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## Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Re-regulation of Homeschooling

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## I. INTRODUCTION

Bobby and Esther Riddle, the Supreme Court of West Virginia conceded, “did an excellent job” teaching their children, Jill and Tim—

“possibly better than the public schools could do.”<sup>1</sup> Like many fundamentalist parents,<sup>2</sup> the Riddles believed the *Bible* required them personally to teach their children, protect them from heresy and worldly influence, and resist government intrusions that could imperil their eternal salvation.<sup>3</sup> Moreover, they believed they had constitutional rights to do so.<sup>4</sup> Jill and Tim Riddle studied the same subjects as public schoolchildren, but their studies were interwoven with religious lessons based upon their parents’ idiosyncratic view of Christian doctrine.<sup>5</sup> The Riddles chose to be “separated from, and at odds with, the values of the world,” the West Virginia Supreme Court stated.<sup>6</sup> Similarly, they believed it their divinely mandated duty to remove their children from institutional schools, places suffused with those values.<sup>7</sup>

Yet the court found it “inconceivable” that children could “lawfully be sequestered . . . during all of their formative years to be released upon the world only after their opportunities to acquire basic skills have been foreclosed and their capacity to cope with modern society has been so undermined as to prohibit useful, happy or productive lives.”<sup>8</sup> Allowing the Riddles to educate their children at home—as they chose and without state supervision—would “lead[] ineluctably to a hideous result.”<sup>9</sup> If the Riddles could homeschool their children, all parents or guardians would

have the right to keep their children in medieval ignorance, quarter them in Dickensian squalor beyond the reach of the ameliorating influence of the social welfare agencies, and so separate [them] from organized society in an environment of indoctrination and deprivation that the children [would] become mindless automatons incapable of coping with life outside their own families.<sup>10</sup>

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1. *West Virginia v. Riddle*, 285 S.E.2d 359, 361 (W. Va. 1981).

2. See CHRISTOPHER J. KLICKA, HOME SCHOOL HEROES: THE STRUGGLE & TRIUMPH OF HOME SCHOOLING IN AMERICA 5, 15–20 (2006) (quoting numerous scriptural passages that animate the homeschooling community by stating the spiritual necessity of parents taking an active role in their children’s education).

3. *Riddle*, 285 S.E.2d at 361.

4. *Id.* at 360–62, 362 n.2.

5. *Id.* at 363–64.

6. *Id.* at 361.

7. See *id.* at 361, 367 (explaining that the Riddles “perceive[d] public school . . . as a pernicious influence on the young”).

8. *Id.* at 366.

9. See *id.* at 367 (estimating that, in 1985, about 50,000 children were being homeschooled).

10. *Id.*

Affirming the Riddles' convictions under truancy laws, the court reasoned that constitutional protections for parental decisions and religious freedom could not command such a result.<sup>11</sup>

Twenty-five years ago, parents like the Riddles who chose to homeschool would have been subject to prosecution in nearly every state.<sup>12</sup> Although there may have been tens of thousands<sup>13</sup> who nonetheless homeschooled their children, they often did so in secret, under shadow of criminal penalties.<sup>14</sup> Yet by a "political miracle," homeschooling is now legal practice in every U.S. jurisdiction.<sup>15</sup> Indeed, in many states, homeschooling is not only an accepted alternative to institutional education, but also one seemingly favored by the law in that it is subject to little or no legal regulation.<sup>16</sup> Due in no small part to the impressive political acumen of the homeschooling community, state courts and legislatures altered or reinterpreted existing standards or enacted new, more favorable law<sup>17</sup> such that today ten states do not even require that parents notify anyone that they plan to homeschool their children.<sup>18</sup> Given the impressive recent growth of the homeschooling population, this level of deregulation is troubling.

Parents who want to teach their children as they please or to protect them from social pressures and values in schools that they view as corrosive have flocked to the practice in staggering numbers.<sup>19</sup> The homeschooling population has grown by at least 75 percent since 1999.<sup>20</sup> More than 1.5 million children are homeschooled in the United

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11. *Id.*

12. Patricia M. Lines, *Homeschooling Comes of Age*, 140 PUB. INT. 74, 77 (2000).

13. *Id.* at 74.

14. See KLICKA, *supra* note 2, at 5, 9–10 (recounting an anecdote in which early Michigan homeschooling parents pretended to go on vacation each Monday, only to hike back to their own home and teach behind blackout shades so neighbors would not know they were home).

15. Scott W. Sommerville, *Legal Rights for Homeschool Families*, in HOME SCHOOLING IN FULL VIEW: A READER 135, 135 (Bruce S. Cooper ed., 2005); see also *infra* notes 37–47 and accompanying text (describing the "countervailing pressure for more stringent regulation," and the variety of homeschool laws among the states).

16. See *infra* notes 42–48 and accompanying text (describing homeschooling regulations).

17. See Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 128–30 (2008) (describing the clout and organizational prowess of the homeschooling lobby and the fruits of its efforts).

18. See *infra* Parts II and II.A (describing regulatory variations and the power of the homeschooling lobby).

19. See STACEY BIELICK, ISSUE BRIEF: 1.5 MILLION HOMESCHOOLED STUDENTS IN THE UNITED STATES IN 2007, at 2–3 (Nat'l Ctr. for Educ. Statistics, 2008), available at <http://nces.ed.gov/pubs2009/2009030.pdf> (describing the substantial increase in the homeschooling rate and population and showing the primary reasons parents opt to homeschool).

20. *Id.* at 2 (stating that the population increased by 74 percent between 1999 and 2007).

States, over 3 percent of the nation's school-age children.<sup>21</sup> Homeschoolers outnumber all "students enrolled in Wyoming, Alaska, Delaware, North Dakota, Vermont, South Dakota, Rhode Island, New Hampshire, and Hawaii . . . combined."<sup>22</sup> Homeschooling is the second most popular form of non-government-sponsored education, behind only Catholic schools.<sup>23</sup> Moreover, given that several states have no means to track homeschooled students under their jurisdiction and that many homeschooling parents "remain underground, refusing to be counted by state or local authorities," the reported numbers may substantially underestimate the size of the homeschooled population.<sup>24</sup> The social, political, and legal consequences of such a sizable proportion of the next generation receiving a non-traditional education could be dramatic.<sup>25</sup> The uncertain and perhaps completely unknown

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21. *Id.* at 1. In some categories, the percentage is even higher. For example, homeschooled children comprise 7 percent of the school-age population of students from two-parent households in which only one parent works. MICHAEL PLANTY ET AL., *THE CONDITION OF EDUCATION 2009*, at 14 (Nat'l Ctr. for Educ. Statistics, 2009), available at <http://nces.ed.gov/pubs2009/2009081.pdf>.

22. Yuracko, *supra* note 17, at 125.

23. Jeff Archer, *Doing It Their Own Way*, UNESCO COURIER, June 2000, [http://www.unesco.org/courier/2000\\_06/uk/apprend.htm](http://www.unesco.org/courier/2000_06/uk/apprend.htm) (explaining that homeschooling is second only to Roman Catholic private schools).

24. *Id.*; see also Rob Reich, *Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling*, in MORAL AND POLITICAL EDUCATION, NOMOS XLIII 275, 278 (Stephen Macedo & Yael Tamir eds., 2002) ("Because many states do not collect data on homeschooling, and because parents sometimes resist the monitoring efforts of the state, accurate data do not exist."); *id.* at 280 ("In many or even most states, however, it appears that regulations go utterly unenforced."). Some estimates on the size of the homeschooling population range up to 2.5 million children, which would constitute nearly 5 percent of the entire school-age population. *Barack Obama Could Hasten the Spread of Educating Children at Home*, ECONOMIST, Aug. 8, 2009, at 26.

25. For example, in states with no minimum curricular requirements for or testing of homeschooled students, it is likely that at least some homeschooled students may enter adulthood lacking even the basic skills necessary to find gainful employment and support themselves. *E.g.*, Yuracko, *supra* note 17, at 134–35 & n.51 ("Anecdotal evidence suggests that at least some homeschooled children, by design or accident, may not be receiving even a basic minimum education. The fact that one cannot know for sure how rare such occurrences are is itself a problem."); Sam Howe Verhovek, *Six Siblings Make a Lonely Stand, Minus Mother, Father, and Power*, N.Y. TIMES, June 1, 2001, at A1 (relating the tragic story of six Idaho siblings, ages eight to sixteen and "apparently schooled at home in name only," who were discovered living in Dickensian squalor and who engaged in a tense, armed standoff with local authorities). Further, to the extent education serves the dual instrumental values of fostering pluralism and civic cohesiveness, the growth of a community that abjures teaching on this subject and considers itself separate from the democratic collective enterprise would contribute to social fragmentation. *E.g.*, Rob Reich, *The Civic Perils of Homeschooling*, 59 EDUC. LEADERSHIP 56, 58 (2002) ("[A] heterogeneous society without some shared experiences and common values has a difficult time addressing common problems and risks social fragmentation." (citing CASS R. SUNSTEIN, REPUBLIC.COM 9 (2001))); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (stating that education "is the very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values"); cf. Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling*, 54 S.C. L. REV. 75, 78–

educational status of these students amplifies the potential impact. Yet the phenomenon has received almost no scholarly attention.<sup>26</sup>

