David Hall has suggested a peculiar division of literacy training between mothers and fathers, the former more often taking responsibility for reading, the latter for writing. "I learned to read of my mother," Increase Mather recalled. "I learned to write of

1 Father.” Reading aloud, along with reciting and memorizing, were critical
2 parts of parents’ instruction.³

3 It would be a mistake, though, to equate this instruction in reading and
4 writing in the home with schooling today, which constitutes comprehensive
5 preparation for adult civic life and employment. In the colonial era, prepara-
6 tion for employment was mostly a matter of learning by doing in actual
7 workplaces—that is, farms, craft shops, trading posts, and so on. Many chil-
8 dren worked beside their parents and grew up in the “family business”—
9 whatever the family did to make a living. Many parents, though, placed their
10 children with other families or businesses as apprentices, to learn a trade,
11 usually when the children were at an age not much higher than that for com-
12 pulsory schooling today. There were not a great number of options for “ca-
13 reers,” nor was there much of the individualistic sense we have today that
14 every person should be free to pursue the occupation for which her or his
15 talents and abilities are best suited. The focus was on survival, not fulfillment.

16 The at-home instruction, though, was viewed as of sufficient impor-
17 tance to the community that local authorities would mandate that par-
18 ents keep the appropriate religious texts in their homes. In Massachu-
19 setts, officials periodically went from house to house to ensure families
20 owned these texts. And parents who failed to train their children for a
21 useful trade were likely to have the children simply taken away from them
22 and placed by local officials in an apprenticeship with someone else.⁴ In
23 that era, none would have objected to such government oversight on the
24 grounds that it was infringing parental prerogative; that notion would
25 arise much later in our history. The prevailing conception of parenthood,
26 reflecting both the monarchical cultures from which colonists came and
27 the normative prescriptions of the Bible, was very much about duties
28 rather than rights, with the duties being owed principally to God and the
29 community. Jeffrey Shulman explains: “What is deeply rooted in our legal
30 traditions and social conscience is the idea that the state *entrusts* parents
31 with custody of the child, and the concomitant rule that the state does so
32 only as long as parents meet their legal duty to take proper care of the
33 child.”⁵ Thus, “the American colonies, and later states, developed a sys-
34 tem of separating children from their undeserving parents”—that is, from
35 those “not providing ‘good breeding,’ neglecting their formal education,
36 not teaching a trade.”⁶ The great early nineteenth-century jurists James
37 Kent and Joseph Story spoke clearly of parenthood as a sacred trust that
38 the state has given to those whom it assumes will best fulfill legal child-
39 rearing duties.

On the other hand, no one ever spoke of universal standards or core competencies (other than in scripture). In an era long before one could purchase ready-made curricula through the mail or glean information from homeschooling websites, there probably were as many approaches to teaching children in and around the home as there were parents doing it. Mothers and fathers simply did the best they could with what little free time and resources they could muster.

In the antebellum South, most African Americans received no book learning. Custom (and, later, law) prohibited enslaved persons from learning to read and write, because “access to the written word, whether scriptural or political, revealed a world beyond bondage in which African Americans could imagine themselves free to think and behave as they chose,” according to historian Heather Andrea Williams. Many enslaved adults and their children nevertheless undertook clandestine and ad hoc efforts to obtain literacy skills. “I have seen the Negroes up in the country going away under large oaks, and in secret places,” one enslaved person later told an interviewer, “sitting in the woods with spelling books.” This piecemeal academic training became an important “symbol of resistance,” as Williams puts it.⁷

In contrast to both African Americans and average white parents of that time period, Martha Laurens Ramsay approached the home education of her children from a position of privilege and in a systematic manner. The daughter of Henry Laurens, the wealthy South Carolina planter who at one point served as president of the Continental Congress, she took seriously her role as the primary educator of her children. One of her sons later wrote that she “studied with deep interest most of the esteemed practical treatises on education, both in French and English, that she might be better informed of the nature and extent” of her role as a teacher. Yet for Ramsay, too, one text was central to training children: “She taught them early to read their Bibles.” This served the dual purpose of providing spiritual uplift and developing their literacy.⁸

Benjamin Franklin’s formative intellectual experiences also took place largely outside of school. Franklin impressed his father by learning to read at an early age (“I do not remember when I could not read,” he later wrote). With the hope that he would pursue a career in the ministry, he was initially dispatched to a grammar school for instruction in writing and ciphering, but after only a few years the school proved to be too costly. Franklin wound up apprenticing as a printer under his brother James. Outside the confines of a school, Franklin still managed to learn,

1 borrowing texts from a bookseller and devouring them late into the night.
2 This autodidactic training was famously successful, and Franklin almost
3 wore his lack of formal schooling as a badge of honor, a sign that he had
4 succeeded through grit and guile rather than privilege. Franklin's expe-
5 riences also showed that genuinely independent thinking (and not sim-
6 ply religious indoctrination) could flourish outside of regimented school
7 environments.⁹

8 Small-scale, makeshift home instruction continued throughout the nine-
9 teenth century, and sometimes the results were spectacularly successful.
10 Thomas Edison, another famous polymath, succeeded without much for-
11 mal school training. In the 1850s, Edison was abused both verbally and
12 physically by his schoolmaster because, like many bored students before
13 and after him, he doodled, daydreamed, and generally failed to cooperate
14 with teachers. After only three months in school, he left for good when
15 he overheard the man describe him as “addled.” From there, Edison's
16 mother took control of his education. Foreshadowing the post-World
17 War II leftists who would rejuvenate homeschooling in the modern era,
18 Mrs. Edison was, as one biographer put it, “determined that no formal-
19 ism would cramp his style, no fetters hobble the free rein, the full sweep
20 of his imagination.” This approach clearly paid off, nurturing a singularly
21 innovative mind.¹⁰

22 Dorothy Reed Mendenhall, the first woman to graduate from Johns
23 Hopkins Medical School and later an esteemed pediatrician, experienced
24 the opposite pattern—homeschooling first, then attendance at a regular
25 school. A combination of family misfortunes (including her own early ill-
26 nesses) prevented her from receiving any formal schooling outside the
27 home until she was a teenager. Yet she never believed home education
28 had hindered her. “I am unconvinced,” she later wrote, “of the value of
29 grade schooling.” Mendenhall believed younger children would be better
30 served if allowed to devote their energies to things like physical develop-
31 ment and organized play.¹¹

32 Illnesses such as those suffered by Mendenhall necessitated education
33 in the home for many children. Theodore Roosevelt suffered from de-
34 bilitating asthma and so received tutoring at home throughout his child-
35 hood and adolescence. Though he was instructed in a variety of subjects,
36 including Latin and French, young “Teedie” (as the family called him)
37 quickly developed a near-obsession with the study of natural history, and
38 it remained a passion throughout the remainder of his life. (His family
39 created an informal collection of specimens known as the “Roosevelt

Museum of Natural History.”) The tutoring that young Roosevelt received at home was supplemented by his family’s frequent trips abroad. His traditional schooling only began when he entered Harvard as an undergraduate.¹²

At the beginning of the twentieth century, Margaret Mead likewise found intellectual engagement at home rather than at school. In her formative years, the pioneering anthropologist attended kindergarten and high school, but during the intervening years she was schooled at home by her grandmother. Such was the elder woman’s influence that Mead devoted an entire chapter of her autobiography, *Blackberry Winter*, to their relationship. In that work, Mead wryly observes that her grandmother kept her out of school because she wanted the young woman to receive an adequate education.¹³

In this earlier, formative period of American history, parents generally did not undertake home instruction with any sense of repudiating the state’s authority or expertise in the realm of education. This was in part because in the prevailing view parents held authority themselves only by leave of the state, and in part because, in most places, the state’s commitment to providing and regulating schooling was relatively tepid. In the hardscrabble world of many colonial settlements, the time and resources that might have been dedicated to educating children were instead diverted to keeping communities economically viable and secure from attack. Time spent ciphering in the schoolhouse would be time lost in the fields or the workshop.

Over time, more direct state control and coercion became prominent elements in the American educational landscape. Communities and colonies (and, later, states) gradually enacted laws mandating the construction and staffing of schools. There were some very early instances. In 1642, New Haven required “that a free schoole shall be sett vp in this towne.” Massachusetts enacted general school laws in that year and again in 1647 that gave the colony a more direct role in providing that children be educated. The 1642 measure, lamenting “the great neglect of many parents and masters in training up their children in learning and labor,” required parents to ensure that their children and apprentices were literate and understood the commonwealth’s laws. The General Court appointed selectmen who were empowered to monitor these efforts. The 1647 law, memorably known as the “Old Deluder Satan Act,” gave the state a more direct role in furnishing education, requiring towns of fifty or more families to hire a schoolmaster who would teach children to read and write (and

1 thereby give them the intellectual tools necessary to understand the Bible
2 and thus resist the devil). Although no one at the time understood it, here
3 were the first moves toward universal compulsory education in the United
4 States—and they were taken in response to the perceived shortcomings
5 of parents as educators even when expectations were slight compared to
6 those in the modern era.¹⁴

7 The state's interest in, and control over, education grew as immigra-
8 tion and industrialization began to transform American society over the
9 middle part of the nineteenth century. Fleeing economic turmoil and ideo-
10 logical repression, waves of immigrants poured into the United States
11 from places like Ireland and Germany as well as southern and eastern
12 Europe. These hardworking newcomers fueled the new nation's break-
13 neck economic expansion, but they also threatened the social and cultural
14 hegemony that had reigned throughout the colonial period. A land that
15 was once rural and Protestant became increasingly urban and Catholic.
16 Schools were increasingly seen as a vital means of assimilating and accul-
17 turating immigrant populations as well as maintaining social order. They
18 were places where immigrant children could shed the alien customs of
19 their forebears and learn to become properly American.

20 A band of reformers led by Horace Mann came to view the schools as
21 a bulwark against the changes that appeared to be recasting, if not out-
22 right threatening, the core values that defined American society. From his
23 post as the chair of the state board of education in Massachusetts, Mann
24 pushed for the establishment of a system of common schools backed by
25 the full fiscal and legal authority of the state. The schools would work to
26 the benefit of both society broadly and students individually. Mann in-
27 sisted that it was a “great, immutable principle of natural law” that ev-
28 ery person possessed an “*absolute right*” to an education. Along with this
29 came the “correlative duty of every government to see that the means
30 of that education are provided for all.”¹⁵ Thus, the earliest references to
31 individual rights in connection with schooling in America were about the
32 rights of children, not of parents.

33 The schools envisioned by Mann—staffed by well-trained, profes-
34 sional teachers—would provide consistent and rigorous academic train-
35 ing throughout the year. The results would be profound and far-reaching.
36 Mann believed common schools could be a great equalizer, a “balance
37 wheel of the social machinery.”¹⁶ No longer would affluent students be
38 able to further their advantages in society by having exclusive access to
39 the best schools. Now, everyone, rich and poor alike, would have the

chance to learn. Moreover, the schools would build character and instill discipline. Moral education would be paramount.

The purported benefits of the common-school system were manifold. Children would be prepared for economic and social advancement in an increasingly fluid society that was becoming less agrarian and more industrial. Moreover, such well-educated citizens would be better equipped to participate effectively in the democratic system that governed the nation. Implicit in this argument for the common schools was the notion that many families—especially immigrant families—were largely incapable of providing such crucial training for their children. Indeed, few parents then would themselves have had more than the basic literacy that sufficed in the preindustrial economy. Mann touted the importance of common schools by insisting that in order “to provide surer and better means for the education of their children,” parents had an obligation to send their sons and daughters outside the home for formal academic instruction.¹⁷

The common-school system Mann advocated took hold in the mid-nineteenth century and became more widespread in the decades after the Civil War. To be sure, meaningful reforms in schooling came more slowly in some places than others. Frontier communities often lacked the wherewithal to establish schools, and the attenuated nature of state power throughout the South often resulted in lackluster organization and administration of schooling. Nonetheless, in general, more and more children attended better schools and for longer periods of time.

Although their impact was often difficult to gauge, compulsory school attendance laws facilitated the growth of the common-school system advocated by Mann and other educational reformers. These measures, by which states assumed power to require families to send children to school for a prescribed number of weeks per year, did not have uniquely American roots. Martin Luther frequently called for compulsory schooling. “I maintain,” he wrote, “that the civil authorities are under obligation to compel the people to send their children to school.” This schooling was essential, according to Luther, because “we are warring with the devil, whose object it is secretly to exhaust our cities and principalities of their strong men.” John Calvin was an equally staunch advocate of compulsory schooling and for similarly grave reasons.¹⁸ Thanks in part to Luther’s worried exhortations, a variety of Protestant states in Germany established school systems and then mandated attendance in them. Duke Christopher, Elector of Württemberg, is credited with establishing one of the first modern compulsory state-education systems, in 1559.

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8 CHAPTER TWO

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10 **The Birth of Modern Homeschooling**
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13 **F**or the past century, the overwhelming majority of American children
14 have been educated outside of their homes in public or private “regu-
15 lar” schools—state-accredited institutions staffed by professional educa-
16 tors who have received years of formal training. With school enrollments
17 totaling in the tens of millions during the middle part of the twentieth
18 century, homeschooling remained a novelty. There was a national consen-
19 sus that the most worthwhile and profound educational experiences for
20 young people were provided when, in the company of their peers, they
21 attended schools staffed by certified teachers following a standardized
22 curriculum.

23 More frequent and strident challenges to this dogma emerged in the de-
24 cades following World War II. Academics, journalists, and professional edu-
25 cators penned a series of critiques insisting that the country’s public schools
26 were in fact spectacularly failing to educate the nation’s young people. The
27 year 1953 marked a watershed, with the publication of several notable
28 books bemoaning the state of education in the United States. A character-
29 istic jeremiad came in Arthur Bestor’s provocative *Educational Wastelands:
30 The Retreat from Learning in Our Public Schools*. The iconoclastic Bestor
31 charts how education policy makers, “by misrepresenting and undervaluing
32 liberal education, have contributed . . . to the growth of anti-intellectualist
33 hysteria that threatens not merely the schools but freedom itself.” These
34 professional educators had effectively crippled the public schools by articu-
35 lating “purposes for education so trivial as to forfeit the respect of thought-
36 ful men, and by deliberately divorcing the schools from the disciplines of
37 science and scholarship.”²¹ Even at this early point in America’s modern his-
38 tory, some were blaming standardized testing for “dumbing down” the curri-
39 culum and inducing teachers to “teach to the test.”²²

Overheated warnings like Bestor's came at a time when the expectations for American schools were soaring rather than diminishing. The exigencies of the Cold War seemed to demand even more rigorous academic training, especially in the realms of math and science; adequate training in those fields would be essential if young Americans were to counter the advances of their peers in the Soviet Union. And yet there was a nagging sense that the nation's schools were not up to the task. Panic over the purported rise of juvenile delinquency in the 1950s was paired with a critique of the American education system. The schools apparently were failing to perform one of their essential tasks: training young people to be ethical citizens who understood and respected the rule of law.

Such damning analyses dovetailed with the broader indictments of state power that pervaded American public discourse in the postwar era. These condemnations emanated from across the ideological spectrum. Following the United States Supreme Court's landmark ruling in *Brown v. Board of Education* (1954), many whites—not all of them Southerners—were aghast that the courts would not only mandate an end to the segregation of public schools but also eventually countenance controversial measures meant to guarantee integration, such as busing. To some, this appeared to be an unfathomable abuse of state power. For critics on the Left, the debacle of the war in Vietnam epitomized the failings of a political and economic system that devoted enormous resources to military misadventure and imperialism while ignoring such urgent problems as poverty and racism. Conversely, conservatives insisted that the state was meddling too much in the latter matters and thereby squandering resources (as well as trammeling individual rights).