Any legal analysis of homeschooling is complicated by the unclear applicability of parental substantive due process rights and free exercise rights, which prohibit state interference with certain parental decisions and the practice of sincerely held religious beliefs.<sup>27</sup> No Supreme Court case and very few lower court cases squarely address the constitutional status of homeschooling as it exists today.<sup>28</sup> Moreover, the standards that can be analogized from other areas of constitutional law fit uncomfortably and are themselves far from clear or settled.<sup>29</sup>

As homeschooling continues to grow,<sup>30</sup> the drawbacks to the interests of the public and the students themselves in overly lax homeschooling regulations are likely to become more apparent. The potential that homeschooled children, taught by parents who in some instances need not even notify state authorities which children are being taught or by whom, may be subject to educational neglect or abuse or may be taught in such a way as to render them dangerous or

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80 (2002) (listing removal of children from a society whose values and mores they abhor as among the four primary motivations of homeschooling parents). Additionally, homeschooled students whose teachers do not provide basic civic or democratic education or who lack interaction with alternative viewpoints may be unable to participate fruitfully in pluralistic democratic discourse and democratic society. *See, e.g.*, JOHN DEWEY, *DEMOCRACY & EDUCATION* 100–16 (1916) (detailing a theory of pluralistic education as a necessary predicate to functioning institutional and social democracy). Just as troubling, many laws of general applicability depend upon schools as a kind of centralized reporting agency. *See infra* Part II.B.2. The efficacy of these laws and, consequently, the collectively agreed-upon purposes they are intended to further may in some instances be undercut by special statutory exemptions or constitutionally mandated exceptions for homeschoolers. *See id.* Many of these consequences are more fully addressed in Part II.B.

26. Yuracko, *supra* note 17, at 130.

27. *See id.* at 132 (“Parents do have constitutionally protected liberty interests in their relationship with their children.”). For one of the few more incisive examinations of parental rights precedent as analogized to homeschooling, see McMullen, *supra* note 25, at 91–98 (reading the slim precedent to, paradoxically, both “consistently support state [control], while equally consistently upholding the right of parents to raise and educate their children as they see fit”).

28. For the one potential exception, see *Wisconsin v. Yoder*, 406 U.S. 205 (1976), discussed, *infra* Parts III and IV.

29. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND L. REV. 527, 545 (2000) (contending the status of familial due process rights both on their own and when coupled with free exercise rights are “profoundly murky regarding the balance they strike between private and communal interests”).

30. BIELICK, *supra* note 19, at 3 (“From 1999 to 2007, the number of homeschool students in the United States increased, as did the homeschooling rate.”); Rob Reich, *Why Home Schooling Should Be Regulated*, in HOME SCHOOLING IN FULL VIEW, *supra* note 15, 109–10 (stating that homeschooling “is widely considered the fastest growing sector of K-12 schooling”). By contrast, the proportion of students educated in private schools appears to be dropping. PLANTY ET AL., *supra* note 21, at 12.

unproductive citizens<sup>31</sup> has already led some states to begin reexamining their existing homeschooling statutes.<sup>32</sup> Yet, homeschooling has proven itself a viable, popular educational alternative<sup>33</sup> and may in some cases be necessary as a means to preserve a parent's role within the family as protector and guide.<sup>34</sup> Further, given that a parent's decision to send her children to a private school lies within the "private realm of family life which the state cannot enter,"<sup>35</sup> failing to provide homeschooling decisions with similar constitutional protection seems both counterintuitive and counterproductive. But while homeschooling should receive some degree of constitutional protection, the stakes are simply too high to presume the practice constitutionally unregulable.

This Note argues that homeschooling must be better regulated. State legislatures should take notice of the potential harm to children educated without standards or oversight and should reexamine the appropriate level of regulation. Most should consider re-regulating the practice. Yet, the current uncertainty about when and to what degree the Constitution protects homeschooling decisions presents a major obstacle to a level-headed dialogue on what level of regulation is appropriate. This uncertainty magnifies perceived threats to homeschoolers, provides political cover for weak-willed legislatures, and fails to adequately protect important interests of parents, children, and society as a whole. Courts, and ultimately the Supreme Court, must illuminate the constitutional thicket surrounding homeschooling to create sufficient space for debate about how best to strike the balance between these interests.

Part II.A of this Note examines the growth and current power of the homeschooling community and its success, to date, in fending off attempts to impose even minimally intrusive regulation of homeschoolers' activities. Part II.B explores the interests of children and the state left unprotected by current regulations and posits that, as homeschooling continues to grow in both popularity and visibility, the deregulatory trend of the last twenty-five years may well reverse

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31. See, e.g., Reich, *supra* note 25, at 56 ("It's symptomatic of the unregulated environment of homeschooling that precise figures of homeschoolers are impossible to establish."); Yuracko, *supra* note 17, at 134 ("[T]here is simply no good data on what and how much homeschooled students are learning."); see also anecdotal evidence described *infra* Part II.B.3 and accompanying notes.

32. See *infra* Parts II and II.B.

33. See *supra* notes 20–24 and *infra* notes 257–60 and accompanying text.

34. E.g., *Morse v. Frederick*, 551 U.S. 393, 420 (2007) (Thomas, J., concurring) (finding that parents' ability to choose, instead, to "home school [their children]" serves as a justification of public school authority to restrict student free speech).

35. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

itself. Part III examines the current constitutional framework for parental and religious rights in the education of children, as well as when and what state interests may override those rights. Part IV analyzes the constitutional muddle and highlights the doctrinal, practical, and political problems that the lack of constitutional clarity exacerbates. It argues that courts, and ideally the Supreme Court, should clarify the scope of the fundamental parental right such that it includes the choice to homeschool and the choice to teach certain subjects in homeschools, but does not prevent states from imposing additional obligations that do not effectively foreclose those choices. Finally, it examines how states might re-regulate homeschooling to protect public, parental, and student interests in education in a manner consistent with the constitutional standards proposed.

## II. REVOLUTION: THE POLITICAL BATTLE AND THE PROBLEMS

Homeschooling advocates long have dominated the debates over whether homeschooling should be allowed and, if so, how it should be regulated. Even with growing variation in the homeschooling community,<sup>36</sup> “one article of faith unites all homeschoolers: that home schooling should be unregulated.”<sup>37</sup> Despite countervailing pressure for more stringent regulation from a coalition including social scientists,<sup>38</sup> educators,<sup>39</sup> and child welfare advocates,<sup>40</sup> regulatory oversight of homeschooling became remarkably lenient between the mid-1980s and mid-1990s and broadly remains so.<sup>41</sup> Homeschooling laws vary widely from state to state,<sup>42</sup> but the trend

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36. See John Cloud & Jodie Morse, *Home Sweet School*, TIME, Aug. 27, 2001, at 46 (describing the changing face of homeschooling across the country). *But see* Mitchell L. Stevens, *The Normalisation of Homeschooling in the USA*, 17 EVALUATION & RES. IN EDUC. 90, 95 (2003) (noting that conservative Protestant Christian homeschool groups “ultimately secured definitional control of home education” in the public and political spheres).

37. Reich, *supra* note 30, at 109–10.

38. See, e.g., *id.* at 110 (“I believe that home schooling must be strictly regulated.”).

39. See, e.g., Peter T. Kilborn, *Learning at Home, Students Take the Lead*, N.Y. TIMES, May 24, 2000, at A1 (“The National Education Association, the largest teachers union, has adopted a resolution saying that home schools cannot provide a comprehensive education . . .”).

40. See, e.g., Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging “The Power of Parents to Control the Education of Their Own,”* 11 CORNELL J.L. & PUB. POL’Y 481, 490 (2002) (urging states to regulate homeschooling to allow children more voice in the decision).

41. See Reich, *supra* note 30, at 109 (describing the broadly permissive “patchwork regulatory environment” and the consistent pattern of “lift[ing] or eas[ing]” regulation that has prevailed for thirty years).

42. See Samantha Lebeda, *Homeschooling: Depriving Children of Social Development?*, 16 J. CONTEMP. LEGAL ISSUES 99, 100 (2007); see also Yuracko, *supra* note 17, at 128–30 (comparing homeschooling laws among the several states).



over the past two decades has favored wholesale deregulation.<sup>43</sup> Further, “oversight of homeschooling in several states is so lax as to be nonexistent.”<sup>44</sup> Only twenty-five states require standardized testing or evaluation of students of any variety,<sup>45</sup> and most do not require that these evaluations be conducted or reported on an annual basis.<sup>46</sup> Ten states do not even require notice of the names of students removed from schools.<sup>47</sup> This Section examines the legal and political pressures that have caused states to not “only look[] the other way . . . but actually change[] their laws to grant even greater freedom to homeschoolers.”<sup>48</sup> The discussion then turns to consideration of the interests disserved by this permissive atmosphere and how these drawbacks to unregulated homeschooling may turn the regulatory tide.

### A. *The Ascendancy of Homeschooling and the Homeschooling Lobby*

The homeschooling movement has, in some instances, been so successful in securing favorable legislation that it has effectively “taken the power away from state and local leaders.”<sup>49</sup> Given the direct impact of homeschooling regulation on homeschoolers and the diffuse impact on any other constituency, that homeschoolers wield greater political power than their numbers might suggest is perhaps unsurprising in public-choice terms.<sup>50</sup> In the fifteen years following the founding of the Homeschool Legal Defense Association (“HSLDA”), the most powerful legal and political advocate for homeschooling,<sup>51</sup> homeschooling went from being illegal “in most states” to legal in all fifty<sup>52</sup> in what has been described as a “political miracle.”<sup>53</sup> Only six

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43. Yuracko, *supra* note 17, at 128–30.

44. *Id.* at 130.