The courts also seemed determined to make the public schools more secular. In the early 1960s, the United States Supreme Court handed down two landmark rulings (*Engel v. Vitale* in 1962 and *Abington School District v. Schempp* in 1963) holding that school-sponsored prayer exercises and Bible readings violated the First Amendment's establishment clause. Although these rulings did not immediately put an end to religious exercises in public schools, they sparked considerable outrage among conservative Protestants who believed that God was being "removed" from the public schools. Their anger was further stoked by a perception that moral and religious training was being supplanted in the schools by sex education and the teaching of biological evolution. Summing up these perceptions, the *Christian Educator* would later complain that public schools had become "places where a carefully maintained atmosphere of materialism,

humanism, evolution, relativism, and sometimes downright atheism is deliberately created for the impressionable student.”³ In short, the public schools were allegedly now anti-Christian by design.

No one bemoaned the supposed godlessness of American schools with more fervor than American theologian Reverend Rousas J. Rushdoony, a Christian Reconstructionist who penned several forceful attacks on the public schools in the 1960s.⁴ *The Messianic Character of American Education*, his dissection of the progressive underpinnings of American public education, singles out for especially harsh criticism the likes of Horace Mann and John Dewey. Thanks to their pernicious influence, “the task of the schools has become religious conversion to a politico-economic statist order rather than education,” Rushdoony wrote. As children were indoctrinated in this humanist order, he argued, it was inevitable that they would lose their faith in the teachings of the Bible. The implications of this were disastrously apparent in American life in the 1960s: social disorder, economic upheaval, and moral chaos.⁵

Soon enough, Rushdoony was offering an alternative: a thoroughgoing “Christian curriculum” grounded not in humanism but in a decidedly fundamentalist reading of the Bible. Instead of being subjected to the “devastating and enslaving forces of amoral statism and anarchistic individualism” that were being purveyed in the public schools, students would approach every subject through the prism of scripture. Of course, the teaching of evolutionary theory had no place in this scheme, nor did anything that challenged a rigidly conservative conception of God’s law.⁶

Rushdoony hoped that such principles would help to spark and then guide the growth of nonsecular schools. And, indeed, a new breed of religious schools offered one alternative to parents who were appalled by the apparent decline of the intellectual and moral training provided by public schools. Roman Catholics, of course, had a long-established (if increasingly fragile) system of parochial schools in most areas of the country. Conservative evangelical Christians got a somewhat later start in the realm of creating their own schools, and their efforts—which often came in the form of small academies catering to a handful of students—generally lacked the overall coordination of the Catholic schools.

Despite their relatively late start, so-called Christian “day schools” experienced explosive growth in the late 1960s and early 1970s. Schools reflecting the approaches of Rushdoony and others for whom the public schools were anathema were founded, and grew, at astonishing rates in this period. According to one estimate, enrollment in them expanded by over 200 percent between 1965 and 1975,

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Iconoclastic thinkers like Everett Reimer, Allen Graubard, and Paulo Freire challenged normative assumptions about pedagogy and touted the potential of alternative educational environments. (For instance, Freire's 1970 masterwork *Pedagogy of the Oppressed* famously criticizes the "banking" concept of education, which views children as receptacles into which information is deposited, one of the underpinnings of traditional schooling.)²⁹

Other dissenters also pushed for fundamental changes in how children are educated and socialized. Paul Goodman's *Growing Up Absurd* (1960) and *Compulsory Mis-education* (1964) argue that schools are little more than training grounds for conformity and intellectual orthodoxy. Edgar Friedenberg's *Coming of Age in America* (1965) describes how high-school students primarily learn how to submit to the arbitrary authority of teachers and administrators. Jonathan Kozol's bestselling *Death at an Early Age* (1967) details his disheartening experiences teaching in Boston's crumbling public schools. By highlighting the immense and seemingly intractable flaws of schools—among them underfunding, systemic racism, and rigid approaches to pedagogy—from a liberal, secular perspective, such works, too, "provid[ed] the ideological underpinnings for educational innovation," in the words of one study of the period.³⁰

Kozol was so disturbed by his experiences as a teacher that he worked to establish free, independent, and community-run schools in disadvantaged neighborhoods. Describing these institutions in *Free Schools*, published in 1972, Kozol offers an impassioned plea for innovation in education as a means of freeing children from the thoroughgoing oppression of the public schools. And the impact of these liberating free schools would resonate beyond the children themselves, as committed parents and teachers banded together and challenged local institutions and political leaders to respond to the formidable economic, social, and cultural needs of their communities. Kozol pairs these broad ambitions with a narrower advocacy for intensive and rigorous academic training for students. There would be no long-term liberation for inner-city youth, he believed, if they lack core literacy and numeracy skills.³¹

To have any hope of legitimately liberating students and their communities, these free schools would have to be racially and socioeconomically diverse. Some of the sharpest passages of *Free Schools* are directed at breakaway schools that served the privileged—that is, white middle- and upper-class children who already enjoyed myriad advantages. Kozol, in

one especially caustic outburst, excoriates schools that amount to little more than “a sandbox for the children of the S.S. guards at Auschwitz.”³²

The types of innovations championed by Kozol were part of a liberal wave of alternative-schooling proposals to emerge during the period. Some took shape in the form of “free” or “open” schools that were modeled on Summerhill, a British boarding school founded by A. S. Neill. The Summerhill model—popularized in America by the publication of Neill’s book *Summerhill: A Radical Approach to Child Rearing* in 1960—stressed self-governance and minimal coercion by adults. (It should be noted that Kozol loathed Summerhill itself, calling it “one of the most racist schools in England.”) Following such models, alternative schools made students’ attendance voluntary. Furthermore, children learned by following informal curricula that stressed the value of practical, real-world experiences. Leadership emanated from parents and local communities, not educational professionals. These schools were almost by definition idiosyncratic, but they shared a fundamental aversion to the strictures and mandates that were the hallmarks of traditional schools.³³

According to Allen Graubard, there were probably fewer than two dozen of these revolutionary schools in the United States in 1967. That number skyrocketed over the next five years, reaching roughly two hundred by 1972. The schools tended to be small—two-thirds enrolled fewer than forty students—and student-teacher ratios averaged 1:5. The size and scale of the schools were crucial to creating the kind of learning environments that reformers desired. “Obviously, the warm intimate atmosphere where everyone knows everyone else,” Graubard observes, “is vital to the style of learning and governance which free schools espouse.”³⁴

Ron Miller, in his excellent study of the free-school movement, notes that its “ideology was explicitly countercultural; that is, it sought to educate children and young adults according to a set of attitudes, values, and beliefs in direct opposition to those of the predominant culture.” Mainstream American practices and institutions—among them corporate capitalism and the pervasive state power that buttresses it—were rejected in favor of a utopian vision in which communities would be rebuilt to reflect more inclusive values. In this framework, the schools, instead of serving the interests of the state, would empower individuals to flourish on their own terms.³⁵

To be sure, not all of these liberal experimental schools thrived. Activist Bill Ayers (later known for his role in the communist revolutionary group Weather Underground) helped to lead a “free school,” called the

1 Children's Community School, in the mid-1960s in Ann Arbor, Michigan.
2 "We felt that too many schools were highly competitive and destroyed
3 people's learning," Ayers later said. "We thought that students had an in-
4 clination to learn, but that most schools stifled their creativity." Believing
5 "that learning should be organic, that children should learn subject mat-
6 ter in real-life contexts when they are ready," students were, for instance,
7 challenged to write, revise, and share their own life stories to build their
8 literacy skills. But the school, which was designed in part to serve Afri-
9 can American families in Ann Arbor, floundered and eventually closed.
10 There were many reasons for the failure, including harassment from local
11 authorities, but, according to one account, one of the main factors was
12 pedagogical: "no one learned to read there."³⁶

13 Amid this clamor on the Left for educational reform, it was a disillu-
14 sioned schoolteacher named John Holt who catalyzed the liberal branch
15 of the modern homeschooling movement. In two landmark books pub-
16 lished in the mid-1960s, Holt offers a forceful critique of the public schools,
17 insisting that they stifle learning by trapping children in regimented and re-
18 pressive environments. *Why Children Fail* (1964) and *How Children Learn*
19 (1967) describe a bleak educational landscape in which fearful children
20 mainly learn to obey orders and are all but barred from thinking for them-
21 selves. With no thought given to nurturing their intellectual curiosity, Holt
22 argues, most children in the public schools merely master the art of taking
23 tests and charming teachers. "What impedes learning today is teaching,
24 too much of it," he told a reporter in the late 1970s. "The teacher takes
25 all the fuel that makes the learning engine run and turns the students into
26 passive laboratory rats."³⁷

27 As his critiques gained wider circulation in the 1960s, thousands of par-
28 ents and educators reached out to Holt and praised him for his blunt, un-
29 sparing diagnosis of what was ailing the public schools. Their letters and
30 phone calls confirmed for him that public schools had become, in effect,
31 educational factories that were failing in their primary mission—fostering
32 human growth and learning. There was, he realized, a widespread and fun-
33 damental dissatisfaction with how professional educators approached learn-
34 ing; they seemed primarily concerned with churning out docile students who
35 pass tests. Instead of being organic and personalized, this learning was mech-
36 anized and standardized.

37 Initially, Holt was more of an educational reformer than an outright
38 revolutionary. He clung to the belief that schools could and should be
39 overhauled and transformed into sites of authentic learning. However, his

perspective changed over time, in part because of the influence of Ivan Illich, whose 1971 book *Deschooling Society* questions the entire idea of institutionalized education. Asserting that “universal education through schooling is not feasible,” Illich’s book argues that the nation’s system of compulsory education should be supplanted by “learning webs” in which all members of a community use advanced technology and serve both as instructors and pupils throughout their lifetimes.³⁸

Illich, like Holt, bemoaned compulsory education as a counterproductive exercise of state power. In his view, it had engendered widespread passivity and provided but a thin facade of real learning. Compulsory education had served to create “a dazed population, a ‘learned’ population, a mentally pretentious population, such as we have never seen before,” Illich commented. Its chief accomplishment might have been creating millions of compliant consumers of television.³⁹

Illich’s critique of schools was grounded in part in his distrust of the technocratic assumptions that undergirded them. It was a fundamental premise of schools that, as one scholar has put it, “self-development must occur in specially designed and administered places” where individuals surrender much, if not all, of their autonomy. So ingrained was this thinking that even many radicals had come to view their “‘liberation’ as the product of an institutional process,” Illich wrote. But authentic deliverance could only be attained by “liberating oneself from school.”⁴⁰

Nudged in a more radical direction by the likes of Illich, Holt eventually concluded that schools, at least as they were presently constituted in the United States, were broken beyond repair. His book *Instead of Education* (1976) offers an unmistakably stark assessment of how dysfunctional they had become:

Education, with its supporting system of compulsory and competitive schooling, all its carrots and sticks, its grades, diplomas, and credentials, now seems to me perhaps the most authoritarian and dangerous of all the social inventions of mankind. It is the deepest foundation of the modern and worldwide slave state, in which most people feel themselves to be nothing but producers, consumers, spectators, and “fans,” driven more and more, in all parts of their lives, by greed, envy, and fear.

Holt no longer saw the point in trying to reform such a pernicious system. He thundered that he hoped it would be eliminated altogether and replaced by alternative, and superior, forms of schooling.

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There seemed to be as many approaches to homeschooling as there were families practicing it. Some parents formulated and followed relatively traditional curricula that essentially mirrored (albeit on a smaller scale) the type of instruction provided in schools. A typical school day might be divided into set periods in which a child moved between traditional academic subjects. Other families, however, gravitated toward the looser practice of “unschooling,” in which children were given the freedom to pursue their interests without being bound by conventional notions of schoolwork or even subject matter. Patrick Farenga has noted that unschooling parents and children “live and learn together, pursuing questions and interests as they arise and using conventional schooling on an ‘on demand’ basis.”⁵¹

Homeschooling parents often marveled at the benefits of this joint learning. One mother explained that, before she began homeschooling, her math skills were embarrassingly poor. However, they grew “by leaps and bounds” after she began teaching math to her two daughters. The act of teaching brought her a deeper understanding. What she once feared, she now came to love. “So homeschooling has been a blessing to me,” the mother stated.⁵²

The nascent movement comprised “odd bedfellows,” as John Holt said in 1979. “It has fundamentalist Christians, some of whom don’t have much schooling themselves. It has back-to-the-landers, college-educated people who grow their own food and have babies at home. It has people representing all classes and all sections of the country.” Holt noted that these seemingly disparate approaches have some significant things in common, most notably “old-fashioned independence, a skepticism of experts, and a willingness to trust themselves.”⁵³

More families were brought into the homeschooling fold after a convergence of events gave the movement widespread publicity in the late 1970s and early 1980s. In December 1978, *Time* magazine published an article on Holt and the “growing if still small number of converts” he had brought into the homeschooling cause. The piece explains why people were repudiating conventional schools: “More and more parents are becoming disenchanted with rigid programs, school strikes and the reluctance of teachers to accept responsibility for students’ failures to learn.”⁵⁴

The *Time* article led to appearances by Holt and by homeschooling families on Phil Donahue’s syndicated television talk show in 1978

John Holt, the father of the modern homeschooling movement, believed the American Civil Liberties Union (ACLU) should have been integral to this effort. Compulsory school attendance laws, he wrote, “constitute a very serious infringement of the civil liberties of children and their parents.” Students’ fundamental rights were further violated, he asserted, by the authoritarian operation of the schools themselves. For Holt, these depredations should have drawn the attention of the nation’s oldest and most prominent advocacy group for civil liberties, but, at both the state and national levels, the ACLU failed to show much sustained interest in homeschooling. The national leadership seemed to view “the right of children to go to school as paramount over their right not to go,” according to homeschooling advocate Pat Farenga.⁹⁵

In the absence of the ACLU, several organizations stepped up and advocated for homeschoolers in courts, including the Rutherford Institute, a Virginia nonprofit that championed myriad conservative political causes over the years. (Indeed, it was often described as a conservative version of the ACLU.) Rutherford’s founder, John Whitehead, penned an enormously influential book, *Home Education: Rights and Reasons*, that for many years served as an essential primer on homeschooling law and jurisprudence.

Another important player has been the Home School Legal Defense Association (HSLDA), which built on and complemented the efforts of Rutherford and smaller organizations devoted specifically to homeschool advocacy. Founded in 1983, HSLDA began providing legal representation to homeschoolers throughout the country. Many attorneys who worked for the organization joined the effort in part because they perceived that the government was waging a legal attack on parents who merely wanted to provide the best education for their children. For such attorneys, HSLDA was not merely a legal advocacy organization; it was part of a holy crusade. They believed they were doing God’s work by helping create a legal regime that enabled parents to do something profoundly important: ensure their children received only Christian instruction, in an environment free of influence from nonbelievers.

Driving the work of HSLDA were, as law professor Kimberly Yuracko has noted, two fundamental claims. One was the assertion that parents alone should control the upbringing of their children, without interference from the state. Echoing the sentiments of many homeschoolers, Michael Farris, the organization’s founder, went so far as to say parents possess an “absolute right” to control children’s education.

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8 CHAPTER THREE

9
10 **Homeschooling Comes into Its Own**
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12

13 **T**he national media took note of homeschooling's coming of age. In
14 some ways, it was an irresistible story: with the public schools seem-
15 ingly beyond repair, some idealistic parents were taking matters into their
16 own hands by providing old-fashioned instruction around the kitchen
17 table. In 1990, both *Time* and the *New York Times* ran laudatory articles
18 marveling at the increasing number of children who were being educated
19 at home. "Home schooling—motivated by the notion that learning should
20 be unpolluted by the classroom—is an eccentricity that has become a na-
21 tional movement," *Time* notes. This account and the one published in the
22 *New York Times* feature glowing portrayals of homeschooled children
23 and their parents. The youngsters in one family depicted in the *Times*
24 story had become "independent thinkers" who had been given the free-
25 dom to pursue their curiosities.¹ Of another homeschooled child, reporter
26 William Celis wrote, "He seems to be benefiting from personal attention
27 and from being able to learn at his own pace."²

28 It was clear from these stories that some homeschooling parents were con-
29 cerned with something besides providing their children with a learning expe-
30 rience and moral instruction superior to those found in public schools. Many
31 mentioned an ostensible concern for physical health and safety. One Funda-
32 mentalist mother who homeschooled her four boys pointed out to *Time* that,
33 as the article puts it, "there are no drugs in her bathroom, or switchblades
34 in the hallways." Another parent, explaining in 1981 why she had decided to
35 teach her children at home, stated, "Public schools are pushing us away with
36 their drugs, their sex, their drinking, their smoking."³ These parents insisted
37 that the overly permissive public schools simply had become unsafe.