45. *Id.* at 129.

46. *See, e.g.,* McMullen, *supra* note 25, at 87–91 (detailing varieties of homeschooling regulations, including those that require periodic testing or maintenance of a portfolio).

47. *See* Reich, *supra* note 30, at 109. Additionally, two territories require no notice. *Id.*

48. Yuracko, *supra* note 17, at 130.

49. Bruce S. Cooper & John Sureau, *The Politics of Homeschooling: New Developments, New Challenges*, 21 EDUC. POL’Y 110, 111 (2007).

50. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 3 (Harvard Univ. Press, 1971) (“In the sharing of the costs of efforts to achieve a common goal in small groups, there is . . . a surprising tendency for the ‘exploitation’ of the *great* by the *small*.”).

51. *See, e.g.,* Stevens, *supra* note 36, at 93 (noting that the HSLDA provided the bulk of the organizational machinery in the policy debates and remains the “preponderant policy advocate for home education”).

52. *Home-schooling: George Bush’s Secret Army*, ECONOMIST, Feb. 24, 2004, at 52; *see also* Jane Gross, *Lack of Supervision Noted in Deaths of Home-Schooled*, N.Y. TIMES, Jan. 12, 2008, at

states currently impose what homeschooling advocates consider “high” regulations: requiring curricular approval, setting educational or training requirements for parent-teachers, or providing for evaluation of the learning environment and observation of the educational process.<sup>54</sup> Over roughly the same time frame, the movement also successfully changed public perception of homeschooling from almost entirely negative to a near balance between negative and positive.<sup>55</sup>

Also during this same period, homeschooling advocates have garnered a remarkable degree of national political clout.<sup>56</sup> For example, seven of the approximately 100 interns working for the White House in 2004 were drawn from the 240 students of Patrick Henry College, a school founded in 2000 by Michael Farris, chairman and co-founder of the HSLDA, specifically to educate homeschooled students; the campus is also the current home of the HSLDA.<sup>57</sup> Former chairman of the House Committee on Education and the Workforce Bill Goodling has called homeschoolers “the most effective educational lobby on Capitol Hill.”<sup>58</sup> Homeschoolers were conspicuously exempted from the test performance requirements of

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A8 (“Once against the law in all but five states, home schooling is now legal throughout the country and highly regulated in just six states.”).

53. Sommerville, *supra* note 15, at 135.

54. HSLDA, Home School Laws, <http://www.hslda.org/laws/default.asp> (last visited Jan. 28, 2010); see also Gross, *supra* note 52 (contrasting past regulations of homeschooling across the states with present regulations).

55. See Lowell C. Rose & Alec M. Gallup, *The 33rd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, 83 PHI DELTA KAPPAN 41, 46 (2001) (recording that the proportion of those surveyed who considered homeschooling a “bad thing” for the nation decreased from 73 percent to 54 percent between 1985 and 2001 and the proportion who considered it a “good thing” increased from 16 percent to 41 percent over the same period).

56. Michael Farris, for example, co-chaired the committee that drafted the national Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq. (2006), *invalidated* by *City of Boerne v. Flores*, 521 U.S. 507 (1997), a law (later ruled unconstitutional) purporting to overturn the Supreme Court’s landmark *Employment Division, Department of Human Resources of Oregon v. Smith* decision, 494 U.S. 872, 876–83 (1990). See *Religious Liberty Protection Act: Hearing on H.R. 4019 Before the H. Subcomm. on the Constitution*, 105th Cong. (1998) (statement of Michael P. Farris, Esq., Founder and Pres. of the Home Sch. Legal Defense Ass’n), at 1998 WL 390275 (“I served as co-chair of the initial drafting committee for RFRA. . . . I understand the gravity of the problem that the Supreme Court has created with respect to religious freedom . . .”). Farris was also one of only five persons invited by President Bush to the Oval Office to witness the signing of the Partial Birth Abortion Act of 2003. David D. Kirkpatrick, *College for the Home-Schooled is Shaping Leaders for the Right*, N.Y. TIMES Mar. 8, 2004, at A1.

57. See Kirkpatrick, *supra* note 56; see also Hanna Rosin, *First Chapter: ‘God’s Harvard,’* N.Y. TIMES, Sept. 9, 2007 (describing Patrick Henry, its students, and its clout).

58. Daniel Golden, *Social Studies: Home Schoolers Learn How to Gain Clout Inside the Beltway*, WALL ST. J., Apr. 4, 2000, at A1.

the No Child Left Behind Act.<sup>59</sup> Lawmakers viewed it as “not worth the legislative battle to take on the nation’s well-organized, politically savvy homeschool families and their organizations.”<sup>60</sup>

The lobby’s national clout notwithstanding, the primary battleground has been on the state level. In “a long string of judicial and legislative victories”<sup>61</sup> in state courts and legislatures, homeschoolers have chipped away at regulation and worked to secure lessened or nonexistent enforcement where it persists.<sup>62</sup> And despite the uncertainty of the constitutional doctrine underlying their claims,<sup>63</sup> homeschool advocates often show an eagerness to invoke constitutional grounds for opposing regulations. Farris has stated that “[t]he right of parents to control the education of their children is so fundamental that it deserves the extraordinary level of protection as an absolute right.”<sup>64</sup> When the District of Columbia attempted to regulate homeschooling in 1991, for example, Christopher Klicka, now Senior Counsel and Director of State and International Relations for the HSLDA, warned officials that “they were on shaky ground because of the 1st, 4th, and 14th amendments.”<sup>65</sup> The proposed rules were promptly abandoned.<sup>66</sup>

From its inception, HSLDA has contended that state regulation of homeschooling unconstitutionally infringes upon parental liberty and free exercise rights.<sup>67</sup> In perhaps its greatest court victory,

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59. 20 U.S.C. § 7886(b) (2006) (“Nothing in this Act shall be construed to affect a home school . . . nor shall any student schooled at home be required to participate in any assessment referenced in this chapter.”).

60. Cooper & Sureau, *supra* note 49, at 125. When Representative George Miller introduced a bill before Congress that some believed would require home educators to obtain credentials, the response was so overwhelming that it “shut down the Capitol Hill telephone system.” Kirkpatrick, *supra* note 56.

61. Stevens, *supra* note 36, at 93.

62. See Reich, *supra* note 24, at 303 (“Over the past decade, . . . regulations on homeschooling have eased dramatically and, where they exist, are often unenforced.”); Yuracko, *supra* note 17, at 129–30 (describing how the HSLDA has managed to prevent passage of new state laws and alter existing laws).

63. See *infra* Part III.

64. Yuracko, *supra* note 17, at 127 (quoting MICHAEL FARRIS, HOME SCHOOLING AND THE LAW 148 (1990)).

65. See Gross, *supra* note 52.

66. *Id.*

67. See HSLDA, *Marking the Milestones: A History of HSLDA (The Good, the Bad, and the Inspiring)*, <http://www.hsllda.org/about/history/good-bad-inspiring.asp> (last visited Jan. 30, 2010) (recounting the history of the HSLDA and describing its early cases and claims). In fact, HSLDA based the very first case it filed, a challenge in state court to state compulsory attendance laws effectively banning homeschooling, on multiple constitutional claims. *Id.* While the case was pending, however, political pressure led the state legislature to pass a law allowing homeschooling with only slight regulation, which still remains on the books today. *Id.*

HSLDA persuaded the Michigan Supreme Court in *People v. DeJonge* that strict scrutiny should be applied to the state's home education regulations because they infringed upon both parents' substantive due process rights and the free exercise of religion.<sup>68</sup> The court found no state interest sufficiently compelling to permit the regulations at issue to survive and held that, even if such an interest existed, the state had failed to demonstrate that it had used the least intrusive means to vindicate that interest.<sup>69</sup> Consequently, the court deemed the regulations unconstitutional as applied to religiously motivated homeschooling parents.<sup>70</sup>

In 2005, the Montana legislature considered a bill that would have required that (1) homeschooled students take national standardized tests in the fourth, eighth, and eleventh grades; (2) parents maintain annual records of courses taught; and (3) any parent-teacher who had only a high school diploma or less be monitored during her first two years of teaching in a home-education program.<sup>71</sup> According to the bill's sponsor and chair of the education committee, Senator Don Ryan, the Quality Home School and Child Protection Act was proposed to ensure that homeschooled children received adequate education and to prevent abusive parents from hiding their children from the authorities.<sup>72</sup> Nonetheless, an effort by homeschooling advocacy groups, including HSLDA, mobilized more than one thousand homeschoolers to descend upon Helena to convince the Senate Education Committee that the bill trampled constitutional rights.<sup>73</sup> Ultimately, only Senator Ryan voted in favor of moving it to

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68. 501 N.W.2d 127, 134–35 (Mich. 1993) (“[The] Free Exercise Clause in conjunction with . . . the right of parents . . . to direct the education of their children . . .’ demands the application of strict scrutiny.” (quoting *Employment Div., Dep’t of Human Resources of Or. v. Smith*, 494 U.S. 872, 881 (1990))).

69. *Id.* at 294–99.

70. *Id.* at 299. It is interesting to note that the same court handed down a diametrically opposed decision regarding parents who homeschooled for non-religious reasons on the very same day. See *People v. Bennett*, 501 N.W.2d 106, 120 (Mich. 1993) (“We conclude that the Fourteenth Amendment does not provide parents a *fundamental* right to direct their children’s secular education, and, thus, the state regulation need only be judged by a rational relationship test.”). In any event, this decision was effectively overturned by the passage of MICH. COMP. LAWS ANN. § 380.10 (West 2005) (“It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children.”).

71. Quality Home School and Child Protection Act, S. 291, 59th Leg. (Mont. 2005) (as introduced by Sen. Don Ryan), available at <http://data.opi.mt.gov/bills/2005/BillPDF/SB0291.pdf>.

72. Alison Farrell, *Panel Vote Kills Home School Bill*, BILLINGS GAZETTE, Feb. 15, 2005, available at [http://www.billingsgazette.com/news/state-and-regional/montana/article\\_c03024b8-7cee-56d8-ad8b-153f7ad8f493.html](http://www.billingsgazette.com/news/state-and-regional/montana/article_c03024b8-7cee-56d8-ad8b-153f7ad8f493.html) (quoting Senator Don Ryan, the bill’s sponsor, as stating he proposed the bill to prevent parents and legal guardians from using the state’s “lax home school laws to cover up abuse, neglect or their own crimes”).

73. See *id.* (noting that opponents of the bill argued it infringed upon their rights).

the floor for a vote.<sup>74</sup> In written testimony submitted to the Committee, HSLDA informed the committee that “the Fourteenth Amendment to the United States Constitution [affords parents] the fundamental right to direct the education of their children. This is well settled law.”<sup>75</sup> The testimony opined that the proposed law would not “survive a constitutional challenge in court.”<sup>76</sup>

Similarly, in 2008, when a California appellate court issued an opinion<sup>77</sup> reasoning that “parents do not have a constitutional right to school their children at home”—which some argued would effectively outlaw homeschooling in the state<sup>78</sup>—the response was swift and overwhelming.<sup>79</sup> Within days, 250,000 signatures had been collected on a petition calling for the California Supreme Court to de-publish the decision.<sup>80</sup> The governor’s office,<sup>81</sup> the superintendent of Public Instruction,<sup>82</sup> and the State Assembly<sup>83</sup> all quickly decried the decision and the court unanimously agreed to vacate and depublish it.<sup>84</sup> Upon rehearing and confronted with amicus briefs submitted by HSLDA and numerous other advocacy groups castigating the decision’s constitutional interpretation, the court admitted that it was at a loss as to the correct constitutional standard.<sup>85</sup> Advocates’ claims to a near-

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74. *Id.*

75. See *Hearing on S.B. 291 Before the Montana S. Comm. on Educ. and Cultural Resources*, 2005 Leg., 59th Reg. Sess. 4 (Mont. 2005) [hereinafter *Montana Minutes*] (statement of Dewitt Black, Senior Counsel, Home School Legal Defense Association) (stating that the bill violated “settled law” under the Fourteenth Amendment), available at <http://data.opi.state.mt.us/legbills/2005/Minutes/Senate/Exhibits/eds36a090.pdf>.

76. *Id.* at 5.

77. *In re Rachel L.*, 73 Cal. Rptr. 3d 77, 79 (Cal. Ct. App. Feb. 28, 2008) (depublished), vacated, reh’g granted sub nom. Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008).

78. See, e.g., Michael E. Hersher, “Home Schooling” in California, 118 YALE L.J. POCKET PART 27, 27 (2008) (stating that *In re Rachel L.* could be “understood . . . as holding that it is illegal for parents . . . to teach their own children at home” unless they were certified teachers).

79. See Daniel E. Witte & Paul T. Mero, *Removing Classrooms from the Battlefield: Liberty, Paternalism, and the Redemptive Promise of Educational Choice*, 2008 BYU L. REV. 377, 405–08 (describing the faulty legal logic and potentially far-reaching consequences of the *In re Rachel L.* decision); see also Céleste Perrino-Walker, *Home-School Panic*, LIBERTY MAG., Sept./Oct. 2008, <http://www.libertymagazine.org/index.php?id=1306> (criticizing the decision and describing the fierce backlash that followed it).

80. Perrino-Walker, *supra* note 79.

81. Robert C. Cloud, *Balancing Parental Rights and State Interests in Home Schooling*, 235 ED. LAW REP. 697, 698 (2008).

82. *Id.*

83. *Id.*

84. *Depublished at* No. B192878, 2008 Cal. App. LEXIS 548 (Cal. Ct. App. Mar. 25, 2008).

85. *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, 593 (Cal. Ct. App. 2008) (“[T]he level of scrutiny to which alleged violations of the parental liberty interest in directing the education of one’s children are subject is not clearly established.”).

absolute right to homeschool, the court noted, were a plausible reading of the U.S. Supreme Court's recent constitutional constructions.<sup>86</sup> Reversing itself, the court set a standard of strict scrutiny for the lower court on remand,<sup>87</sup> plaintively noting that "additional clarity in this area of the law would be helpful."<sup>88</sup>

### *B. Problems with Homeschool Deregulation*

Despite the impressive feats of homeschooling advocates, new concerns may be spurring a counterpoint to the deregulatory pressures. The current level of regulation in many states leaves important interests of both the public at large in the education of children and homeschooled children themselves largely or entirely unprotected. As homeschooling continues to become more prevalent<sup>89</sup> and demographically diverse,<sup>90</sup> the visibility and extent of these drawbacks to current homeschooling law will likely increase. As public awareness and scrutiny of the practice grows, pressure on lawmakers to implement more stringent regulations may ultimately overcome the power of the homeschooling lobby.

A brief examination of pending and recently passed legislation suggests that the balance may already have begun to shift. In New Jersey, which currently does not even require parents to notify any government official of their intent to homeschool their children,<sup>91</sup> the General Assembly recently considered legislation that would have required homeschooling parents to notify local superintendents of their intent to homeschool and to submit portfolios of written

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86. See *id.* at 592–93 (noting that, while the claim to an absolute right is incorrect, both *Troxel v. Granville*, 530 U.S. 57 (2000), and *Employment Division, Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 881 (1990), suggest that, at least under certain conditions, parental rights might be fundamental, and, hence, entitled to the most exacting scrutiny of claimed infringements).

87. *Id.* at 592–96.

88. *Id.* at 596.

89. See BIELICK, *supra* note 19, at 2 (describing a 74 percent relative increase in the percentage of students homeschooled between 1999 and 2007).

90. See, e.g., DANIEL PRINCIOTTA & STACEY BIELICK, U.S. DEP'T OF EDUC., HOMESCHOOLING IN THE UNITED STATES: 2003, at 6 (2006) (showing that the largest percentage increase in homeschoolers came from households in which both parents' highest educational attainment was a high school diploma or less); Stevens, *supra* note 36, at 95–96 (describing the demographic and ideological diversification of homeschoolers).

91. See State of New Jersey Department of Education, Homeschooling Frequently Asked Questions, [http://www.state.nj.us/education/genfo/overview/faq\\_homeschool.htm](http://www.state.nj.us/education/genfo/overview/faq_homeschool.htm) (last visited Jan. 30, 2010) ("A parent/guardian is not required by law to notify the local board of education of the intent to educate the child elsewhere than at school.").

materials, standardized test results, and an independent evaluation of each child on an annual basis.<sup>92</sup>

Most tellingly, in the summer of 2008, the District of Columbia—which previously had, in essence, declined to regulate homeschooling altogether—became the first jurisdiction in the United States to enact more stringent homeschooling regulations in over fifteen years.<sup>93</sup> The new regulations require that parents give fifteen-days notice before removing children from school, maintain a portfolio of written materials that must be made available for inspection upon request, and have a high school diploma or its equivalent.<sup>94</sup> These regulations were prompted in part by discovery of the decaying bodies of four girls who had been removed from District charter schools, ostensibly to be homeschooled by their mother.<sup>95</sup> This sad case highlighted the possibility that parents could exploit the nonexistent homeschooling regulatory regime and use the practice as cover to circumvent measures designed to detect and prevent abuse and neglect.<sup>96</sup> Despite receiving mountains of mail from homeschool

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92. See Assem. B. 3123, 213th Gen. Assem. (N.J. 2008), available at [http://www.njleg.state.nj.us/2008/Bills/A3500/3123\\_I1.pdf](http://www.njleg.state.nj.us/2008/Bills/A3500/3123_I1.pdf). Michigan, whose existing laws also do not require parents to notify to any governmental entity of their intent to homeschool, is also considering putting in place an annual notice requirement. H.B. 5912, 2007-08 Sess. (Mich. 2008), available at <http://www.legislature.mi.gov/documents/2007-2008/billintroduced/House/pdf/2008-HIB-5912.pdf> (proposed bill implementing new notice requirement); HSLDA, *Home Schooling in the United States: A Legal Analysis—Michigan* (2009-2010), available at <http://www.hslda.org/laws/analysis/Michigan.pdf> (outlining current Michigan homeschooling law). New Hampshire, which currently requires notice and a relatively lenient annual evaluation, also recently examined a bill that, functionally, would have required parents to maintain a portfolio, test their children annually, and teach certain prescribed subjects. H.B. 368, 2009 Sess. (N.H. 2009); HSLDA, *Home Schooling in the United States: A Legal Analysis—New Hampshire* (2009-2010), available at [http://www.hslda.org/laws/analysis/New\\_Hampshire.pdf](http://www.hslda.org/laws/analysis/New_Hampshire.pdf) (outlining current New Hampshire homeschooling law). The bill garnered considerable protests, see NH Home Schoolers PROTEST! UNPRECEDENTED! bill to restrict home education, <http://www.youtube.com/watch?v=ad5IuC7yDHA> (last visited Jan. 30, 2010), and was decried as a violation of the U.S. Constitution, J. MICHAEL SMITH & MICHAEL P. FARRIS, HSLDA MEMO IN OPPOSITION TO NEW HAMPSHIRE HOUSE BILLS 367 AND 368, at 1-4 (2009), available at [http://www.hslda.org/Legislation/State/nh/2009/NHHB368/Talking\\_Points\\_Analysis\\_HB\\_367.pdf](http://www.hslda.org/Legislation/State/nh/2009/NHHB368/Talking_Points_Analysis_HB_367.pdf). The bill was roundly defeated. HSLDA, Grassroots Activism, National Attention Keys to Lopsided Victory (Jan. 14, 2010), <http://www.hslda.org/hs/state/nh/201001140.asp>.