38 Indeed, for many parents who made the decision to educate their chil-
39 dren at home, social and cultural concerns dwarfed worries about the

supposedly ineffective pedagogy of the public schools. One homeschooling sourcebook bemoans the schools' "failure to provide an environment in which children can grow in moral strength and integrity. Most parents, whether or not they are teaching at home, are worried about drugs, violence, promiscuity, and teen pregnancy." The book compares the relatively benign hijinks of students in the 1940s (running in the hallways, chewing gum) with the much more dire transgressions of their counterparts in the 1980s (arson, murder, extortion, and gang warfare). The book's authors assert that such dangers are nonexistent in the traditional home, which promises a safe and secure environment.⁴

Beneath the surface of homeschoolers' discourse about "safety," some perceive implicit worries about racial integration. Certainly homeschooling has been particularly popular in communities where courts have ordered school districts to use busing plans to create more racially balanced schools. (Such plans proliferated nationally after the US Supreme Court's 1971 ruling in *Swann v. Charlotte-Mecklenburg Board of Education*, upholding such an order.) In the Los Angeles area, an antibusing group created an educational alternative called the Home Tutorial Program in 1978. Eighty-nine percent of the participants in the program were white, and they stressed that they were motivated to keep their children safe from harm and within their neighborhoods. Three scholars who studied the program concluded that these rationales were essentially proxies for aversion to racial mixing.⁵ In the end, some parents appeared really to be balking at sending their children to integrated schools.

The homeschooling movement continued to comprise two basic and quite divergent groups—"pedagogues" and "ideologues." The former category included the likes of those who, taking their cue from John Holt, sought out alternatives to traditional schooling because they believed it failed to deliver the kind of meaningful education that would help children fully develop their myriad creative and intellectual talents. Meanwhile, for ideologues, predominant were worries that the public schools represented a direct and dire threat to both their faith and their authority as parents.⁶

In 1990, Michael Farris of HSLDA joked that, of the parents who had joined his organization, "We have everything from Black Muslims to Jews and one woman who is a cross between a Zen Buddhist and Winnie the Pooh." However, it was clear by that year that the "ideologues" described by Jane Van Galen had come to predominate in not only HSLDA but also in the broader homeschooling movement in the United States.

the children confined to the many religious-cult compounds in this country are reported to school officials, if at all, as being homeschooled.

Critics assert that the emphasis many homeschoolers place on strict physical discipline creates an environment where physical abuse is more likely. Some books popular among homeschoolers, such as Michael and Debi Pearl's *To Train Up a Child*, advocate harsh disciplinary techniques meant to instill complete obedience. The Pearls' methods include hitting children, withholding food from them, and subjecting them to cold-water baths, a regimen that can begin with children only a few months old. Homeschool advocacy groups have bought and distributed thousands of copies of the book.⁵² Individuals who have endured such treatment have become increasingly vocal in recent years. Journalist Kathryn Joyce has noted "the emergence of a coalition of young former fundamentalists who are coming out publicly, telling their stories, and challenging the Christian homeschooling movement." They often speak out on websites such as that of Homeschooling's Invisible Children and Homeschoolers Anonymous. The latter has a self-proclaimed mission to provide a platform for those who have been homeschooled to share "the good, the bad, and the ugly" of their experiences.⁵³

Another reason for the concern that child abuse rates might be higher among homeschoolers is that evangelical Christian leaders urge followers to adopt children from abroad as a way of expanding the Christian community.⁵⁴ As a result, some people might undertake a foreign adoption not because of an inherent drive to adopt but to fulfill a religious duty, and the burdens such an adoption often entails might be more than they can handle. The missionary aspect of the choice might also make these followers less wary of adopting children who have special needs because of adverse experience in infancy.⁵⁵ This, too, is speculative, but it could explain a perceived peculiarity concerning homeschooled children who were adopted: whereas in the US population as a whole, rates of maltreatment are lower for adopted children than for children being raised by biological parents, among homeschoolers, according to Homeschooling's Invisible Children, a "disproportionate number of cases of severe abuse and neglect involved children who are adopted."⁵⁶

Conversely, homeschool advocates might note that colds and flus predictably spread like wildfire at certain times every year in regular schools, whereas their children avoid much germ spreading, and that regular schools present danger of physical and psychological abuse by fellow students and even teachers.

I. Ruling Out Extreme Views about Homeschooling

The first difficulty facing anyone who would take either extreme view is the plain fact of tremendous variety among homeschools today. Not only do parents' aims for their children's education vary, but there is also great variation with respect to parents' own educational level and talent for teaching, employment of instructors other than the parents (e.g., online correspondence programs, music lessons, homeschool co-ops), connection to a parent network or homeschooling organization that provides guidance, interaction with regular schools (e.g., participation in team sports), opportunities for nonschool educational experiences given location and financial resources (e.g., museums, travel), arranged interactions with peers outside the family, and types of curricular materials used (if any). This variety makes utterly implausible any blanket empirical assertion about homeschooling, such as that it is always good or that it is inherently bad for children.

Consider first blanket condemnation. Anyone taking this position is most likely operating from a liberal standpoint that accepts, more or less, the state's aims for children's education, as reflected in the curricular aims of public schools, and that assumes public education generally (even if not in all schools) fulfills those aims. The position is likely to rest on a supposition that homeschooling is inherently deficient in terms of those aims.

An initial reason to reject this position is that it would not follow logically from a premise that homeschooling is inherently deficient *in some respect* that homeschooling is inherently bad *on the whole* for children. (Certainly common schooling could be deemed inherently deficient in some respects.) It could be that any inherent deficiency of homeschooling is not important enough to make all homeschooling fall to some level properly characterized as "bad." And it could be that homeschooling is also inherently superior to other forms of schooling in other ways (e.g., potential for individualized curriculum, real-world context for learning, less exposure to disease, flexibility of schedule, no time wasted on transport), and that these outweigh the perceived deficiency. Much more would need to be said than simply that something is always missing with homeschooling. One would need to have some standard of "bad" and demonstrate that the alleged deficiency is so great as to make homeschooling fall below that standard even after taking into account any compensating benefits homeschooling can offer. We are not aware of anyone having done this.

In addition, it is difficult to imagine what could be *inherently* deficient about homeschooling, given the capaciousness of that concept. If we can describe an approach to education that fits within our understanding of what homeschooling is and that also fulfills all the liberal aims for children's education, then liberals cannot say homeschooling is inherently problematic. So imagine this scenario:

Someone who is, by liberal standards, one of the best teachers in America's public schools is also a parent. She decides to quit her job in order to homeschool her four children. She uses at home exactly the same materials the public school uses. In some ways, the experience she can give her children is clearly superior even to what she was able to give the children in her classroom when she worked in the public school. She is able to tailor her teaching to her children's individual strengths and weaknesses. Learning experiences occur more organically, as household events (repairs, parties) and projects (cooking, furniture building) raise questions that require study in one or more curricular areas. With fewer pupils and freedom from standardized testing, she is able to spend substantial time on the arts. Without having to worry about upsetting any pupils' parents, she can add a robust critical-thinking component, using "philosophy for children" books and online lesson plans that liberal philosophers have created,¹ and she has her four children debate and reason with each other, puzzling over answers to intellectually stimulating questions, after reading provocative essays that argue for positions unfamiliar to them. She has the children do progressively lengthy papers, both creative and analytical, and with only four pupils she is able to give them extensive feedback on all aspects of the writing. A few days each week she joins other homeschoolers, carefully selected to represent a variety of religious and cultural backgrounds, and they take their children for field trips to museums and various workplaces (e.g., factories, university science labs, government offices, and firehouses). They also hold events for socializing and for discussions of current events.² Twice per week her children go to the home of another homeschooling parent who has professional training in an area of study in which this mother is not so strong. On other days that parent's children come to this mother for instruction. She registers her children in various community recreation programs with non-homeschooled children. When her children reach middle-school age, the mother has them go the local public middle school to participate in after-school activities with the public-school children, such as sports teams, theater productions, and special-interest clubs. She imposes no restrictions on their socializing, except ones necessary to keep them safe and out of trouble (e.g., not

1 allowing them to spend time unsupervised with children known to have serious
2 behavioral disorders). She encourages friendships with peers in the neighbor-
3 hood who attend public schools or private religious schools, allows the children
4 progressively more unsupervised time with peers as they get older, and enrolls
5 her children in the neighborhood summer swim team. They regularly attend
6 local government meetings and occasionally attend sessions of the state legis-
7 lature, and the mother discusses with the children the pros and cons of policy
8 measures these bodies are considering.³ They read the *Washington Post* every
9 day and frequently write letters to their Congressional representatives urging
10 support or opposition to pending legislation. The mother and her spouse take
11 advantage of the flexibility homeschooling allows to travel with the children
12 outside peak vacation times to big cities where they visit museums and see
13 operas and plays, to national parks where they enroll in hands-on nature pro-
14 grams, and to other countries where they learn about other cultures and prac-
15 tice other languages.

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17 What could a liberal say is missing from these children's experience that
18 public schools generally provide? Is not the education just described
19 patently *superior* to what children receive in the vast majority of pub-
20 lic schools, in terms of liberal aims such as fostering critical and creative
21 thinking and a love of learning, preparing them to have an "open future,"
22 developing respect for and an inclination to engage with persons of dif-
23 ferent worldviews, and teaching them how to participate constructively
24 in the political process? And is it not less likely than public schooling to
25 lead to unhealthy peer interactions that diminish self-esteem or result in
26 life-limiting behaviors?⁴

27 One could, we believe, tell a similar story to satisfy a skeptic operating
28 from any other worldview—that is, a story depicting a homeschool that
29 incorporates all that they think is important in children's schooling.
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1 What most homeschooling parents more likely believe is that their
2 own values are objectively good, and not just for their own children. From
3 this it follows that they should view as severely deficient a great number
4 of other homeschools. Many homeschooling parents extoll the benefits
5 of being able to tailor their child's schooling to the child's unique char-
6 acteristics, but that is quite different from asserting that the values one
7 aims to promote for one's child apply to no one other than one's child.
8 The values are typically thought to be universal—for example, that every
9 child should express his or her authentic nature, or that every child should
10 learn to defer to authority. A view that value X is objectively good, rather
11 than merely subjectively important or attractive, implies the belief that
12 everyone should aim to promote that value in similar settings. And so
13 any homeschooling parent, adhering to any conception of the good, must
14 regard *some* forms of homeschooling, practiced by a substantial percent-
15 age of other homeschooling parents, as bad, precisely because they are
16 directly contrary to that parent's deeply held values, values the parent
17 believes to be objectively good and essential to children's education.

18 For example, conservative Christians presumably would deem bad a
19 homeschool in which children learn that atheism is true, that conserva-
20 tive Christians are knuckle-scraping know-nothings, that creationism is a
21 manifestation of insanity, and that it is the state's proper role to stop the
22 spread of Christianity. Or they might deem bad a homeschool in which
23 overindulgent parents who have never imposed any limitations on their
24 child are entirely unable to get the child to do any learning exercises
25 they think he or she should do; the child refuses, manipulates, watches
26 cartoons all day, and so forth. The staunchest defenders of unregulated
27 homeschooling—religious conservatives—rationally should conclude that
28 *a large percentage* of homeschooling is objectively bad, because it instills
29 what they regard as objectively bad values (e.g., moral relativism), bad at-
30 titudes (e.g., willfulness), bad habits (e.g., questioning authority), and mis-
31 information (e.g., that religion is myth, and the Bible fiction).

32 Regardless of ideological outlook, then, everyone should agree that
33 homeschooling can be good, even great, or can at least be the best choice
34 for some parents given their circumstances. But also everyone should
35 agree that for many children staying home with parents instead of going
36 to a school is bad, in the sense of depriving the children of something very
37 important, whether it be education or proper values or physical safety
38 or something else, something they could get instead by attending some
39 regular school, public or private.

1 Of course, many people believe there are moral rules or “natural laws”
2 that should govern the state’s decisions about parentage. They would say,
3 “Okay, yes, the state has maternity and paternity laws conferring legal
4 status on biological parents, but the state *must* have those laws, to respect
5 and recognize our God-given rights.” We address those contentions be-
6 low. But regardless of the reason *why* one thinks the state *ought* to confer
7 legal-parent status and legal powers, the fact remains that the state, as a
8 practical matter, *must* assign children to legal parents; the state must cre-
9 ate *legal* parent-child relationships. Absent a legal rule conferring legal-
10 parent status on them, biological parents could expect no help from the
11 police, the courts, or any other state actor should the doctor who deliv-
12 ers a baby whisk the child away to the doctor’s home or to the hands of
13 someone who offered a lot of money. The birth parents would have no
14 legal basis for complaint and would stand in no better legal position than
15 the doctor with respect to having custody of the child. Any shouts they
16 make about God-given rights or natural law would have no practical ef-
17 fect. Everyone who gives the matter a moment’s thought will therefore
18 acknowledge that it is a good thing the state decides who will be a child’s
19 legal parents. Even if the state did not do so directly by substantive rule,
20 it would have to do so indirectly by commanding what other entity (e.g., a
21 nongovernmental organization or certain private citizens) is to make such
22 decisions, or else there would be no legal recourse against someone who
23 thumbs their nose at any other entity purporting to have such authority.
24 Again, the alternative is bloody chaos. Lawlessness with respect to par-
25 entage is not something any rational person could want.

26 In connection with this inevitable state decision as to who will be a
27 child’s legal parents, the child must have some moral right as to how the
28 decision is made. A fundamental precept of modern Western legal sys-
29 tems is that every human being after birth is a distinct legal person. No
30 such human being, regardless of relative mental or other capacity, is mere
31 property of some other being who is a legal person. Further, every distinct
32 legal person stands in a direct legal relationship to the state, with rights
33 against the state and rights against all other private parties—including
34 parents—that the state protects. The pro-life movement takes this prin-
35 ciple very seriously and extends it further, to unborn children, insisting
36 that they are persons distinct from the parent carrying them and persons
37 who possess rights even before birth, rights the state should enforce by le-
38 gally prohibiting abortion, by intervening in the lives of pregnant persons
39 to the substantial degree of forbidding them from undergoing a medical

procedure. Likewise, every sane person would concede that children after birth have a right against being killed by their parents, a right the state should enforce by legally prohibiting such killing and punishing those who do it. Were the state to authorize legal parents to kill children, it would be obvious that the state was violating children's rights. The same is true with authorization of less severe harms. And if the state made parentage decisions as to newborns in complete disregard for their interest in being raised by their birth parents—for example, by assigning them to just-released convicts in the hope that this would make the convicts less likely to commit more crimes—everyone, we think, would see this as a violation of the children's rights, even if everyone also viewed it as violating a right of the birth parents. Thus, children themselves have moral rights that constrain how the state chooses legal parents for them, whether it is their first parents at the time of birth or substitute parents in cases of adoption.

In addition to choosing parents, the state must decide what content the legal-parent role will have. There must be laws dictating what powers, rights, and duties legal parents have. Again, no one would, upon reflection, want it to be otherwise. If the state anointed people as parents but then said nothing further, anyone so anointed would be in the same predicament as a biological parent in a world with no legal rules about parentage—that is, without any legal recourse against other private parties or state actors who interfere with their relationship with the child or inject themselves into the child's life uninvited. If I physically seize my neighbor's child while he is out playing in the yard, in order to give him the education I think is best, and if the state has not imbued my neighbor's status as legal parent with any legal rights, not even a legal right to physical custody, then there is nothing my neighbor can effectively do to regain custody of the child other than attempt forcible physical recapture. He cannot expect the police to help, because the police enforce laws, and if there is no law that says my neighbor shall have exclusive custody of the child, then my neighbor is out of luck. So too with efforts by outsiders to influence the child's life in ways short of physical seizure; it is only because the state bestows a legal power of exclusion on legal parents that custodial parents can prevent such private influences if they wish to do so. Unless the law infuses the legal-parent role with legal power over the child's life, the legal-parent status is meaningless in practice. No sane person wants that.

Thus, the reality is that everyone actually wants the state to involve itself intensively in all children's lives. Everyone wants the state to enact laws dictating with whom a child will have family relationships, and laws

1 empowering the persons whom the state has made a child's legal parents to
2 exert substantial control over the child's life. What people really disagree
3 about is *which* legal powers, rights, and duties the state should give persons
4 in the state-created legal-parent role, or in other words *how much* legal
5 power and practical control over children's lives the state should give par-
6 ents. Those who assert that the state should "leave parents alone" do not
7 really mean that. Quite the opposite. What they mean is that the state ought
8 to go to the extreme of conferring on parents absolute legal power and ex-
9 tensive rights and privileges with respect to children's lives—that is, powers
10 to dictate whether a child receives various benefits the state offers, rights to
11 others' not interfering in their interactions with their child, and a legal privi-
12 lege to treat the child physically and psychologically in ways that otherwise
13 would be prohibited (e.g., undressing, restraining, perhaps even hitting).
14 Likewise, when courts appoint guardians for incompetent adults, it would
15 make no sense for guardians to say the state should "leave them alone" to
16 do whatever they want with their wards; what anyone who wants complete
17 control would actually need to request is that the state confer on them ple-
18 nary legal powers over their wards, because otherwise they would have no
19 effective legal authority. This is a severe state intrusion into private life.

20 Moreover, those who ask the state to give them monopoly control over
21 the mind of a child need to give the state *reason* to do that. It is an extraordi-
22 nary thing for the state to do, to place nonautonomous persons into family
23 relationships they have not themselves chosen, and then to give the other
24 persons in the relationships tremendous power over their lives and exemp-
25 tions from the prohibitions that ordinarily constrain how one treats other
26 persons. In certain times and places, governments have also done this with
27 respect to competent adults—for example, arranged marriages and given
28 husbands extraordinary powers over wives. But today in Western society
29 we strongly reject the state's doing that with adults. We understand that the
30 state must, out of practical necessity, do it to some extent with nonautono-
31 mous persons, but we should not lose sight of the fact that it remains a pro-
32 found thing for the state to do to any private individual. The state must have
33 legitimate and compelling justification for doing it, one that fully respects
34 the personhood of the child or incompetent adult, and the state's action in
35 conferring on other persons power over the life of the child or incompetent
36 adult may not outstrip that justification and may not exceed what that justi-
37 fication supports. To do so would be a gross abuse of state power.

38 Because the state is necessarily intensely involved in children's lives,
39 then, and necessarily establishes what legal powers, rights, privileges, and

1 duties legal parents will possess, it does not make sense to think about
2 the legal regime relating to homeschooling as posing a choice between
3 regulation and nonregulation or between intervention and nonintervention.
4 The state must enact legal rules that govern parental choices and
5 behaviors relating to children's education. Abstaining is not an option.
6 For the law to say absolutely nothing about children's education would
7 *not* mean parents have complete *legal* authority to do as they wish; to the
8 contrary, it would mean that parents have no legal powers, rights, or privi-
9 leges relating to their children's education whatsoever, so they would have
10 no *legal* basis for waiving their children's statutory right to a public educa-
11 tion nor for preventing other private individuals from trying to control the
12 children's minds. What those claiming to be antiregulation are actually
13 demanding is not government noninvolvement but rather government in-
14 volvement of a particular nature—namely, aimed at empowering parents
15 to an extent that, at least with respect to children's intellectual formation,
16 is extreme. They wish the state to empower parents to keep children at
17 home regardless of what anyone else (including the children) might pre-
18 fer, to entitle parents to receive the state's assistance if anyone outside the
19 family attempts to interfere (e.g., a local teacher or minister who thinks
20 she is better able to instruct the child), and to empower parents to shield
21 children's daily experience and development from any outside observa-
22 tion. That is a monumental thing to demand from the state. Opponents
23 of school-district oversight of homeschooling might be right that it is a
24 justified demand; we consider that below. The point here is simply to rec-
25 ognize the truth about what they are demanding—extraordinary state ac-
26 tion in their favor.

27 By analogy, consider how we would characterize a legal regime that
28 treated husbands in relation to their wives the way some homeschool ad-
29 vocates want the legal system to treat parents. Imagine a state enacting
30 a statutory right for all adults to attend a state university but then also
31 legally empowering husbands to waive that right as to their wives, so that
32 a wife could not attend university if her husband objected, and also con-
33 ferring on husbands a legal privilege to forcibly keep their wives at home,
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1 6. IN ESTABLISHING SCHOOL LAWS, THE STATE ACTS AS A FIDUCIARY FOR
2 CHILDREN Our final starting assumption concerns the essential role of
3 the state in connection with legal regulation of children's lives. The state
4 has two basic types of interests relating to children's schooling, reflecting
5 the fact that the state potentially serves two roles in connection with any
6 policy making or lawmaking concerning nonautonomous persons. As a
7 general matter, the state most commonly acts in what legal theorists call
8 a "police power" role, as an agent for society collectively, promoting so-
9 cietal well-being, preventing disorder, adjudicating disputes between au-
10 tonomous persons, and so forth. In that role, the state, as agent for society
11 collectively, has an interest in today's children receiving schooling that will
12 make them law-abiding and hardworking adults who apply themselves to
13 socially useful endeavors. We saw the creation of common schools justifi-
14 fied principally in terms of the benefits to society it would produce as the
15 economy began to demand more advanced learning, and so as an exercise
16 of the state's police power.

17 But the state in Western society has for centuries also taken upon it-
18 self what legal theorists call a "parens patriae" role, acting as the ultimate
19 guardian over the welfare of individuals who are not autonomous and who
20 therefore are highly vulnerable to abuse and exploitation at the hands of
21 private parties. In that role, the state has an interest in ensuring each indi-
22 vidual child an education conducive to his or her own immediate and long-
23 term well-being. For example, when the Pennsylvania Supreme Court in
24 *Commonwealth v. Fisher* (1905) justified removal of a child from parental
25 custody so that the child would not "end in maturer years in public pun-
26 ishment and disgrace," it was invoking the state's parens patriae duty to
27 protect children from deficient parenting; the state was "compelled to take
28 the place of the father."¹⁸ Likewise, in its earlier 1839 decision in *Crouse*,
29 the same court had asked rhetorically, "May not the natural parents, when
30 unequal to the task of education, or unworthy of it, be superseded by the
31 parens patriae, or common guardian of the community?"¹⁹ In the police-
32 power role, the state is a fiduciary for society collectively. In the parens
33 patriae role, the state is a fiduciary for the dependent individual.²⁰

34 The state's dual role could lead to conflicting policy conclusions. For ex-
35 ample, in deciding what course of action doctors should take with a per-
36 son who has fallen into a persistent vegetative state, the state might best
37 fulfill its police-power role by favoring quick termination of life-sustaining
38 treatment because this will reduce medical costs that might benefit no one,
39 or because this will ease the suffering of family members while seemingly

depriving the patient of little (i.e., just the remote possibility of recovery). But the state might best fulfill its *parens patriae* role by maintaining life support, either because the person asked for this in an advance directive or because the state assumes that this is what most persons would choose if they were to execute an advance directive. In the context of education, there could be many such conflicts between roles. In its police-power role, the state might, at least in some localities, impose a curriculum aimed at producing a lot of docile future workers who will fill a pressing societal need (e.g., miners). In its *parens patriae* role, in contrast, the state would design a curriculum aimed at giving every child a flourishing life, so each child is able to pursue careers or other endeavors consistent with his or her talents and abilities as well as have an enjoyable time while in school. There can be overlap between these two aims, of course, given that children will have a better chance at finding jobs upon reaching adulthood if their education has been mindful of likely future labor-market needs. But the two approaches are likely to lead to significantly differing schooling experiences for children.

An important question that therefore arises in policy making about child-rearing, though few people recognize it, is how the state should resolve any such conflict when making choices about the lives of persons presumed unable to adequately choose for themselves. Most theorists who perceive a potential conflict of interests between a child and a society collectively, or between a child and his or her parents, simply assume, implicitly or explicitly, that the state should take all interests into account and, when conflict arises, balance them—that is, should act in a police-power capacity. This assumption is usually false.

First, even when the state acts in a police-power role, it is not the case that it must weigh the interests of every potentially affected person in making policy decisions. As noted earlier, sometimes rights trump others' interests, rendering the latter irrelevant. For example, though many people care greatly about abortion and would be happier if the state prohibited it, the state need not balance the happiness interest of those people against the rights of pregnant persons in order to arrive at a correct legal regime. Pro-lifers have a free-speech right to protest abortion, because every individual's interest in freedom of self-expression is thought strong and deserving protection, but they have no right to make their happiness *per se* part of the policy or legal analysis of the permissibility of abortion. In turn, the fact that distant pro-choice onlookers find the pro-lifers' demonstrations annoying should be irrelevant to the policy and legal question

1 of whether the state should tolerate such demonstrations; the distant on-
2 lookers' interests are not part of the legal equation and, at least within a
3 deontological ethical framework, are also off the moral table.

4 Second, when the state does put on its *parens patriae* hat, it must take
5 off its police-power hat. As a practical matter, it is impossible to serve
6 in both roles simultaneously. Both roles are fiduciary roles, and what it
7 means to serve as a fiduciary is to act with undivided loyalty as an agent
8 for a group or for an individual person. A fiduciary for an individual must
9 stand in the place of the person and make decisions in behalf of that per-
10 son exclusively in the way the person presumably would do for himself
11 or herself if able. In the absence of a contrary, autonomous choice by the
12 principal, the law presumes a person would make decisions for himself or
13 herself based only on self-interest. Thus, the law requires fiduciaries to
14 have a single-minded focus on the welfare of their client and not serve as
15 fiduciary also for others with conflicting interests. Trustees are required
16 to act exclusively for the benefit of trust beneficiaries and are not allowed
17 to make decisions for the trust with the aim of serving their own inter-
18 ests or the interests of other persons who are not beneficiaries. Similarly,
19 lawyers making decisions in behalf of their clients, whether the clients are
20 autonomous persons or nonautonomous, have strict duties of loyalty to
21 their clients; they may not aim to serve the interests of others while pur-
22 porting to represent their clients. Because a fiduciary must be singularly
23 focused on promoting the interests of the client, the fiduciary cannot also
24 serve as a fiduciary for another client that has conflicting interests. Thus,
25 lawyers must do a "conflicts check" before taking on any new client. The
26 state similarly cannot serve two principals at once, society as a whole and a
27 nonautonomous individual, when there is any potential conflict of interest
28 between the two, and there clearly can be such conflict between society as
29 a whole and individual children in connection with schooling, as explained
30 above.

31 The important question, then, is *when* the state must put on the *parens*
32 *patriae* hat and, accordingly, take off its police-power hat. It does not fol-
33 low from the fact that the state does sometimes act in a *parens patriae*
34 role and the fact that children need the state to protect their interests
35 that the state is always acting in a *parens patriae* role with respect to ev-
36 ery decision it makes impacting minors. The state certainly may impose
37 on minors' behavior limits that are intended to protect the interests of
38 other people—for example, prohibitions on driving before a particular
39 age, on committing acts of violence, and so forth. In deciding whether

children may drive, the state properly acts in a police-power role, balancing whatever interests children might have that count in favor of their driving against the interests of the rest of society that count against their driving. So when should the state be viewed as acting in a fiduciary capacity for an individual child rather than as an agent for society collectively?

The most sensible answer is that the state must see its role as purely a *parens patriae* one, acting as an agent for a nonautonomous individual, when it presumes to make for a nonautonomous person decisions of a type that autonomous persons are generally entitled to make themselves and solely on the basis of their own interests—that is, self-determining decisions as to central aspects of one's own life that threaten no harm (wrongful injury) to others. In those situations, there is no warrant for the state's involvement in the decision at all, *except for* the nonautonomous person's need for an agent to act in their behalf.

For example, as a general matter autonomous persons are entitled to decide if they will receive or decline recommended medical treatment. The state cannot force a competent adult to undergo surgery for a heart problem. If the state makes a medical decision for an incompetent person, that person's lack of competence is the only legitimate reason for its doing so, and the state's power goes only as far as that justification for having it. Thus, the state must attempt to instantiate what the incompetent person would choose for himself or herself if competent, and may not take into consideration collective societal interests or the wishes of other individuals. In the absence of a prior competent direction from the person or clear evidence of the person's values, the state must act on the basis of what it supposes to be the person's best interests (though it may certainly solicit input from the person's family or friends in doing so). Thus, the United States Supreme Court, in *Cruzan v. Director, Missouri Dept. of Health*,²¹ rejected a claim by parents of a woman in a persistent vegetative state that they had a right to decide whether their daughter would continue to receive life support, holding that only the patient herself had any rights in the matter and that those rights included effectuation of her values or supposed best interests. Similarly, if the state has custody of (e.g., has in foster care) a three-year-old with a heart defect, the state's decision as to whether the child will undergo surgery to correct the defect must be based exclusively on what is in the child's best interests as the state perceives them. That undergoing the surgery would give pediatric surgeons more practice and so improve medical care in the society is not a legitimate consideration; if the surgery has no chance of helping the child and would cause her great suffering, the state

1 should not order it, period. In contrast, competent adults are *not* deemed
 2 entitled to decide for themselves whether they will strike another person,
 3 and so when the state decides the rules for children's striking others it need
 4 not don the *parens patriae* hat but rather may wear the police-power hat
 5 in deciding what limits to impose on children's conduct toward others and
 6 what penalties it will use to enforce those limits.

7 Schooling is like undergoing surgery and unlike hitting another person.
 8 We competent adults are absolutely entitled to decide what schooling, as
 9 among the opportunities practically available to us, we will receive, if any.
 10 And we are entitled to make that decision based solely on what we believe
 11 to be in our best interests, even if the state offers some form of schooling
 12 to us at its own expense. (And allocation of state funds among types of
 13 schooling or between schooling and other public purposes is a separate
 14 matter, one to which the state's police-power role applies.) Thus, when
 15 the state steps into the shoes of children to make schooling decisions for
 16 them—that is, to decide which forms of schooling parents may choose
 17 for them (assuming, as we do, that no single form alone is best for all)—it
 18 may do so only as a fiduciary for the children, singularly focused on what
 19 is in their best interests. Giving content to that much-contested concept of
 20 best interests is the task of the next chapter.

21
 22 **SUMMARY** The analysis of state policy regarding homeschooling will pro-
 23 ceed from these assumptions:

- 24 1. Children are persons.
- 25 2. No one has a “right” to control the life of another person.
- 26 3. The child has the greatest interests at stake in connection with schooling.
- 27 4. The state must have the ultimate authority to determine what children's inter-
 28 ests are.
- 29 5. The state may not act on the basis of religious beliefs.
- 30 6. In establishing laws about schooling, the state acts as a fiduciary for children.

31 **Notes**

- 32 1. Lupu, “Home Education, Religious Liberty.”
- 33 2. For a description and critique of these various perspectives, see James G.
 34 Dwyer, “Changing the Conversation about Children's Education,” in *NOMOS*
 35 *XLIII: Moral and Political Education*, ed. Stephen Macedo and Yael Tamir (New
 36 York: New York University Press, 2002).

There is no clear minimum number of relationships one must have. We can say with great confidence, however, that one type of relationship is crucial to healthy development—namely, a secure attachment to caregivers. We address that type of relationship in the subsection on family life below. But any developmental psychologist would say that children must also have for their healthy development horizontal relationships with peers, in addition to the parent-child attachment relationship. Through such horizontal relationships, children learn to interact as equals, to negotiate over competing preferences, to make choices for themselves, and to bond in a way that is distinctive to nonhierarchical and voluntary relationships.⁸

Much of this children can experience with just siblings and/or a few friends. One need not have as many real friends as the typical social-media user has Facebook friends or Twitter followers in order to learn how to cooperate with equals, to assert one's own preferences, and to love. There is no reason to think these experiences were unavailable to persons living in small, isolated communities in colonial New England or on the prairie in the nineteenth century.