93. See Elissa Silverman, *D.C. Adopts Oversight Regulations for Home-schooling; Portfolio of Work Must Be Available*, WASH. POST, July 31, 2008, at T.6.

94. *Id.*

95. *Id.*

96. See Transcript of Public Hearing on Home Schooling Regulations: Hearing Before the District of Columbia State Board of Education at 169 (Mar. 5, 2008) (statement of Acting President William Lockridge), available at [http://sboe.dc.gov/sboe/frames.asp?doc=/sboe/lib/sboe/3-5-08\\_Home\\_School\\_Regulations\\_Public\\_hearing\\_transcript.pdf](http://sboe.dc.gov/sboe/frames.asp?doc=/sboe/lib/sboe/3-5-08_Home_School_Regulations_Public_hearing_transcript.pdf) (stating that this case

activists, less than 1 percent of which came from District residents, the case so “highlighted the need for greater oversight of children whose parents claim to home-school them,” that the regulations passed with an overwhelming majority.<sup>97</sup>

Allowing homeschooling to be practiced completely free from regulation or subject only to minimal or unenforced oversight presents a host of normative, constitutional, and legal problems. All the while, the interests in education of students and the state are left largely unprotected. As the District example demonstrates, broader exposure of the costs to these interests in unregulated homeschooling, as discussed below, can incite public reaction and galvanize public opinion sufficient to overcome homeschoolers’ resistance and to provide the political will necessary to jump-start debate about re-regulating the practice.

### 1. Constitutional Implications

States may have constitutional obligations to enact more stringent oversight, accountability, and curricular-control measures designed to ensure that parent-teachers provide homeschooled students with a threshold basic education. Professor Kimberly Yuracko notes that when states abandon oversight and regulation of homeschooling, they may violate positive constitutional obligations to ensure equal access to an adequate education.<sup>98</sup> She contends that either educational provisions contained in every state constitution or the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment to the federal Constitution require states to provide a “basic minimum level of education” to children.<sup>99</sup> “To the extent that homeschooling parents control the public function of providing a basic minimum level of education, they are bound,” either as executors of a monopolized public function or as delegates vested with state authority, “by the state’s own constitutional obligations.”<sup>100</sup>

Yuracko further contends that states additionally may be constitutionally obligated to prevent fundamentalist parents from enacting traditional conceptions of gender roles by providing

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of abuse alerted the board of the “need for us to really, really look at this and to put some regulations in place that had a little meat”).

97. Silverman, *supra* note 93 (quoting the District’s state education chief, Deborah Gist).

98. See generally Yuracko, *supra* note 17, at 131–33 (stating the basic premises of the constitutional arguments more fully propounded throughout the article).

99. *Id.* at 134–42.

100. *Id.* at 142–51.



substantively unequal education to male and female children.<sup>101</sup> Under this analysis, even absent proof that homeschooling parents perform a public function or that states effectively delegate their educational obligations to homeschooling parents, states that allow parents to “provid[e] its daughters with educations that are inferior to those provided to its sons” may violate the Equal Protection Clause.<sup>102</sup>

However, Yuracko recognizes the considerable uncertainty of the constitutional doctrine on which her argument relies.<sup>103</sup> Further, she fails to squarely address the issue of what parties would have standing to bring actions against a state in order to force it to implement or to enforce homeschooling regulations. Yet the greatest impact of her arguments, she notes, is not on the courts, but rather in providing political and positive law reinforcement to states that already wish to re-regulate homeschooling.<sup>104</sup> Positive constitutional obligations could bolster each state’s ability to “withstand pressure from an increasingly powerful homeschooling lobby seeking to gain parents unfettered control over their children’s education.”<sup>105</sup> The important point is that, if Yuracko is correct, state abdication of regulatory oversight may not simply be normatively or legally troubling; it also may be constitutionally suspect.<sup>106</sup> Recognition of, or even a plausible argument for, state constitutional obligations to regulate homeschooling may pack sufficient political firepower to cause a reversal of the trend toward wholesale deregulation and reinvigorate the debate over the appropriate level of regulation.

## 2. Legal Implications

Overly lax regulatory oversight also may indirectly hamper enforcement of unrelated state law, thereby undermining public objectives that are at least as important as the provision of education. Schools, whether private or public, “[t]raditionally . . . perform a safety-net function in a variety of areas concerned with child

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101. *Id.* at 156–58.

102. *Id.* at 158–73.

103. *See, e.g., id.* at 171 (recognizing that multiple interpretations of the doctrine of *Shelley v. Kramer* could produce widely differing results on the Equal Protection analysis); *id.* at 142 (admitting that the existence of a federal constitutional right remains highly unsettled); *id.* at 151 (allowing that whether and to what extent homeschooling parents can be considered state actors and so subject to constitutional strictures is up for debate).

104. *Id.* at 184.

105. *Id.*

106. Readers interested in a more thorough discussion of the potential constitutional obligations states may have to positively regulate homeschooling should consult Yuracko’s article. *See supra* note 17.

protection.”<sup>107</sup> Historically, the homeschooling community demographically has been both sufficiently small and homogeneous that many concerns associated with the lack of such safeguards have been either invisible or ameliorated.<sup>108</sup> Yet as a larger and more diverse segment of the population opts to homeschool their children,<sup>109</sup> it seems likely that any detriment unregulated homeschooling poses to the state’s legal protection of child welfare will become more apparent and acute.

Compliance with compulsory immunization laws is “typically monitored through the schools,” as enrollment typically requires proof of certain vaccinations in many states.<sup>110</sup> Some parents choose to homeschool primarily to avoid vaccinating their children,<sup>111</sup> either out of an irrational fear of unsubstantiated health risks or because they “do not wish their children to be tracked by the state vaccination registries.”<sup>112</sup> States that do not require notification of intent to homeschool have no means to track compliance, even if they nominally require homeschooled children to be immunized (which many do not).<sup>113</sup> Indeed, the last major polio outbreaks and the vast majority of cases of rubella occurred in Amish and Mennonite communities, two groups that have long homeschooled their children.<sup>114</sup> In addition to putting the health of homeschooled children themselves at risk, “the growing number of homeschooled children [also] puts herd immunity,” the primary value of compulsory vaccination, “at risk.”<sup>115</sup>

The lack of mechanisms in many states to even know where children spend the hours of a school day, much less monitor their continued physical well-being, may undermine states’ ability to police and enforce their child abuse and neglect laws. As the above-discussed

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107. McMullen, *supra* note 25, at 86.

108. *See, e.g.,* Lines, *supra* note 12, at 78 (“[T]he typical homeschooling family is religious, conservative, white, middle-income, and better educated than the general population. Homeschoolers are more likely to be part of a two-parent family . . .”).

109. *See, e.g., id.* (“Despite this predominant profile, it is also clear that the full range of American families are trying or considering homeschooling.”).

110. McMullen, *supra* note 25, at 86.

111. Donya Khalili & Arthur Caplan, *Off the Grid: Vaccinations Among Homeschooled Children*, 35 J.L. MED. & ETHICS 471, 474 (2007); Chris Joyner, *Parents Home-school to Avoid Vaccinating Their Kids*, U.S.A. TODAY, Oct. 22, 2008, at D4.

112. Khalili & Caplan, *supra* note 111, at 474.

113. *Id.* at 473.

114. *Id.* at 472.

115. *Id.* at 474. Herd immunity occurs when a sufficiently large proportion of individuals in a community are immunized such that a threshold is reached (usually 90 percent) at which the community as a whole, even those unable to be vaccinated and those for whom vaccination is ineffective, is resistant to attack. *Id.*

District example demonstrates,<sup>116</sup> the revelation of instances in which parents have used homeschooling to conceal gross abuse of their children can spur regulatory change. Allowing parents to sequester children from any interaction with state officials or even concerned citizens hampers both the state's interest in and systems for protecting the mental and physical welfare of children. Schools typically have served as central reporting agencies for potential cases of abuse and neglect.<sup>117</sup> The accessibility of adults in a child's school makes them "likely recipients of the confidence of an endangered child."<sup>118</sup> Further, teachers and school employees are required by law to report suspected instances of maltreatment under reporting statutes adopted in nearly every state,<sup>119</sup> and U.S. Department of Health and Human Services statistics show that teachers are the most common reporters of all varieties of abuse as well as the source of nearly one-quarter of reports of physical abuse.<sup>120</sup> Indeed, a North Carolina task force determined that the state's lax homeschooling laws served as cover for parents who wanted to "keep [their children] from public view because the children do have visible injuries."<sup>121</sup>

Homeschooling advocates correctly note that there is likely not a "vast undercurrent" of abuse among homeschoolers.<sup>122</sup> But this argument is a red herring. Instances of abuse do exist, even among seemingly high-functioning homeschooling families. Even if homeschooled children are no more likely to be abused, because homeschooling avoids the mechanism that states most commonly rely upon to discover abuse, it may be used to avoid detection of abuse, placing homeschooled children peculiarly at risk and potentially giving abusive parents a perverse incentive to homeschool in the first place.<sup>123</sup> In 2004, two journalists conducted what appears to be the only systematic examination of the prevalence of abuse and neglect

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116. See *supra* notes 93–97 and accompanying text.