To become prepared to live in the larger world today, which the state might suppose is in every child's interest, what might be more important than the number of personal relationships is the diversity of them and that some are voluntary. A child's relationships with siblings, all of them living together in the small community of the family and under the same parental authority, without the possibility of exit, are insufficient by themselves to prepare the child to interact with other citizens who can choose not to associate and with whom the only common authority is the state, let alone with fellow citizens who come from dramatically different ideological perspectives. Efforts any states have made to assimilate all newcomers and maintain a homogeneous population have largely failed; the challenges of civic life in today's highly diversified America are different from what they were in the colonial era. One need not interact closely during childhood with people carrying out every other way of life or belief system in order to be well prepared for adult life in mainstream society, but the experience of confronting substantial difference and having to get along with others in that situation should be repeated a significant number of times during the stage of life when children still have the security of parental care to retreat to. The "getting along with others" lesson of social interaction is a particular concern for many critics of homeschooling because they perceive that certain religious groups—groups that appear to predominate

1 in the homeschooling population—foster in children attitudes of hostility
2 and uncompromising adamancy in dealing with persons who hold a dif-
3 ferent conception of the good.⁹ Most such critics worry only about the
4 effect this can have on society generally (i.e., on them and their children),
5 but there is also a deleterious effect on any children who acquire those
6 attitudes; it impairs their ability to engage positively with a huge swath of
7 their nation's population. That concern is somewhat alleviated by the rec-
8 ognition that homeschooling ideologues and conservative Christians are
9 hardly a monolithic bunch; there is significant diversity of belief among
10 them, and so children are likely to develop some skill at getting along with
11 those who disagree even if their socializing is limited to other conservative
12 Christians.¹⁰

13 Thus, for children, relationships with peers outside the family are im-
14 portant in part because of their mostly voluntary nature. Unlike siblings,
15 schoolmates are more or less free to refuse a relationship, so children in
16 regular schools learn that if they want to maintain a normal social exist-
17 tence they must cooperate, compromise, and conform to shared notions
18 of fairness and civility. At a time when ideological division in America
19 is intense and public civility appears severely lacking, the current gen-
20 eration of children also has a strong collective interest in acquiring social
21 virtues that will enable them to coexist more peaceably and respectfully.
22 Diversity in one's relationships would seem also conducive to better self-
23 understanding and to shaping of one's self-identity in a way most consis-
24 tent with one's inner nature, which might diverge from that of parents
25 and of siblings. All of these interests tied to social experience increase as
26 a child gets older, so a small social universe might be adequate in early
27 childhood, but adolescents today need to interact with a much larger
28 number and greater variety of people.

29 The networking that a large portion of homeschooling parents do can
30 *in theory* provide this good of social interaction. To what extent it does so
31 in practice depends very much on the extent and nature of the network-
32 ing. If parents carefully limit the network to families who conform strictly
33 to a narrow worldview, the child's interactions with peers from other fami-
34 lies would be unlikely to provide opportunity for confronting meaningful
35 difference in outlook. It is true that even within such a network, there is
36 likely to be divergence of opinion on some matters, such as small doctrinal
37 points, specific public policies that do not come too close to fundamental
38 values, optimal household routine, or best curriculum publisher. The chil-
39 dren would therefore get some experience with confronting difference,

1 thinking about why they adhere to their particular opinion, and seeing
2 that reasonable people can disagree and remain mutually respectful. But
3 such a narrow network might not prepare children to go forth as adults
4 into mainstream society and successfully navigate the challenges to living,
5 studying, and working in a dramatically heterogeneous environment. In
6 contrast, if parents actively seek out families who differ from their own in
7 ideology and culture, it might well be possible for children to get a very
8 robust experience of heterogeneity through a homeschooling network.

9 With respect to the need to develop an ability to cooperate, compro-
10 mise, and conform to norms among peers in voluntary relationships, the
11 ability of homeschool networking to satisfy that need would seem to de-
12 pend on whether it allows children substantial time together to interact
13 freely and without close adult supervision. If the networking consists
14 solely of meeting once per week for an hour of special instruction, or of
15 socializing that is closely monitored by parents, it cannot suffice for this
16 purpose.

17 Another aspect of successful civic life is the ability to advocate for one's
18 interests or positions. This can at times require the ability to cooperate and
19 compromise with people who sharply disagree, but homeschooling advoc-
20 ates appear to have had great success in combatting regulation without
21 calling on such abilities, though perhaps only because there is little or no
22 pushback from anyone who wants more robust regulation. Many in the
23 ideologue camp of homeschoolers make a deliberate effort to train chil-
24 dren to take up this mantle one day. This entails a more robust civics edu-
25 cation than one will find in most public schools—for example, the Gen-
26 eration Joshua program that HSLDA runs.¹¹ The adversarial approach
27 many ideologue homeschoolers instill, however, is likely to perpetuate and
28 exacerbate the ideological divisiveness and incivility now plaguing social
29 discourse in America and to leave homeschooled persons with a lifelong
30 sense of being embattled and under attack, which is not conducive to hap-
31 piness or great academic achievement or extensive career possibilities.
32 They admirably aim to instill strong character in children, but the char-
33 acter is that of a religious soldier rather than that of a citizen, a brother
34 or sister to all fellow citizens. Civics training can amount to “ideological
35 amplification” if it consists only of learning how to defend and advance un-
36 questionable views of one's belief community.¹² Again, though, we should
37 acknowledge when a perceived problem is not limited to homeschoolers
38 or to religious conservatives; one can point to numerous liberal groups and
39 individuals that display absolutist animosity toward anyone who disagrees

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4 In this chapter, we come at the legal aspect of homeschooling
5 from a different direction, one that puts a burden of persuasion on the
6 state rather than the parents. The starting point for this approach is not
7 at parents' rights, however, as it is for most homeschool advocates and for
8 political theorists we have termed "parentalists." We explained in chapter 5
9 why the concept of parental entitlement to control a child's life is anomalous,
10 disrespectful of a child's personhood, and without rational support
11 in any general moral principles. Our approach begins instead with children's
12 rights, consistent with our starting assumptions that children are
13 persons, capable of possessing rights, and have the greatest interests at
14 stake in connection with their schooling and their upbringing more generally.
15 Several rights of children are relevant and will be considered at
16 some point in the analysis to follow. Which right one begins with is not so
17 important, we think, so long as all pertinent ones receive consideration. It
18 can be illuminating to highlight the unfamiliar, and so we begin in a place
19 that might surprise readers, even though once expressed it seems to be a
20 natural starting point. One children's right that protects what is arguably
21 the most important good on the list of goods presented in chapter 6, yet
22 generally goes unrecognized in debates over homeschooling, would impose
23 on the state the burden of justifying its compelling children to leave
24 their homes to be schooled.

25 We explained in chapter 5 that the state creates *legal* parent-child relationships
26 and thereby effectively also creates *social* parent-child relationships. This
27 parent-child relationship and the family life that grows from it are the center
28 of a young child's world. When healthy, these relationships provide stability,
29 security, love, and comfort. They are the starting point for identity formation,
30 self-understanding, and interaction with the outside world. First and foremost,
31 children need protection from unwarranted interference with their home and
32 family life. Many homeschoolers emphasize this aspect of child well-being,
33 and rightly so. Educational deprivation is a very bad thing, but even worse
34 for a child is to lack a secure and nurturing home life with loving parents.
35 Parents who comply with compulsory education laws by sending their children
36 to regular school might also perceive a trade-off with family closeness, and
37 probably many would complain about the impact on their children's family
38 relationships were the state to greatly increase the amount of time children
39 must spend

in school each year (e.g., by imposing longer days, six-day school weeks, and attendance throughout the summer).

We therefore suggest, as a default legal rule and starting point for normative analysis of homeschooling, that a child has a right against the state's forcing him or her to leave home. Each of us adults has a constitutionally protected liberty to remain home, to not be forced to leave, and that right, though generally taken for granted, is extremely important and valuable for us. There is no reason to deny that right and that constitutional protection to children; indeed, they arguably have a stronger prima facie right to remain undisturbed in their homes than adults do, because important aspects of their personal development naturally occur within the home environment and because they are more vulnerable. This is so even if there are especially strong countervailing interests—that is, greater reason to override the right—in the case of children. Justifications for infringing a right are conceptually distinct from the nature and prima facie strength of the right. Children are more dependent on family relationships than we adults are, and home is where families can be together without interference. In the normal case, that is where children feel most secure. As with other rights young children possess, parents are appropriate persons to represent children and assert this right of children against the state.¹

From this perspective, the state would carry a burden of justifying a law that orders children to leave their homes for any reason, and certainly so with a law requiring children to leave home for seven or more hours at a stretch, day after day, to be placed into the custody of adults who are not their parents. Like parentage rules based entirely on biology, we tend to think of compulsory school attendance as natural and in no need of defense, simply because it has become so familiar, but it too is actually an extraordinary thing for the state to do to people and requires strong justification. If we adults were inclined and practically able to stay home all the time, the state would need compelling reason to order us to leave for many hours each day to undergo training. Likewise, people would be shocked if a US state suddenly decided to mandate school attendance for three- and four-year-olds and would demand that the state defend this forced removal of children from their homes, because compulsory schooling at that age is unfamiliar to us.

So, suppose a state passed a compulsory education law requiring attendance at a state-licensed school, public or private, with requirements for licensure that effectively precluded homeschooling. And suppose some

1 parents filed a petition in court, as agents for their children, requesting an
2 injunction against enforcement of that law, asserting that it infringes *their*
3 *children's* Fourteenth Amendment due process clause right against state
4 interference in their liberty. Even when they accept that children possess
5 rights of the same type as adults possess, courts sometimes treat those
6 rights as weaker, in part because of children's lesser decision-making ca-
7 pacities. But let us suppose courts would treat the children's right asserted
8 in this lawsuit as equally as strong as an adult's right not to be forced to
9 leave home to spend many hours in some state-licensed training facility,
10 because of children's great interest in protection of family relationships.
11 This would likely cause the courts to apply a heightened form of scrutiny
12 that puts a heavy burden of justification on the state, thus generating a
13 normative framework quite consistent with the way homeschoolers gener-
14 ally view the question of state regulation—that is, by presuming that such
15 state action is wrong and demanding to know on what legitimate basis the
16 state dares impose such a law on private citizens.

17 Taking this approach to normative analysis of homeschooling illustrates
18 why supposedly child-welfare-based justifications for parents' rights—that
19 is, defenses of parental entitlement that rest on a claim that it is good for
20 children that their parents have certain rights—are unsuccessful. If the ul-
21 timate justification for a right is the welfare of a child, then logically the
22 right should belong to the child, not to someone else. Ascribing it to par-
23 ents just muddles analysis. It misdirects attention to the parents' interests
24 and desires. Then children's interests, paradoxically, get put on the other
25 side of the equation, as a component of the state's interests, measured to
26 determine whether they are great enough to override parental entitlement.
27 It is simply nonsensical. If homeschooling advocates believe the state's em-
28 powerment of parents to choose homeschooling for children is appropriate
29 because that is best for children, then they should argue that *children* have
30 a right to this—that is, to the state's so empowering their caregivers.

31 Thus, we suppose parents first assert that their children have a right to
32 remain in the home. To begin instead with an assertion that children have
33 a right to be homeschooled per se, which presumably would have to rest on
34 a factual claim that homeschooling is better for children than any available
35 regular school alternative, would put parents in the position of first hav-
36 ing to present evidence to support this factual claim. One cannot simply
37 assert that one's children have a right to whatever one happens to prefer
38 for them in any realm of their lives (e.g., to eat only lettuce) and expect a
39 court to accept that assertion and recognize the supposed right. One must

demonstrate why one’s children have a right to something, which typically will entail showing, at a minimum, that it is good for them. In some circumstances, it might be easy for parents to show homeschooling is good for their children relative to the available alternatives—for example, where the only practically available regular schools are patently horrible. But in most of society, laying a factual foundation for the existence of such a right would be quite difficult for parents because a court would find that local regular schools provide an adequate, perhaps even good, education. A right presumptively to stay at home is a stronger place to begin, we believe, because it is a well-established, universal, incontrovertible right that all persons have, given the presumed value for everyone of being undisturbed in their home. This right should suffice to put the burden of justification for compulsory regular-school attendance on the state, a burden of demonstrating that the presumed value does not pertain in some particular home (e.g., because of abuse) or is generally outweighed by some other value served by forcing persons to leave home (e.g., their educational needs).

The analysis to follow therefore takes the form of suggesting possible justifications that the state might offer for requiring children to leave their homes for twelve hundred or more hours each year, and subjecting those justifications to careful scrutiny. In constitutional terms, the state would have to show that the law it seeks to impose is necessary to serve a compelling interest. The state must (a) identify a compelling interest such a law serves, and (b) show it could not serve that interest sufficiently well by some other means that entails a lesser infringement or no infringement of children’s liberty interest, of children’s right to stay home.

II. Interests That Could Justify Forcing Children to Leave Home

Identifying compelling interests that *might* justify requiring children to leave home for school is the easy part of the analysis. We listed in the previous chapter several basic goods for children, some of which they cannot acquire except by receiving education somewhere. Children’s needs for cognitive development, knowledge, social interaction, and healthy identity formation are all interests to which critics of homeschooling point as justifications for legally mandating school attendance by all, and many would even say every child has a *right* to each of these things—a moral right, a natural right, and perhaps a constitutional right. A corollary to the

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1 right to stay home would be a right to leave home if either the home is a
2 threatening place, as in cases of abuse, or leaving is necessary in order to
3 experience important aspects of well-being such as intellectual stimula-
4 tion and connection with other human beings.

5 Courts uniformly treat children's welfare, including those aspects tied
6 to schooling, as a compelling state interest that can justify attaching all
7 sorts of legal duties to the role of legal parent, and no one seriously dis-
8 puts the importance of securing such basic goods for children.² Home-
9 school advocates do not deny that children's cognitive and intellectual de-
10 velopment and acquisition of knowledge are of great importance; to the
11 contrary, this is a fundamental premise of their advocacy, because their
12 central claim is that homeschooling is a superior way of generating these
13 goods.

14 Other interests that critics of homeschooling sometimes assert, though,
15 might be insufficient to justify infringing children's liberty—for example,
16 collective societal interests such as a stronger economy or a more toler-
17 ant citizenry. These interests might not suffice to justify forcing anyone to
18 leave home for over a thousand hours of training per year. If they were
19 sufficient reason for such compulsion as to anyone, we would suggest the
20 state first force adults to do it, and only if that were not enough to serve
21 the collective interest then perhaps the state could force children out of
22 their homes. Children are more vulnerable and less able to participate in
23 the public debates that produce such policies. If the state is going to treat
24 anyone instrumentally for the sake of collective aims, one might suppose,
25 it should be competent adults. Probably most readers will think the state
26 should *not* treat *them* instrumentally in such a way, in which case they
27 should say the same about children, absent some rational demonstration
28 that it is more appropriate to treat children instrumentally to serve collec-
29 tive aims than it is to treat adults that way.

30 As explained in chapter 5, as to aspects of life we treat as matters of
31 self-determination for adults, the state may presume to control them for
32 children only pursuant to its *parens patriae* authority, stepping into the
33 shoes of individual children and deciding in their behalf in a manner re-
34 sembling as much as possible the self-determining decision-making of
35 adults. That means laws requiring schooling of some kind for children are
36 justifiable only on *parens patriae* child-welfare grounds. The state must be
37 able to plausibly contend that any child would, if able, endorse a compul-
38 sory schooling law as in his or her individual best interests, and therefore
39 as fully respectful of his or her personhood. Assuming the right not to

be forced to leave home is a fairly strong one, the state would need to show that compulsory schooling outside the home is *necessary* to secure certain important goods for a child. Identifying children's interests is, as just noted, easy. And some we might view as giving rise to children's rights, such as a right to an adequate education and a right to socialize outside the family. The truly challenging part is showing that regular-school attendance is necessary to serve those interests or, conversely, that the state's empowering parents to deny their child a regular-school education necessarily thwarts those interests.