117. See, e.g., McMullen, *supra* note 25, at 86.

118. *Id.*

119. *Id.*

120. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2006, at 6, 27 (2008), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm06/index.htm>.

121. Cooper & Sureau, *supra* note 49, at 126. Sociologists note that social isolation of both victim and abuser is a common characteristic of abusive relationships. See RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY 87–88 (1988).

122. Jamie Holgun, *Home Schooling Nightmares: Vince Gonzales Reports on Parents Accused, Convicted of Abuse and Murder*, CBS NEWS, Oct. 14, 2003, <http://www.cbsnews.com/stories/2003/10/14/eveningnews/main578007.shtml>.

123. See, e.g., *id.* (telling the story of former National Spelling Bee second-place prize-winner Marjorie Lavery whose father beat her prior to her performance in the contest and threatened to kill her when she placed second).

among homeschooling families.<sup>124</sup> By collating reports of abuse, neglect, homicide, incest, child pornography, and similar crimes from national newswires that specifically stated the crimes had occurred in homeschooling families, they extrapolated that homeschooled children were as likely to be murdered by their parents as private or public schooled children.<sup>125</sup> Given that their survey was restricted to incidents reported by national newswires in which homeschooling was mentioned explicitly, they almost certainly underestimated the figures.<sup>126</sup> Further, though they discovered numerous gruesome cases of abuse, severe neglect, and other maltreatment,<sup>127</sup> no statistics exist to show the levels of such crimes among homeschooling families.<sup>128</sup> The absence of any effective means to uncover abuse or neglect in many states, especially when families have isolated themselves deliberately,<sup>129</sup> made any attempt to extrapolate rates futile.<sup>130</sup> Determining rates of educational neglect, included within criminal neglect statutes in over half of states,<sup>131</sup> or even uncovering discrete instances would seem impossible in the half of states that require no educational assessment of homeschooled students.<sup>132</sup>

Even if, as advocates often assert, the idea that parents may use homeschooling to escape detection of abusive or neglectful behavior has no basis in truth, in many states the means of discovering any instances of these crimes simply do not exist in the homeschooling context. HSLDA has fought vigorously to overturn requirements for home visits, which were at one point part of homeschooling regulations in twenty states, but now a requirement in none.<sup>133</sup> Indeed, via political force and steady attacks on requirements

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124. Dennis J. Willard & Doug Oplinger, *Home Schoolers May Be No Safer in Their Homes Than Other Children*, AKRON BEACON J., Nov. 17, 2004, at § 1, available at <http://epsl.asu.edu/epru/articles/EPRU-0503-104-OWI.pdf>.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. See, e.g., McMullen, *supra* note 25, at 79 (stating that some fundamentalist families homeschool to “shelter” their children by “severely limit[ing] contact with anyone outside of the family”).

130. Willard & Oplinger, *supra* note 124.

131. Amanda Slater & Ronald E. Reeve, *The ‘Tug-of-War’ Over Attention-Deficit Hyperactivity Disorder: Balancing the Interests of Parents and Schools (and Don’t Forget the Kids)*, 27 DEV. MENTAL HEALTH L. 1, 16 (2008).

132. See, e.g., Yuracko, *supra* note 17, at 134 (“With only half of all states requiring standardized testing or evaluation of homeschooled students, and with poor enforcement of such requirements where they do exist, there is simply no good data on what and how much homeschooled students are learning.”).

133. Gross, *supra* note 52.

and individual investigations in multiple state and federal courts on a variety of constitutional bases, HSLDA and other advocacy groups have steadily sought to reduce the access child-services officials have to homeschooled children.<sup>134</sup> More troublingly, homeschooling advocates are often conspicuous voices decrying more stringent child-abuse investigation laws.<sup>135</sup>

It is illogical to argue that homeschooling families should be on an "honor system,"<sup>136</sup> exempted from laws designed to protect children and the state's interest in the health and safety of its citizens that are applicable to students in any other educational setting. Nor is there sound reason to presume that states cannot enact measures to counteract the difficulties in enforcing these laws peculiar to homeschooling. When these concerns are publicized, they can prompt swift and decisive legislative action, as exemplified by the District.

### 3. Normative Implications

States that do not regulate homeschooling or fail to exercise what level of oversight they retain also have no means to protect the public interest in a well-educated and civically cohesive population. Normatively, without mechanisms to ensure that homeschooled children have the opportunity to receive an education that prepares them to be productive citizens, some may ultimately become burdens on society, lacking the capacity to support themselves or to participate amicably and fruitfully in their communities.

Scholars and critics note that because many states have failed to implement effective oversight over parent-teachers or foundational curricular requirements, it is likely that at least some homeschooled students do not receive even a threshold level of basic education.<sup>137</sup> Indeed, demographic changes suggest that as the number of homeschoolers has grown, the probability that they will not be provided an adequate education has risen correspondingly.

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134. See *Brunelle v. Lynn Pub. Sch.*, 702 N.E.2d 1182, 1185–87 (Mass. 1998) (striking as violative of parents' fundamental constitutional rights law requiring submission to home visits as a condition of approving a homeschooling program); Summer A. Duke, Comment, *Standard Bearers of the Fourth Amendment: The Curious Involvement of Home School Advocates in Constitutional Challenges to Child Abuse Investigations*, 73 UMKC L. REV. 137, 148–57 (2004) (recounting legal and legislative battles by the HSLDA and the National Home Education Network against the validity of warrantless social services investigations).

135. Duke, *supra* note 134, at 148–57.

136. KLICKA, *supra* note 2, at 156.

137. See, e.g., McMullen, *supra* note 25, at 82 ("The most glaring potential downside of homeschooling is that a negligent or ineffective parent can use it as a cover for truancy."); cf. Yuracko, *supra* note 17, at 129–30 (describing regulations in Alaska as an example of a variety "so lax as to be nonexistent").

Historically, parents who homeschooled tended to be “better educated than the general population.”<sup>138</sup> Consequently, the argument that homeschooled children would be educated at least as well as public school students “just because of the one-on-one time working with them” made some intuitive sense.<sup>139</sup> However, between 1999 and 2003, U.S. Department of Education statistics show that the proportion of homeschooled students taught by parents whose highest educational attainment was at most a high school diploma increased substantially, while the percentage of those whose parents had more formal education decreased in every category.<sup>140</sup> This is not to suggest that parents lacking at least “some college” are never qualified to teach their children, but rather that the potential for a subpar education increases when a greater percentage of the teachers themselves have received less formal education. And, of course, anecdotal evidence of students receiving markedly deficient education from their parents is not difficult to discover.<sup>141</sup>

Homeschooled students themselves have an even more direct stake in receiving an education adequate to prepare them sufficiently for the role in society they may later choose for themselves.<sup>142</sup> Likewise, states have a legitimate interest in providing the means for them to ensure they receive such an education.<sup>143</sup> Current regulations in most states giving parents plenary control over both the choice to homeschool and what curriculum will be taught essentially displace both the decisions of the student and the interest of the state in

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138. Lines, *supra* note 12, at 78.

139. Bill Roorbach, *Mommy, What's a Classroom?*, N.Y. TIMES, Feb. 2, 1997, at SM30; see also Lines, *supra* note 12, at 81 (noting that, though parent-teachers may not have certification or teaching degrees, “the advantages of one-to-one learning [might] outweigh the advantages of professional training”).

140. PRINCIOTTA & BIELICK, *supra* note 90, at 6.

141. See, e.g., Cloud & Morse, *supra* note 36 (recounting the story of a 15-year old dyslexic Illinoisan who was allowed to design her own curriculum which involved dancing, but not math or composition). Among the reasons for the above-described unenacted Montana measures were the discovery of a “mom with a fourth grade education . . . homeschooling her daughter, and . . . [an] 18-year-old home school girl [who] saw her dreams of becoming a nurse shatter when she realized she was academically unprepared to enter college.” Farrell, *supra* note 72. In an even more troubling example, six homeschooled Idaho siblings engaged in an armed standoff with authorities in June 2001 after their mother was arrested on child neglect charges. See McMullen, *supra* note 25, at 85. Sheriff's deputies discovered they had received essentially no education beyond being taught an intense distrust of outsiders by their paranoiac mother. *Id.*

142. See *Wisconsin v. Yoder*, 406 U.S. 205, 239–40 (1972) (White, J., concurring) (recognizing that some of the Amish children whose education was at issue in the case “may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary”).

143. *Id.*

providing means to vindicate those decisions.<sup>144</sup> For example, among the reasons asserted for the above-described, unenacted Montana measures<sup>145</sup> was the testimony of an “18-year-old home school girl [who] saw her dreams of becoming a nurse shatter when she realized she was academically unprepared to enter college.”<sup>146</sup> The recent California case *In re: Rachel L.* similarly involved a conflict between the mandates of parents and wishes of the student.<sup>147</sup> After a determination that the student, Rachel, had been abused and that her parent-teacher had attempted to hide her and her younger siblings from authorities and had coached them not to speak to social workers, Rachel asked the court to order that she be sent to public school.<sup>148</sup> Yet, following the political furor and constitutional charges levied by homeschooling advocates, the appellate court felt constrained to declare that such an order would be permissible only if necessary to further a compelling state interest.<sup>149</sup>

Inadequate education may also occur in a more particularized way. Yuracko describes a strain of Christian Fundamentalism in the homeschooling movement that emphasizes “an ideology of female subservience and rigid gender role differentiation.” She continues:

Prominent homeschool curricula, for example, emphasize that girls should be subordinate to their fathers and later their husbands. Vision Forum Ministries, a group founded by a leading homeschool advocate and influential among Christian homeschoolers, posts articles on its website asserting that women belong exclusively in the private domestic sphere. Several articles assert that women should not work outside the home with one contending that “God does not allow women to vote.”<sup>150</sup>

Yuracko notes that such ideologies are allowed full rein under the more lenient homeschooling regimes in place in many states, and may

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144. See Woodhouse, *supra* note 40, at 488–90 (noting the lack of attention to student decisions in homeschooling in most states and contending this should be rectified).

145. See *supra* notes 71–76 and accompanying text.

146. Farrell, *supra* note 72.

147. See *supra* notes 77–89 and accompanying text.

148. *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, 578–79 (Cal. Ct. App. 2008).

149. *Id.* at 594.

150. Yuracko, *supra* note 17, at 156–57 (citing a series of books available to homeschoolers by mail order). The prominent homeschool advocate mentioned in the passage is Doug Phillips, a former staff attorney for the HSLDA and former director of the National Center for Home Education. Vision Forum Ministries, About the President, [http://www.visionforumministries.org/home/about/about\\_the\\_president.aspx](http://www.visionforumministries.org/home/about/about_the_president.aspx) (last visited Jan. 30, 2010). Note also that the article asserting women should not be allowed to vote has since been removed, but can still be found described on other homeschooling websites as linked to Vision Forum. See, e.g., Vision Forum: God Does Not Allow Women to Vote, <http://jensgems.wordpress.com/2007/08/15/vision-forum-god-does-not-allow-women-to-vote/> (last visited Jan. 30, 2010). Vision Forum also has a commercial arm selling, among other things, homeschooling materials. The Vision Forum, Inc., <http://www.visionforum.com/> (last visited Jan. 30, 2010).

lead to “significantly inferior substantive educations for homeschooled girls.”<sup>151</sup>

A more common, though subtler, complaint is that homeschooling deprives children of necessary socialization skills, particularly when undertaken for the primary purpose of insulating children from outside perspectives.<sup>152</sup> Educators, social scientists, and child-development specialists all have argued that “homeschooling deprives the child of the ability to develop socialization skills,” such as the ability to “establish and maintain relationships with others, . . . regulate their own behavior in accordance with society’s codes and standards, and get along with others.”<sup>153</sup> Socialization failures can “lead to interpersonal conflicts, social isolation, and development of aggressive behavior.”<sup>154</sup> These children may lack skills necessary for basic human interaction and may be unable to cope with life outside the home.<sup>155</sup> Advocates regularly note that, in many jurisdictions, homeschooled children are allowed to participate in interscholastic and extracurricular activities, such as sports or band, at public schools.<sup>156</sup> While access to these activities is undoubtedly salutary in that it mitigates the social isolation homeschooled students might otherwise face, homeschooled children are not—and perhaps could not be—required to participate if they chose not to do so.<sup>157</sup>

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151. Yuracko, *supra* note 17, at 157. Moreover, absent more stringent reporting requirements, even the extent to which such discrepancies may occur would remain unknown. *Id.* Indeed, in a case often cited by advocates for more stringent regulation, one of the objections of plaintiff fundamentalist parents was to certain books on their child’s reading list that included “biographical material about women who have been recognized for achievements outside their homes.” *Mozert v. Hawkins*, 827 F.2d 1068, 1062 (6th Cir. 1987).

152. See Margaret Talbot, *A Mighty Fortress*, N.Y. TIMES MAG., Feb. 27, 2000, at 34, 40, 66 (describing the Schiebner family, self described as “selective separatists,” who “encapsulate[d]” their children “in a culture of their own making” to prevent “los[ing] them to other people’s ideas and ideologies”).

153. Lebeda, *supra* note 42, at 101.

154. *Id.* at 102 (citing Wendy Craig, *Introduction: What is Social Development?*, in CHILDHOOD SOCIAL DEVELOPMENT: THE ESSENTIAL READINGS 2 (Wendy Craig ed., 2002)).

155. Director of the University Center for Human Values at Princeton Stephen Macedo argues that “[i]nsulating children from diversity is less serious than keeping them from needed medicine, but awareness of alternative ways of life is a prerequisite not only of citizenship . . . but also of being able to make the most basic life choices.” STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 202 (2000).

156. See generally Christina Sim Keddie, Note, *Homeschoolers and Public School Facilities: Proposals for Providing Fairer Access*, 10 N.Y.U. J. LEGIS. & PUB. POLY 603, 615–19 (describing current legislation in at least eighteen states that grants homeschoolers the privilege of access to public school facilities or activities).

157. See, e.g., *id.* at 632 (noting there is no statistical data on homeschooler participation in such programs where they do exist and that “[o]ne possible explanation for the lack of a systematic empirical study could be that too few homeschoolers actually take advantage of the . . . access available in their states”).



Absent some degree of oversight or basic curricular requirements, children also may be taught material inimical to the public interest.<sup>158</sup> Khianna Bartholomew describes a California parent-teacher whose history curriculum includes advocating skepticism about the Holocaust and the tenet that the fall of the Roman Empire resulted from the “overmixing of races.”<sup>159</sup> In *T.A.F. v. Duval County*, two parents removed their children from public school prior to the legalization of homeschooling in Florida in order to teach them historical and sociological propaganda drawn from the father’s religion—primarily that “blacks and Orientals were conceived through the copulation of Eve and Satan . . . and it is therefore sinful and evil to associate with people of those races.”<sup>160</sup> It is doubtful that in the fourteen states that require only written notice of intent to homeschool or the ten that require no notice at all,<sup>161</sup> such teaching would have even been discovered, much less remedied or countered by exposure to less malicious curricula. If, as the Supreme Court has stated, institutional education is the “primary vehicle for transmitting ‘the values upon which our society rests’ ”<sup>162</sup> and “has a fundamental role in maintaining the fabric of our society,”<sup>163</sup> states that maintain no curricular requirements or oversight run the risk of being forced to confront a subset of the citizenry who were schooled without even an opportunity to overcome antisocial indoctrination.

While it may certainly be true that many of these normative ramifications emanate from an unrepresentative minority of homeschooling families, if homeschooling continues to grow at the current rapid pace, it seems only logical that the minority will grow as well. Additionally, as so much homeschooling “occurs under the radar,”<sup>164</sup> the extent of these problems and their ramifications remain largely unknown. Yet as those homeschooled under the current deregulated regime begin to reach the age of adult citizenship, there is reason to believe that any negative impacts on state and student

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158. *E.g.*, *M.H. v. L.H.*, No. 06A01-0805-CV-234, 2009 WL 1124947, at \*1 (Ind. Ct. App., Apr. 24, 2009) (recounting the testimony of a mother in a custody case about the educational mandates of a father: “He would not let [the children] go to preschool. He . . . wanted me to home school because he doesn’t believe in the history of America, because blacks don’t belong in it, only whites do . . .”).

159. Khianna Bartholomew, Note, *Avoiding Implicit Acceptance of Bigotry: An Argument for Standardized Testing of Home-Schooled Children*, 92 CORNELL L. REV. 1177–78 (2007).

160. 273 So. 2d 15, 18 (Fla. Dist. Ct. App. 1973) (per curiam).

161. See HSLDA, *Home School Laws*, *supra* note 54.

162. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)).

163. *Id.*

164. Reich, *supra* note 30, at 116.

interests that result may manifest themselves and animate debate about the appropriate level of regulation.<sup>165</sup>

### III: RIGHT(S) AT HOME: THE CONSTITUTIONAL MILIEU

An impressive variety of constitutional claims have been levied against laws regulating or prohibiting homeschooling.<sup>166</sup> Dominant among these objections, raised both in courts and legislatures, are arguments based on the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment. Homeschooling parents claim a fundamental liberty interest in directing their children's education protected by the substantive component of due process.<sup>167</sup> Others claim that the religious content of their instruction and their belief that God dictates that they personally teach their children render homeschooling a species of protected religious practice.<sup>168</sup> Yet, with one arguable exception,<sup>169</sup> the Supreme Court has not had occasion to definitively determine the applicability of these protections to homeschooling as an educational institution or to homeschooling families in particular. Nonetheless, several cases dealing with other factual situations provide some guidance.

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165. See, e.g., Yuracko, *supra* note 17, at 184. Yuracko posits the uncontroversial premise that “[s]tates have a social and economic interest in ensuring that all children receive an adequate education. Their political health and economic prosperity depend on it.” Consequently, she notes, legal arguments for heightened regulation based upon the impact of illiberal and inadequate homeschool education may “have their greatest impact in a political rather than a traditionally legal forum,” providing state regulators with sufficient normative, constitutional, and legal justification to “do that which they already want to do.” See also *supra* notes 71–76, 91–97 and accompanying text (discussing recent legislative attempts to reimpose homeschooling regulation occasioned by actual or perceived inadequacies of current deregulated regimes).