If it turns out that the state cannot justify compulsory attendance at a regular school as necessary to ensure basic goods for children, and so it must permit homeschooling, the further question will arise as to whether the state may or must oversee and impose requirements for homeschooling. It is less clear that there is any basic individual right pertaining to that latter question. Whereas all persons have a fundamental-liberty interest in remaining in their homes, it is less clear that one has a fundamental-liberty interest in other persons' (in this case, parents) not being restricted in how they treat one. For example, is there any plausibility to a claim that a person who is married has a right against the state's restricting his or her spouse's conduct toward him or her by means of domestic-violence prohibitions? That would be a very odd sort of right, not entailed by any of the usual bases for ascribing rights to people. The regulation question, should we conclude that states must permit homeschooling, would essentially be whether the state may or must constrain parents' freedom in how they conduct schooling within the home, or, in other words, whether the state may or must condition the empowerment of parents on their acceptance of certain accountability measures. No one really disputes that legal parenthood is and should be conditional; what people disagree about is what the conditions should be, with some champions of parental entitlement insisting that the conditions should be the barest minimum—for example, that one must only avoid severe physical or sexual abuse of the child. As a matter of constitutional law, the answer regarding state oversight of education is clear; the Supreme Court decisions described in chapter 3 affirmed over and over again the power of the state to regulate all schools; the state could prescribe a detailed curriculum, establish qualifications for teachers, mandate periodic assessment, and require periodic reporting to school-district officials. But we are focused here primarily on moral rights, which can provide a basis for supporting or criticizing the constitutional doctrine.

1 From the parents' standpoint, homeschooling is an "other-determining"
2 practice, not a self-determining one, so it is not a matter of moral right for
3 the parents but rather a privilege. The founding generation was correct in
4 viewing parenthood this way; as John Locke expressed it, parental power
5 "so little belongs to the father by any peculiar right of nature, but only as
6 he is guardian of his children."³ It should be a legal privilege parents enjoy
7 only if they commit to meeting children's needs as the state sees them, just
8 as a guardian for an incompetent adult enjoys the privilege of controlling
9 the ward's life only by promising faithfully to serve the ward's interests as
10 the state sees them. Put differently, a law compelling attendance at a regu-
11 lar school fails the necessity prong of our constitutional test *only if* parents
12 in fact provide the other education-related goods to a child at home. If par-
13 ticular parents are unable or unwilling to provide those other goods, then
14 attendance at a regular school is in fact necessary to serve the state's com-
15 pelling interest in ensuring those basic goods for the child of those parents.

16 From the children's standpoint, it is not clear they have any right *against*
17 their parents' being constrained per se in the homeschooling methods
18 that are used. Extreme forms of state oversight and constraint of parents
19 (e.g., posting a state employee in the home around the clock and watching
20 the parents' every move) could undermine the parents' ability to care for
21 a child, by making them feel miserable and harassed and incapable. But
22 the types of homeschool regulation that states have attempted and that
23 might suffice to ensure children's developmental needs are met do not
24 come anywhere close to such extremes.

25 Conversely, it seems children do have a right *in favor of* state oversight
26 and legal constraint on parental freedom with respect to homeschooling,
27 if the state must in fact permit homeschooling. We might view this as a
28 basic (as opposed to equal-treatment) right: the state, having placed chil-
29 dren in the custody and control of certain persons, and implicitly reaffirm-
30 ing that decision every day by continuing to confer legal-parent status and
31 custody on those persons, bears an ongoing obligation to the children to
32 ensure that those custodians meet the children's basic needs and respect
33 the children's natural or moral rights—the rights to learn, explore, as-
34 sociate with others, think independently, ask questions, respectfully ex-
35 press opinions, reach their own conclusions on matters of faith, and more.
36 Otherwise the state would have no justification for continually renewing
37 the adults' legal status as parents and their state-protected custody of the
38 children. Similarly, the state bears an obligation to incompetent adults
39 whom it has placed under guardianship to make sure the guardians are

not neglecting the wards' basic needs or violating the wards' rights. Knowing, as it does, that some parents are unwilling or unable to provide what the state views as children's basic needs, the state presumptively would have to exclude those parents from homeschooling or somehow induce them to comply with the state's expectations for children's schooling.

In addition, and more straightforwardly, children have an equality right against the state; the state must provide to all equally the government benefit of a guarantee of adequate education. To declare a right to education, as many states do in their constitutions or statutes, but then implicitly say, "Except for those children whose parents want to deny it to them," constitutes a prima facie violation of children's equality right, which is embodied in the equal protection clause of state and federal constitutions.⁴ It is so just as much as if the state declared a right against physical abuse but then added the qualification "Except those whose parents belong to church X, Y, or Z, because those churches endorse what we regard as abuse." Or as if the state declared a general right of adults against domestic violence but then added, "Except women whose husbands don't want them to have that legal benefit."

III. Is Regular School Attendance Necessary to Protect Those Interests of Children?

This question, then, is the crux of the policy analysis. There is little or no disagreement that children have developmental needs that necessitate some form of schooling. There can be no rational disagreement that the state, so long as it presumes to place children under the legal custody and state-protected control of particular private caregivers, to the exclusion of other potential caregivers, bears a responsibility to ensure children's basic needs, as the state understands them, are met. When it selects people to serve as legal parents, whether those persons are biological parents or not, the state must insist that they accept that the child will receive an education that the state deems adequate. If they are not willing to accept that, then the state should choose other parents for the child from among the millions of people wishing to adopt a child, because receiving an education is of fundamental importance to a child's life.

Moreover, the state cannot be agnostic about the content of children's temporal welfare, else it would have no moral justification for placing them into legal family relationships in the first place.

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As to at least some children, perhaps most of those now being homeschooled, the state lacks sufficient justification for infringing their moral and constitutional right to remain in their homes with their families. It is not the least restrictive means of promoting the state's compelling interest in ensuring children an adequate education, because the state does have the capacity to ensure homeschooled children receive an adequate education.

But the state must exercise this capacity; it owes a moral (and arguably constitutional) duty to children to begin overseeing private schooling of all kinds, including homeschooling, as well as public schools and doing what it reasonably can to eliminate inadequate or harmful schooling of all kinds. It cannot justify giving parents the power to waive children's state-law right to a public-school education unless and until it institutes effective measures to ensure parents' exercise of such power does not result in serious educational deprivation or other developmental deficits or harms.

B. On What Conditions?

That leaves the final question of what conditions the state should attach to its legally empowering parents to choose homeschooling for a child. Homeschool advocates say the answer is none. But their argument for this rests in important part on the supposition about percentages that we showed above to be entirely groundless, disingenuous, and irresponsible. Their assertion that the existence of a few bad homeschools is not sufficient reason to monitor or restrict or burden all homeschooling parents suffers not only from a lack of evidence as to what the vast majority of homeschools are like and from ignoring evidence that permissive homeschooling laws facilitate child labor, maltreatment, and complete neglect of some children's education, but also from a mischaracterization of state oversight as presenting an intervention versus nonintervention choice and a reliance on the bankrupt notion of parental entitlement.

An adequate regulatory regime should entail a meaningful initial qualification process, subsequent periodic review, and remedial action when homeschooling proves deficient.

There is a tendency to think education begins only at age five or six, whatever a state has set as the age when children must attend some sort of school. But, of course, children start learning from early infancy, and competent parents do a great deal of teaching at home and in the community before a child reaches “school age.” The state, in its *parens patriae* role as agent for the child, should expect that parents who indicate a desire to homeschool their child can show that they have already been promoting the child’s cognitive development, social and communication skills, literacy and numeracy, and knowledge. In effect, this would treat the time before the child reaches school age as “preschool time” and would treat the parents as the preschool teachers. This would test whether the parents are competent at that early stage when teaching might be easier in some ways than it will be in later years, both because the skills little children should be acquiring are relatively basic and because there is a wealth of how-to information and enrichment programs (e.g., at local libraries) available to parents of preschoolers.

This initial assessment should include an evaluation of a child’s native abilities (e.g., an IQ test), so that achievement can be measured on that basis. It would not make sense to fault a parent for a child’s performing below average if the child has a genetically created learning disability that makes higher achievement impossible. But if the school district assesses a child who has just reached school age and finds that he or she is already lagging developmentally well behind the level of which he or she is capable, that should be as clear an indication as any that the parent is not competent to homeschool. If, on the other hand, the school district finds that a child is at or above the expected level, it should feel sufficiently confident that the child’s parents are capable of homeschooling, at least provisionally until the first assessment of academic progress beyond this baseline is conducted. (One necessary caveat is that, because IQ tests measure a developing ability, not a fixed, genetically determined ability, a low IQ score should also trigger further evaluation to diagnose the cause of slow development.)

Once this approach were adopted, all parents would be on notice as to what they must do in order to qualify to be homeschoolers; they must engage in preschool home instruction and succeed sufficiently at it. When parents first apply to homeschool an initial assessment of a child should occur anyway in order to identify any learning disabilities of which parents might be unaware and to ensure the child is not suffering from physical maltreatment.

1 With respect to parents who decide to begin homeschooling after a
2 child has already attended a regular school for one or more years—for
3 example, a child who is kindergarten age but has had substantial preschool
4 experience outside the home, or a preadolescent whose parents want to
5 spare him or her from the notorious travails of middle school—there is
6 also a way for parents to demonstrate teaching aptitude in advance. Par-
7 ents could meet with school-district officials in the spring before the school
8 year in which they wish to commence homeschooling, accompanied by the
9 child, and propose a modest course of summer study (perhaps just one or
10 two subjects) that can serve as a basis for showing-by-doing that they are
11 capable of adequate home instruction. They could present the results of
12 the summer instruction before the next school year begins and receive ap-
13 proval if the results are sufficient. A socialization component could also be
14 included; parents could be required to present at the end of the summer
15 evidence that the children have participated during the summer in a sig-
16 nificant number of activities or programs with children outside the family,
17 such as a sports team, a scouts group, or a sleepaway camp.

18 In addition to excluding parents whose prior instruction of their chil-
19 dren has been substantially deficient, states must guard against home-
20 schooling's serving to hide abuse in the home. Children have a right against
21 the state's placing them in legal parent-child relationships where the par-
22 ents are legally empowered to keep them secluded from all outside ob-
23 servation; that is simply too dangerous a thing for the state to do to a
24 child. One thing the state does in many contexts to prevent child abuse is
25 a background check on potential custodians; it does this when consider-
26 ing applications for adoption or for many jobs involving direct contact
27 with children. When a parent signals a desire to homeschool, the school
28 district or some other state agency should consult state databases to see
29 whether any household member has any relevant criminal history (i.e.,
30 something that might suggest a danger to children) or any civil record of
31 child maltreatment. Given the motivation abusive parents (and abusive
32 intimate partners of parents) have to keep maltreated children away from
33 outsiders' observation, the state should be extremely wary of any parents
34 with an official record of founded child maltreatment or felony convic-
35 tions purporting to homeschool a child.¹⁶ HSLDA characterizes criminal-
36 background checks as “draconian,” but in reality they are no imposition
37 on nonabusive homeschoolers. Such information is already in state da-
38 tabases, so school officials simply need for parents seeking approval to
39 homeschool to provide a list of all household members.

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The most straightforward form of ongoing oversight is a reliable periodic assessment of each child's educational progress and physical and psychological well-being. This can be accomplished by meetings, perhaps twice yearly, between a family and someone who is properly trained to conduct educational assessments and who is employed by the local school district. Ideally, these assessors would be people who have themselves homeschooled successfully, so that they are both supportive of homeschooling and sufficiently knowledgeable about its particular advantages and challenges to provide constructive feedback. But it might be difficult in some communities to hire such people. An assessor could review a portfolio of the student's work brought in by the student or parents, interview the child without the parents present, and ask the child to perform certain tasks on the spot (e.g., writing, performing mathematical operations, explaining how to test a scientific hypothesis, and displaying substantive knowledge).²¹ These tasks need not all be the same ones that children of the same age in public schools are required to perform for assessment; the assessment could, as a general matter, be individualized to allow for various curricular approaches and ordering of subjects (e.g., trigonometry before geometry, second language before state history). But it should measure progress for all with respect to the basic goods of critical thinking, methods of inquiry in a variety of disciplines, and social skills, as well as literacy and numeracy.

This would be analogous to periodic well-child checkups with the doctor, only focused more on cognitive development than physical development (though entailing some observations about that as well) and conducted by a school-district employee or contractor rather than a private party picked by parents. Implicitly, notice to parents of what progress will

be expected would give them some guidance in advance in choosing or developing a curriculum. And, needless to say, the state would conduct the same progress review for girls and boys, which would implicitly rule out gender-discriminatory treatment of homeschooled students.

This evaluation must be done by someone employed or chosen by the school district, because homeschoolers have, as noted in chapter 4, made a mockery of legal requirements for assessment in states that permit parents to submit an assessment by a private party of their choice; it is quite easy to find someone (e.g., a church pastor or a for-profit, online homeschool-approval agency) willing, perhaps for a fee, to submit a positive statement about a child's progress without actually performing any competent assessment.²² So this would distinguish our proposal from existing law in the few states that ostensibly require periodic assessment; farcical statements of completed evaluation would no longer suffice. The assessor, though, ideally would also be familiar with the quality of education in the local public schools and therefore able to compare a child's progress to what is normal in those schools, given that the ultimate question is whether the homeschool is an adequate substitute for alternatives practically available to a given child.

Such an assessment system would be effective, we think, in identifying children suffering from educational neglect, physical or psychological maltreatment (including sexist subordination of girls), or a severe socialization deficit. An important incidental benefit of face-to-face academic evaluation is the opportunity to ensure homeschooling is not serving as a cover for abuse or neglect or child labor, as it appears to have been in the *Jonathan L.* case in California. This seems preferable, at least from a political standpoint, to mandatory home visits made solely to check for maltreatment (an approach proposed in Iowa).²³ And it would not be extraordinarily costly for states to do; certainly it is less costly for the state than educating the children themselves in public schools. Complaints historically about the cost of monitoring homeschooling falsely compare that cost to the state's not spending any money whatsoever on the education of some children,²⁴ which is an indefensible baseline; the comparison should be to what the state spends on other children, including those in public schools.²⁵ In addition, the practical burden on families would be slight, at least so long as the time and location of the meetings are not terribly inconvenient. Assessing by review of portfolio rather than by standardized testing preserves the valuable parental freedom to individualize the curriculum in accordance with an individual child's interests and home

1 circumstances. Public-school systems rely on standardized testing rather
2 than portfolio review in part because of cost but also because the latter
3 makes precise assessments and comparisons across students quite diffi-
4 cult, there being significant subjectivity inherent in portfolio review. But
5 precise assessment and comparison is not needed with homeschooled
6 children; it should suffice that a portfolio shows the child is progressing
7 academically well enough in light of his or her native abilities.

8 Homeschool advocates who oppose state oversight generally do not
9 point to the burdensomeness of record keeping to support their opposi-
10 tion. Instead some predicate their opposition on assertions that curricular
11 or testing requirements would unduly constrain parental freedom, and
12 many simply make categorical and unsupportable claims about absolute
13 parental sovereignty over children and about state incompetence. Many
14 betray their own lack of sophistication in scientific reasoning by ascribing
15 pervasive incompetence to all state employees based on evidence as to a
16 small percentage of bad public schools or public-school teachers (while
17 conversely insisting that a small percentage of bad homeschools should
18 not tar all homeschools).

19 Yet this periodic individualized review need not be the singular re-
20 quired form of oversight; it need not be the only means the state gives
21 parents to demonstrate that a child is not suffering from educational de-
22 privation or maltreatment. The state might offer parents a choice among
23 several means. Randall Curren and J. C. Blokhuis suggest mandatory part-
24 time enrollment in a public school.²⁶ That could instead be simply one al-
25 ternative offered to homeschooling parents; “dual enrollment” (e.g., two
26 classes taken at the local high school, or a few hours a week at the elemen-
27 tary school) could spare parents from having to meet periodically with an
28 academic assessor, as it would enable teachers to assess the child’s reading
29 and writing ability, intellectual and social development, and health. There
30 has been resistance in many localities to homeschoolers’ participating in
31 public-school activities, but it has mostly been in connection with sports,
32 where parents whose children attend public school full-time are unhappy
33 about their children losing a spot on a team to a homeschooled child, and
34 the motivation appears to be selfishness rather than any defensible prin-
35 ciple. Public-school systems should create every possible opportunity for
36 homeschooled students (whose parents presumably are paying taxes that
37 fund the public schools) to participate in the schools’ activities, instruc-
38 tional and otherwise. This can be beneficial not only for the homeschooled
39 students but also for children and adolescents attending the public schools

full time; the homeschooled students might offer their peers a different perspective on the school, on the team or club, or on many other things.

Still another possibility for fulfilling the aim of periodic review might be partial enrollment in a private school that the state has “accredited” on the basis of rigorous examination of its academic quality, coupled with a requirement that a teacher in that private school who has a state teaching credential submit a report on the (mostly) homeschooled child’s academic progress, interpersonal communication abilities, and apparent health. Other approaches might also work, but it is essential that someone able *and inclined* to conduct an informed and objective assessment of the child do so for review by state education officials. Giving any parent monopoly control over a child’s life and over access to the child is absolutely unacceptable; the state cannot plausibly justify its doing that to children.

The current regime of no state oversight of homeschools is therefore immoral; it is a dereliction of a duty the state owes to children—importantly, a duty that arises not simply out of a general societal responsibility to protect helpless people but also from the state’s action of placing each child into the legal custody of particular persons and continually renewing that placement. The state must include among the conditions it establishes for people becoming legal parents that they accept periodic professional assessment of their child’s development, just as the state imposes conditions on people who wish to adopt a child or to serve as guardian for an incompetent adult and on people to whom it entrusts many other important responsibilities. If you wish to enjoy the role of legal parent to a child, you must agree to accept this modest burden, in addition to the other legal duties that states already impose on all parents.

Again, this way of thinking about parenthood, as a fiduciary role with substantial duties dictated by the state, was the norm for most of American history. As eminent nineteenth-century jurist Joseph Story expressed it, “Why is the parent by law ordinarily entrusted with the care of his children? Simply, because it is generally supposed, that he will best execute the trust reposed in him; for, that it is a trust, and of all trusts the most sacred, no one can well doubt.” Industrialization and cultural diversification turned the American consciousness toward a more individualistic and rights-based way of thinking of citizens’ relationships to each other and to the state, and children’s welfare and personhood to some extent got lost in the process. Yet even at the turn of the twentieth century, legal-treatise author Lewis Hochheimer would write that “the American cases may be characterized as an utter repudiation of the notion, that there can

1 be such a thing as a proprietary right of interest in or to the custody of an
2 infant.” Instead, they reaffirmed “the idea of trust as the controlling prin-
3 ciple in all controversies in relation to such custody. . . . In true legal con-
4 ception, [the parent] is simply the agent or trustee of the government.”²⁷
5 In this light, the Supreme Court’s endorsement of the notion of parental
6 entitlement as against the state in the 1920s was an implicit rejection of
7 the traditional conception of parenthood, *not* resting on tradition as most
8 people today suppose. If states in this country had continued to adhere
9 to the traditional trust and fiduciary conception of parenthood, then it
10 would simply be accepted, just as many other legal expectations for par-
11 ents are simply taken for granted, that states may and should hold home-
12 schooling parents accountable, or could ban homeschooling if necessary
13 for children’s well-being. If the states returned to this conception, it would
14 eventually again become accepted and taken for granted.

15 We think other potential forms of state oversight, compliance with which
16 could be a condition on parents’ election of homeschooling, are unneces-
17 sary. One common proposal is that homeschool students take the same
18 standardized tests that children in public schools take. Homeschoolers
19 rightly object that forcing their children to take and pass such tests ef-
20 fectively forces them to adopt, to a substantial degree, the same content
21 and schedule of instruction as in public schools, which largely eliminates
22 the flexibility and individualization of instruction that are core virtues of
23 homeschooling. One might add to this the substantial legitimate criticisms
24 of the standardized testing regimes that legislatures have in recent decades
25 foisted on public schools,²⁸ regimes that some suspect are driven by con-
26 servatives seeking to sabotage public schooling so that parents and taxpay-
27 ers will shift their attention to private schools.²⁹ Many education experts
28 recognize portfolio assessment—that is, review of a compilation of stu-
29 dent work demonstrating a variety of cognitive skills—as superior in many
30 ways to standardized testing, despite the greater subjectivity it entails.³⁰

31 Notably, the periodic assessment should not only provide some assur-
32 ance that children are developing well cognitively and acquiring knowledge
33 that will prepare them for college and life in mainstream society (should
34 they choose that as adults), but should also enable the state to get some
35 sense of whether a child is receiving adequate socialization and is not being
36 maltreated.

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First, states could take a carrot rather than stick approach to regulation and offer financial support to parents who agree to comply with prequalification and periodic-assessment rules. This is the unrealized potential of school voucher programs that already exist for regular private schools; states could attach regulatory strings to the receipt of vouchers, and this would influence the private-school market, inducing more schools to accept and attempt to effectuate the state's aims for children's education. If taxpayers in voucher jurisdictions knew what sort of fanatically illiberal schools can be state funded, they might insist that legislators amend the voucher-program rules. Homeschooling expenses are generally far less than private-school tuition, so there might be less potential for financial inducement, but states could offer to reimburse homeschoolers not only for the costs of (approved) curricular materials, equipment (e.g., computers), and supplies but also for the costs of purchased classes, tutoring, museum memberships, social experiences for children (e.g., a scouts group, sports teams), and anything else that the state deems valuable for homeschooled children and that can be targeted sufficiently to avoid fraudulent fabrication of expenses. Some school districts in Alaska are doing this today with many homeschooling parents; in exchange for funding of educational supplies, parents register in one of the state-run correspondence schools (parents have a choice among curricula and pedagogical approaches) and accept school officials' ongoing review of their children's academic progress. In California, homeschoolers receive state funding for secular and religious materials and fee-based classes in the community by associating with and reporting to a form of "charter school" that is essentially an overseer of home-based instruction.³ HSLDA opposes vouchers for homeschooling precisely because it fears regulation will follow funding (even though that has not happened with vouchers for private schools), but this has not stopped legislators from introducing homeschool-voucher bills at state and federal levels (e.g., H.R. 610 in the 2017–18 congressional session).

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Second, there is a yet-unexplored possibility of using litigation to force legislative action. Chapter 2 described litigation efforts to eliminate regulations. No one has yet attempted, as far as we know, litigation to force the adoption of regulations, but there are viable legal claims to be made. The state's empowerment of parents to keep their children out of school, with no meaningful effort to ensure that the children still receive an adequate education and are not subject to maltreatment, effectively denies some children important state benefits that other children receive. States thereby run afoul of the US Constitution's equal protection clause.

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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 their aggressive advocacy. As a result, parents can now keep their children at home in the name of homeschooling free from any real scrutiny as to whether or how they are educating their children. Many homeschool precisely because they want to isolate their children from ideas and values central to public education and to our democracy. Many promote racial segregation and female subservience. Many question science. Many are determined to keep their children from exposure to views that might enable autonomous choice about their future lives. This article calls for a radical transformation in the homeschooling regime, and a related rethinking of child rights, and restructuring of constitutional doctrine. It recommends a presumptive ban on homeschooling, with the burden on parents to demonstrate justification for any exemption. **

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** All footnotes omitted

I. INTRODUCTION

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

This is true even though child rights to education and to protection against abuse and neglect are on paper universally guaranteed. Every state has legislation requiring that children attend school in their elementary and high school years, and all but one have constitutional provisions calling for public education.

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

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. Children thus have rights to education under both child protection law and education law.

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

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

This homeschooling regime poses real dangers for children and for the larger society. Children are at serious risk of losing out on opportunities to learn things that are essential for employment and for exercising meaningful choices in their future lives.

They are also at serious risk for ongoing abuse and neglect in the isolated families that constitute a significant part of the homeschooling world. Mandated reporters are key to child protection,

and compulsory education has served to protect many children against maltreatment. Teachers and other education personnel have long been responsible for the largest percentage of mandated reports. 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 on any regular basis. Parents don't have to accept home visitors if a system is in place providing home visits for new parents, by contrast to many of our peer countries where universal or near-universal home visiting exists.

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

A recent book provides a chilling description of one homeschooler's experience. In *EDUCATED*, Tara Westover describes growing up with her siblings in a home where the parents provided nothing resembling an education, and a good deal of terrifying physical and emotional abuse. She managed to escape to claw her way into college and then up the educational ladder, eventually earning degrees from Cambridge University and from Harvard. But most of her siblings remained imprisoned in the life of their childhood. She describes growing up with a father who was totally alienated from society and determined that his children should be as well. She and her siblings were prevented from going to school when they were old enough to ask to go, and prevented from going to hospitals when they suffered grievous injuries. They were coerced into hard, dangerous labor for her father's business. She describes the terror of actual and threatened violence by her father and one of her brothers – men who clearly felt they had a license to terrorize and abuse, men she eventually realized suffered from serious mental illness. Perhaps most troubling, she describes how she remains psychologically subject to her father's power years later, repeatedly drawn back to the family, repeatedly subjecting herself to its terrors, repeatedly hoping that it would be better than it was. Tara represents the extraordinary success story, the magically resilient child, the child capable of escape, the child whose brilliance enabled her to overcome gross educational deficits. There is no way of knowing how many homeschooled children experience childhoods comparable to Tara's. But we do know that the homeschooling regime permits children to be raised this way, and we know that few children resemble Tara.

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

The factual claim is largely based on flawed advocacy "research" that is not true social science. We have no way of identifying based on existing information the total group of homeschoolers, or the percentage whose progress is assessed by some objective testing system, and thus no way of knowing how homeschoolers do on average, or what percentage graduate from high school or college. The only methodologically sound social science indicates that even the 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.

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

The legal claim made in defense of the current homeschooling regime is based on a dangerous idea about parent rights -- that they are and ought to be absolute. That those with enormous physical and other power over infants and children should be subject to no check on that power whatsoever. That parents should be granted monopoly control over the child's life, 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 from that society, so as to ensure that the children will replicate their parents' views and lifestyle choices.

This idea is inconsistent with state laws and constitutional provisions that appear to guarantee child rights to education in every state. It is inconsistent with universal state as well as federal child protection law.

It is also inconsistent with our legal and cultural history. From early on our law recognized that the state has a role to play in child rearing and child protection, and that parents have responsibilities and not just rights. Over the decades law has played an increasingly active role guaranteeing children certain important rights, including rights to be free from labor and from unfair criminal punishment, along with rights to education and to protection against maltreatment. These trends in the law reflect growing recognition of the principle that children should be seen as having rights, and not subject to any adult's absolute power.

Finally, the legal claim is inconsistent with an idea that has been central since the beginning of compulsory education -- that the state has rights to educate children in ways that enable positive participation in the larger society. "[P]reparation for citizenship," including exposure to the values of tolerance and deliberative democracy, has been seen as a primary goal of public education from its origins.

Given the extreme conflict that exists between today's homeschooling regime and our laws and tradition regarding education, child protection, and the state's role, how did we get here, and how might 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.

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.

II. THE REALITY

A. History and Trends

Homeschooling as it exists in the U.S. today is a relatively recent phenomenon. It is true that prior to the existence of public and private schools, some parents educated their children at home. But the development of compulsory education laws and free public education in the late 19th century was broadly accepted as an advance both for children and for society. 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. It was supposed to help integrate immigrant groups into the community. It was supposed to expose children to mainstream cultural values, and enable them to become productive participants in society in employment and other ways.

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

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

B. The Varied Nature of the Homeschooling Population

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

Some parents feel, as did the original progressive wing, that they can do better by homeschooling because of the flaws they see in traditional education. Some are concerned with an overemphasis on rote learning and testing, some with the schools' ability to address particular issues such as racism. Many seek to create for their children a system of "total socialization" aimed at negating the influence of competing socialization agents.

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

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

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. The "Quiverfull" and "Stay at Home Daughter" (SAHD) movements endorse confining women to the domestic sphere, and subjecting them to the control of first their fathers and then their husbands. Some in these movements believe homeschooled girls should only be educated in household tasks. Vision Forum, part of the Christian Patriarchy Movement, encourages young girls to forgo college and outside employment in favor of training as "keepers at home" until they marry. It is "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..." Many homeschooling families that don't belong to these groups still pursue a "less rigorous version of female submission," limiting girls' educations by assigning them extensive household and child-rearing duties.

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

Many homeschooling parents are simply not capable of educating their children. Many have had such limited educations 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. In 11% of homeschooling families neither parent speaks English. Some are mentally ill or disabled, or caught up in substance abuse. Many homeschooled graduates complain about educational neglect.

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

The nature of the homeschooling population presents dangers for children and society, failing to adequately prepare most of the children involved 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 and safety risks, as discussed below.

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 the child protection services (CPS), since teachers and other school personnel are “mandated reporters,” required by law to report suspected child maltreatment. Some, for example, take their children out of school when teachers report them for suspected violation of child protection laws. Others simply never send their children to school, knowing that whatever they do to children in the privacy of the home is not likely to trigger CPS intervention.

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

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

Even if we knew the total homeschooling population, official child maltreatment rates would tell us nothing 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 the largest group of mandated reporters of child maltreatment, teachers and other school personnel.

Also no state connects its child protection system with its homeschooling system so as to facilitate understanding of the risk of maltreatment.

Nevertheless, we know enough to know that homeschooling in its current unregulated form poses serious risks of abuse and neglect. As discussed below, many scholars, child abuse

pediatricians, and others with experience with homeschooling, have voiced concern based on their research and experience.

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

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

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

In another study child abuse pediatricians from five U.S. medical centers focused on a sample of cases involving horrific child torture. They found a powerful connection with homeschooling. Out of the school-age children, 76% were at home rather than in school, with 29% never allowed to go to school and another 47% withdrawn for homeschooling. They concluded that this "homeschooling" typically occurred after closure of a previously opened CPS case, and appeared designed to further isolate the child.

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

subsequent reports of child abuse, homeschooling continued until the Harts drove their children off the cliff in 2018.

Another recent California case involved the thirteen Turpin children, discovered only when one seventeen-year-old child escaped through a window and called 911. The children, registered as being homeschooled, had been living for many years in what authorities called “horrible” conditions, subject to desperate malnutrition and torture. The parents were criminally charged with torture and child endangerment.

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

CHRE published an Issue Brief in 2017 summarizing the data on abuse in homeschooling, documenting evidence of the connection between child maltreatment and homeschooling, and making recommendations for policy reform. It states: “A growing body of data points to the need for lawmakers to create protections for at-risk homeschooled children.”

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

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

Homeschool Alumni Reaching Out (HARO) was formed with a special focus on the potential for abuse in homeschooling families. HARO created a website in 2013 for homeschoolers to share their stories, called “Homeschoolers Anonymous.” 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.”

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

Some homeschooling leaders openly promote what should be understood as child abuse. One very popular book recommends a spanking regimen beginning in infancy. Other popular books

recommend severe physical punishment, teaching parents how to inflict it without leaving marks. Many make clear their opposition to the child protection system.

Officials in several other countries have expressed concern with the risks homeschooling poses for child abuse and neglect. In the United Kingdom, several high-profile cases of abuse have triggered reports calling for more restrictive regulation. In England the Secretary of State commissioned a report on homeschooling, including on whether it was being used to conceal abuse and neglect. A leading child rights organization commissioned a similar report, which found that in the 800 cases of serious or fatal cases reviewed, homeschooling emerged as a major theme. In Wales, a notorious child abuse case triggered a report on homeschooling which found, after extensive investigation, that “where there is abuse or neglect home education can and does lead to children being hard to identify, monitor and assess.”

D. The Social Science Research on Homeschooling Success & Failure

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

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

Another problem with the research in this area is that it is dominated overwhelmingly by policy advocacy research put out by the homeschooling movement. This is not true social science. It is advocacy masked as social science. Below I first discuss the relatively good research, which at least proceeds from an intent to discover truth about the phenomenon studied, and then I discuss the policy advocacy research.

III. THE CURRENT LAW

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

A. Federal and State Constitutions Permit Significant Restrictions on Homeschooling

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

The movement largely failed to achieve this goal, regularly losing its claims in both federal and state courts. U.S. Supreme Court doctrine makes it clear that states are free to impose reasonable restrictions on homeschooling, and the state and lower federal courts have so held. They 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, they 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. But it did make clear in the cases that first established parents' rights, *Meyer v. Nebraska*, and *Pierce v. Society of the Sisters*, that these rights are limited by the state's right to impose "reasonable" regulations ensuring an adequate education. The Court struck down the regulations at issue as unreasonable. But these cases raise very different issues from homeschooling. The children attended actual schools, with their many characteristics taken as a given—credentialed teachers, required courses and instructional hours, and extensive socialization with children and adults outside the family. *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 for institutions which it supports.*

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.

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.*

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

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

The Court’s decision in *Prince v. Massachusetts* supports the state’s right to regulate to protect children against maltreatment, and to ensure the child’s future autonomy. In rejecting a claim to immunity from the law criminalizing child labor, the Court stated:

It is in 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. ...[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. ... the 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.

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

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

The Court has addressed religious freedom in the education arena in one case, *Yoder*, which the homeschooling movement regularly relies on. There the Court held Amish parents exempt from compulsory education requirements after the eighth grade, based on parent liberty and religious freedom rights. However the Court noted the state's general power, "having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." 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." 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, by contrast to much of what goes on in homeschooling. Since children were not formally represented, nor any conflict between parent and child interests raised, *Yoder* is limited on these grounds also.

Yoder is a deeply problematic case that should either be confined to its facts or overruled. The Court entirely ignored child interests in apparent conflict with Amish parent and group interests. 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. It vindicates parent and group control over children without regard to child rights, including what has been called "the right to an open future."

A subsequent Supreme Court case significantly undermined *Yoder*, holding that "as a general matter, free exercise clause objections to generally applicable laws henceforth would not trigger heightened scrutiny." 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, courts and commentators have generally rejected this vague hybrid rights theory, and courts have upheld homeschooling restrictions in the face of religious freedom claims.

In sum, Supreme Court doctrine generally 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 courts and legislators to conclude that homeschooling regulation should be looked at through a strict scrutiny lens.

And even if the intermediate or rational relationship standards are recognized as appropriate, and courts engage in balancing conflicting interests, Supreme Court doctrine gives precedence to parent as opposed to child rights, because it is only parents that are seen as having *constitutional* rights in the education and child protection areas. The state may intervene to promote child interests and the state's own interest, but children are not seen as having their own constitutional rights. Under any test involving a balancing of interests, children may lose out if parent interests are constitutionally protected while child interests are not. This doctrine also leaves states free *not* to protect children if they so choose.

2. State and Lower Federal Court Doctrine

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

On the whole, then, the current status of parents' constitutional rights to control children's upbringing appears quite weak, regardless of religious motivation, leaving states free to impose any rules and restrictions rationally connected to what they deem children's well-being. If states have a reasonable basis for believing they will promote children's educational interests or other aspects of children's welfare by requiring attendance at a regular school or by conditioning any authorization of homeschooling on compliance with rules regarding qualifications to teach, content of curriculum, or assessment, Supreme Court doctrine clearly permits them to do so. No parent's religious objection to such regulations entitles them to an exemption. At most, some courts might say the state must show there are no less-intrusive means of protecting children's interests.

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

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 regulations, many of which have been proposed in response to child abuse scandals.

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

1. Limited Regulation Governing Homeschooling

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

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

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

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

* Only about ten states require homeschooling instructors to have teaching qualifications, generally a high school diploma or its equivalence. But even this minimal guarantee of teacher competency may be bypassed by affiliation with an umbrella school, in response to religious objection, or at the discretion of local education officials.

* In at least fourteen states there are no curricular requirements, either because states fail to impose them or otherwise exempt homeschoolers. 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. In other states, parents may submit student portfolios in lieu of more objective test scores. Even where state law requires that

homeschooling parents demonstrate adequate academic progress through annual assessments, it may take years before school officials can take remedial action to terminate deficient home education.

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

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

Even the minimal requirements that exist in some states often provide religious exemptions, which would presumably make them inapplicable to the Christian conservatives that constitute the vast majority of homeschoolers.

2. Absence of Enforcement

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

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

[T]here is today in the vast majority of states no real legal obstacle to parents' withholding their children from school and doing whatever they want in terms of instruction at home. Regulations on the books vary significantly from one state to another, but by virtue of slight or no accountability measures in the great majority of states and school officials' disinclination to enforce any significant regulations in other states, by and large states leave children to their parents' devices.... [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, so it is difficult to know whether this is a meaningful safeguard; presumably it

varies by locality. Four states require parents to maintain records or subject their children to testing but do not authorize school officials to demand to see either. Three other states and the District of Columbia require parents to either maintain records of progress or submit to standardized tests in certain grades, but do not require parents to submit test results or a portfolio of work to school officials unless the officials ask them to do so. Among the small number of states that require submission of any evidence of performance, most allow homeschoolers to choose between standardized tests and a private evaluation of the child's progress by someone of the parents' own choosing.

3. Absence of Regulation Protecting Children Against 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."

Only two 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. 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. But Pennsylvania relies on homeschooling parents to provide accurate information rather than conducting an independent background check. 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. Parents can petition to have this restriction waived.

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

When homeschooling scandals have erupted, involving horrific abuse suffered by children supposedly being homeschooled, the movement has successfully fought off attempts to impose protective regulation. Thus while some say that these scandals may finally trigger some minimal regulation, this has not yet occurred. Examples abound of legislators proposing modest protective regulation only to be overwhelmed by the movement's lobbying force.

4. Trends in the Law

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

In 1985, seven states reduced restrictions; in 1988, five more states reduced restrictions. In 2014 Pennsylvania reduced assessment requirements. In 2014 Utah declared that "the homeschooling

parent assumes sole responsibility” for children’s education, and eliminated the requirement that parents teach subjects mandatory in public schools, and for the same amount of time. In 2015 Arkansas eliminated assessment requirements. In 2016 West Virginia relaxed annual notice and assessment requirements, and lowered the threshold for “acceptable progress” for homeschoolers.

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

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

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.”

IV. THE POLITICS

A. Ideological Nature of the Homeschooling Movement

It is the religious ideologues who dominate the powerful homeschooling movement. And they dominate it overwhelmingly. They founded the extraordinarily powerful Home Schooling Legal Defense Association (HSLDA), which has played the leading role fighting against regulation and shaping homeschooling law.

The different political strains and variety of populations represented within the homeschooling population are not reflected in the political leadership of HSLDA and related advocacy organizations. Nor is there any other significant advocacy organization designed to represent the views of the highly educated non-religious homeschoolers, or the descendants of the John Holt progressive wing of the homeschooling movement, or those who choose homeschooling to allow room for competitive sports, dance, or acting careers.

B. Political Dominance of The Homeschooling Movement

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

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

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

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

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

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

CRHE advocates for “sensible oversight.” It has developed a set of detailed reform recommendations both for education issues, and for child maltreatment issues, an area of key concern.

Many homeschooling graduates speak out on the CRHE and other websites. Many maintain blogs giving voice to their own and other homeschoolers’ concerns. *Homeschoolers Anonymous* is a blog operated by former homeschoolers with the goal of raising awareness of problems including isolation, abuse, and neglect. *Recovering Grace* provides support for homeschoolers and publishes stories of young people raised in the cultish Advanced Training Institute (ATI). *Love, Joy, Feminism* is a blog by Libby Anne Bruce documenting her critical reflections on being raised in a Quiverfull homeschooling family.

“Homeschool Alumni Reaching Out” (HARO) helps homeschoolers share their stories, and encourages them to promote awareness of child abuse and neglect. But, notably, it “does not advocate for or against public policy.”

These homeschooling graduate groups get limited attention outside of their own community, and 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. And it says that *if* permitted, regular teacher licensing and curriculum requirements should apply. 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 in most states of any significant regulation, the inability of most homeschooling parents to teach the variety of courses appropriate, the extreme ideological views many hold, the limited socialization most provide, and the risks of abuse and neglect.

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

Most call for reforms designed to better ensure that homeschoolers receive an adequate education. These include such requirements as notice and registration, credentials demonstrating fitness to teach, review of proposed curriculum, teaching of certain required courses, and assessments of educational progress. Some call for reforms designed to better protect children against maltreatment.

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

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

Lawyers with an interest in education have joined in the critique and the call for reform. Scholars and physicians knowledgeable about child maltreatment have noted the risks to children in homeschooling, and called for related reforms. International academics have united to counter the policy advocacy research put out by the homeschooling movement, and to promote methodologically sound research.

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

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

C. Positions and Tactics of The Homeschooling Movement

1. Parent Rights Absolutism

The homeschooling movement takes the position that parents have, and should have, absolute power over the education of their children. It relies on both natural law and on constitutional theory. 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. Some see as possibly tolerable supportive regulation, such as policies providing homeschoolers access to school sports and other programs their parents want them to participate in.

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

The homeschooling movement has for related reasons opposed U.S. ratification of the Convention on the Rights of the Child (CRC). 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. The movement considers this vindication of child human rights a threat to parental control.

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.

Homeschoolers Anonymous blogger “Libby Anne” argues that HSLDA has been complicit in aiding child maltreatment in four key ways: (1) it works to minimize the reporting of child maltreatment; (2) it works to impede the investigation of child maltreatment cases; (3) it defends the legality of excessive corporal punishment; and (4) it opposes any homeschooling regulation that might provide a check on maltreatment.

The evidence supports her claims. HSLDA has long opposed mandatory reporting laws. It actively opposed federal legislation to expand reporting in response to the Sandusky abuse

scandal at Pennsylvania State University. This legislation would have amended the federal CAPTA act governing mandatory reporting, to require that all adults report suspected child maltreatment. HSLDA claimed this would create a “police state,” massively increasing reports and hurting innocent families. HSLDA has opposed many other proposals to increase reporting requirements, threatening to send “e-letters” to their members if the bills came up for hearing.

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. This would seriously hamper efforts to monitor homeschooling and ensure that parents follow through on educational commitments. It would seriously hamper CPS and police efforts to address maltreatment.

HSLDA has opposed legislation designed to provide some check on corporal punishment so that it doesn’t cross over into brutal abuse. It opposed one bill forbidding the use of “implements” to beat children, and another forbidding beating that results in “significant welts and bruises.

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

2. Organizational, Legal and Lobbying Tactics

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

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

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

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

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.

V. THE WAY FORWARD

The current homeschooling regime gives parents free rein to educate their children or not, free rein to teach racism and sexism, 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 simply by keeping them out of school. Parents can choose not to educate their children at all, not to teach them the fundamentals of reading, writing, arithmetic, not to teach them science, history, government. Parents can choose to teach that Biblical truth trumps all, that all science is false science that women should be educated to be subservient to men that people of color are inferior to whites, that people who claim non-traditional sexual orientations or gender identities should be “cured” or condemned.

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

We need a new legal regime designed to guarantee all children rights to an adequate education, and to adequate protection against child abuse and neglect. We need a related radical transformation of policy 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 in the law worldwide that children’s 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 cannot 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 cannot trump child rights to exposure to alternative views enabling them to exercise meaningful choice about their future religion.

The new legal regime should impose a presumptive ban on homeschooling, allowing limited exceptions for parents who can satisfy a significant burden of justification. And it should impose significant restrictions on all homeschooling allowed under those exceptions. See discussion below in VC.

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

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

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

Constitutional doctrine should recognize that children have enforceable *rights* to 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 skewed by assumptions that parents have constitutionally protected rights 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 protect children if they choose to, but not *duties*.

This way of thinking puts at risk all state action to protect children in the education and child welfare context. Parents can always claim that state action violates their constitutionally protected rights. Courts must 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 parental responsibilities over rights, and emphasized the state's own responsibility for children, and for ensuring that parents fulfilled their responsibilities. It is inconsistent with the way other countries think, and the way they treat homeschooling, as discussed below.

A. 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 both state and federal constitutions, and that restrictions along the lines described below are required to satisfy constitutional requirements.

1. General Presumption Against Homeschooling

The new regime should deny the right to homeschool, subject to carefully delineated exceptions for situations in which homeschooling is necessary and appropriate. Parents should have a significant burden of justification for a requested exception. There is no other way to ensure that children receive an adequate education, or protection against maltreatment at all comparable to the protection provided public school children.

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

When exceptions are granted, children should still be required to attend some courses and other programs at school, including, for example, civic education, to ensure exposure to alternative views and values, socialization, and contact with mandated reporters.

This approach seems the only one that will ensure an adequate education for most children. Parents who are ideologically committed to raising children in isolation from the majority culture, 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. Requiring submission of proposed curricula, or academic testing, will not solve this problem.

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

While some homeschooling parents could provide some of these things, most clearly could not. The majority 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. As Rebell notes: "some fundamentalist religious groups take the position that exposing their children to ideas such as secularism, atheism, feminism, and

value relativism is inconsistent with the family values they espouse and undermines their ability to inculcate in their children their beliefs in the sacred, absolute truth of the Bible.”

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

Ira Lupu finds this problem central to concluding that the “middle ground” between absence of regulation and a ban on homeschooling cannot work:

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?”... Moreover, the statutory requirement that schools teach “the duties of citizenship” may well produce conflict with a program of home instruction based on claims of devotion to God and “exclusive parental jurisdiction” over children. Parents who reject the concept of citizenship duties are hardly likely to teach such duties effectively, and official policing of the manner in which parents teach about duty to God, family, and country respectively seem highly likely to place officials in a constitutional danger zone.

Lupu argues, accordingly, that an “enduring solution” to the homeschooling problem may require a choice between the extremes of very limited regulation in the form of periodic testing of student progress, and a ban on homeschooling for all cases where children are physically capable of leaving the home. Lupu chooses the near-total ban, finding it more consistent with child rights and with our constitutional values:

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. Adults other than parents may serve as sources of information, models of behavior, and safe outlets for concerns that children feel they cannot share with their parents, including concerns about the parents themselves. Parents, of course, can be similarly supportive in helping their children cope with the tensions of other relationships in their lives. Children raised in a regime of separated power are rather less likely to feel at risk and far more likely to feel themselves to be citizens of their larger communities than children raised in a regime of highly concentrated authority.

Parents should have substantial power to choose their children's teachers, but there is reason to be troubled, and sufficient constitutional warrant for states to act, when parents choose only themselves.

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, roughly equivalent to public school education in term of knowledge and skills taught, and exposure to varied views and values. It should be designed to further children's rights to future autonomous decision-making with regard to employment and lifestyle.

The burden of proof should be on parents to demonstrate that their educational plan will accomplish these goals, and they are fit to implement the plan.

Regulation should be designed to guarantee that all homeschooled children receive roughly the same protection against abuse and neglect as children in public schools.

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

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

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

b. Specific Requirements to Ensure an Adequate Education

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

conditioned on proof presumptive minimum credentials satisfied, unless waiver granted based on persuasive other evidence of fitness;

- Testing of homeschoolers on a regular basis, at least annually, to assess educational progress, with tests selected and administered by public school authorities; permission to continue homeschooling conditioned on adequate performance, with low scores triggering order to enroll in school.
- Home visits by school authorities to assess educational environment and check on child welfare, a minimum of two times per year, with more visits or order to enroll in school triggered by evidence of problems. If deemed appropriate based on suspected problems, visits shall be without prior warning and without consent.
- Parents must satisfy basic vaccination and other health-related requirements.
- School authorities charged with enforcement of above requirements, including by orders transferring children to public school based on inadequate compliance, inadequacy of education, low test scores, or other problems.

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

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

B. Need For A New Political Reality

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

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

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

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

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

The courts may be essential to move things forward. Here children are also dependent on adults – lawyers to mount litigation campaigns on their behalf, and judges to vindicate their rights. But courts can at least operate somewhat more freely than legislatures from political pressure. Their charge is to strike down legislation that violates constitutional principles, however strong the lobbying forces. Constitutions are supposed to protect the rights of the politically powerless, those who have no potential for protecting themselves through political systems. Children are the quintessential politically powerless group.