166. See generally Robin Cheryl Miller, *Validity, Construction, and Application of Statute, Regulation, or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students*, 70 A.L.R. 5TH 169 (1999) (collecting cases raising, among others, constitutionally-based free exercise, family privacy, equal protection, vagueness, and unreasonable search and seizure objections to homeschooling laws).

167. See, e.g., *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) (per curiam) (relying on cases establishing fundamental rights protected by the Due Process Clause, including the right to direct the education and upbringing of one's children), *cert. denied*, 129 S. Ct. 1013 (2009).

168. E.g., *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) (setting forth the parents' claim that the substance and method of their educational practice constituted “an essential part of their religious belief and practice”).

169. *Id.* at 205 (upholding the Amish system of education based on a parental right to direct the religious upbringing of one's children). See discussion *infra* Parts III.B and IV.C.

*A. Do Parents Have a Fundamental Liberty Interest in their  
Children's Education?*

Two of the Supreme Court's earliest substantive due process decisions established the existence of parents' "fundamental liberty interest . . . in the care, custody, and management of their child[ren]."<sup>170</sup> In *Meyer v. Nebraska*, the Court struck down a Nebraska statute prohibiting the teaching of certain foreign languages to young children.<sup>171</sup> The Court concluded that the law infringed upon the "power of parents to control the education of their own."<sup>172</sup> The Court reasoned that the "inhibition with consequent infringement of rights long freely enjoyed" caused by the statute was "arbitrary and without reasonable relation to any end within the competency of the state."<sup>173</sup>

Two years later, in *Pierce v. Society of Sisters*, the Court invalidated an Oregon statute requiring parents to send their children to public school.<sup>174</sup> The Court held that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control,"<sup>175</sup> stating that such "rights guaranteed by the Constitution" could not be abrogated by legislation unrelated to legitimate state interests.<sup>176</sup>

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>177</sup>

Scholars consider *Meyer* and *Pierce* foundational to the "family privacy" strand of substantive due process,<sup>178</sup> carving out a "private realm of family life which the state cannot enter."<sup>179</sup> Nonetheless, the bounds of the constitutional protection they actually afford remain uncertain in at least two important respects.

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170. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

171. 262 U.S. 390, 400-01 (1923).

172. *Id.* at 401.

173. *Id.* at 403.

174. 268 U.S. 510, 534-36 (1925).

175. *Id.* at 534-35.

176. *Id.* at 535.

177. *Id.*

178. See, e.g., *Meyer*, *supra* note 29, at 533 (describing these cases as the basis of the family privacy liberty interest).

179. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

First, these cases and their progeny provide little guidance as to the scope of the rights they recognize.<sup>180</sup> The Court has continued to expressly decline “to decide the precise scope of the parental due process right . . . .”<sup>181</sup> *Pierce* explicitly refused to draw into question “the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require . . . that certain studies . . . be taught . . . .”<sup>182</sup> In the eighty-five years since these rights were recognized, their scope has dilated and contracted unpredictably.<sup>183</sup> For example, in *Runyon v. McRary*, stressing the “limited scope of *Pierce*,”<sup>184</sup> the Court rejected a challenge to the application of a civil rights statute that precluded parents from choosing a segregated private school.<sup>185</sup> Parents, the Court stated, “have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”<sup>186</sup> Yet, in a more recent decision, Justice Thomas reiterated that “[t]his Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children.”<sup>187</sup>

The constant fluctuation in the Court’s definition of a parent’s constitutionally protected liberty interest has led to considerable confusion among lower courts about which homeschooling decisions, if any, are within its purview and, if so, to what extent. Homeschooling parents convicted under compulsory attendance statutes in states that historically did not allow the practice have been held to lack any right that would support a due process claim.<sup>188</sup> The *In re: Rachel L.*

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180. See *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003) (recognizing that, even after *Troxel*, the scope of the *Meyer-Pierce* right of parents to “direct the upbringing and education of children under their control” remains “undefined”).

181. *Troxel v. Granville*, 530 U.S. 57, 73 (2000).

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

183. See *Meyer*, *supra* note 29, at 563 (“[T]he Court has been far from consistent about defining the scope of fundamental rights . . .”).

184. 427 U.S. 160, 177 (1976) (stating that *Pierce* “simply ‘affirmed the right of private schools to exist and to operate . . . .’” (quoting *Norwood v. Harrison*, 413 U.S. 455, 462 (1973))).

185. *Id.*

186. *Id.* at 178–79 (citations omitted).

187. *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring).

188. See, e.g., *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452, 461 (N.D. Ill. 1974) (holding that homeschooling parents at risk of conviction had “established no fundamental right which has been abridged by the compulsory attendance statute”); *People v. Bennett*, 501 N.W.2d 106, 112–15 (Mich. 1993) (determining that parents have no fundamental right under the Due Process Clause that would protect their decision to homeschool from regulations that effectively foreclosed that decision); *State v. DeLaBruere*, 577 A.2d 254, 273 (Vt. 1990) (upholding conviction of homeschooling parents under a compulsory education statute that set relatively stringent reporting requirements and required instruction in several substantive subject areas because the statute did not infringe upon any right protected by the Due Process Clause). Similarly, parents challenging statutes that effectively prohibit homeschooling have been held to

decision stated explicitly: “[P]arents do not have a constitutional right to home school their children.”<sup>189</sup> Several courts have recast the right asserted in homeschooling cases not as the right to direct the education of one’s own but rather as the right to be free from reasonable governmental regulation, and hence determined it unprotected by the Due Process Clause.<sup>190</sup> Still others have found homeschooling decisions well within the “protected right of parents to raise their children” and have struck down regulations having little or no effect on the actual decision to homeschool.<sup>191</sup> This type of uncertainty led the Tenth Circuit to delineate the scope of parental rights in education only in the negative: “Parents simply do not have a constitutional right to control each and every aspect of their children’s education.”<sup>192</sup>

Perhaps more confusingly, because *Meyer* and *Pierce* were decided before the Court’s development of the current two-tiered substantive due process analysis, they are couched in the language of “rational basis” while applying a significantly higher standard of review. Several lower courts have acknowledged this conundrum.<sup>193</sup>

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lack any right that would support a due process claim. *See, e.g.*, *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) (noting that while a decision “concerning the manner in which [a] child is to be educated” may be outside legitimate government authority, the parents had no cognizable claim under the Fourteenth Amendment against reasonable regulations); *Clonlara, Inc. v. Runkel*, 733 F. Supp. 1442, 1458 (E.D. Mich. 1989) (“No case has yet found a generalized right of privacy under the Constitution which would allow parents the right to home school free from reasonable government regulation.”).

189. *In re Rachel L.*, 73 Cal. Rptr. 3d 77, 79 (Ct. App. 2008) (depublished), *vacated, reh’g granted sub nom. Johnathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571 (Ct. App. 2008).

190. *See, e.g.*, *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 250 (3d Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 1013 (2009) (“[T]he particular right asserted in this case [is] the right to be free from all reporting requirements and ‘discretionary’ state oversight of a child’s home-school education[, which] has never been recognized.”).

191. *See, e.g.*, *Brunelle v. Lynn Pub. Sch.*, 702 N.E.2d 1182, 1185–87 (Mass. 1998).

192. *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998).

193. *See, e.g.*, *Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003) (noting that even “after *Troxel*, it is not entirely clear what level of scrutiny is to be applied,” but contending it “evident . . . that courts are to use some form of heightened scrutiny in analyzing these claims” (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000))); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (“[T]he *Meyer* and *Pierce* cases were decided well before the current ‘right to privacy’ jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one’s children is among those fundamental rights whose infringement merits heightened scrutiny.”); *Leebeart v. Harrington*, 193 F. Supp. 2d 491, 498 (D. Conn. 2002) (stating that precedent was unclear as to the “appropriate standard of review of parental rights claims,” but applying rational basis), *aff’d*, 332 F.3d 134 (2d Cir. 2003); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 113 (N.D.N.Y. 1988) (stating, in the context of a homeschool case, that “the degree of scrutiny to be applied to a governmental action that interferes with the privacy interests recognized in *Pierce* and *Meyer* . . . is not clear to this court”), *aff’d on question of mootness*, 866 F.2d 548 (2d Cir. 1989).

Some of these courts, noting that the early cases use “the language of rational basis,” have determined that the right articulated in *Pierce* is not “‘fundamental’ in the constitutional sense.”<sup>194</sup> However, the D.C. Circuit recently stated that, on its reading of the *Meyer* and *Pierce* line of cases, rights “focused on the parents’ control of the home and the parents’ interest in controlling . . . the formal education of children” were entitled to strict scrutiny.<sup>195</sup> Moreover, in *Troxel v. Granville*, the Court recognized that parents possess “a fundamental right”<sup>196</sup> to make determinations with respect to the upbringing of their children. Justice Thomas, in concurrence, phrased this constitutional right as one “to rear . . . children, including the right to determine who shall educate and socialize them.”<sup>197</sup> Confoundingly, even in reiterating the fundamentality of the interest, the Court in that case failed to explicitly articulate the strict scrutiny test.<sup>198</sup>

*Wisconsin v. Yoder* stands as the only Supreme Court case specifically addressing a homeschool-like educational arrangement.<sup>199</sup> In *Yoder*, the Court overturned the convictions under state compulsory education laws of three Old Order Amish parents who declined to send their children to public or private schools after the eighth grade.<sup>200</sup> These Amish parents objected to the values ingrained in public schooling, seeking to exempt their children from “‘worldly’ influence in conflict with their beliefs.”<sup>201</sup> The Court found “no doubt” that Wisconsin’s interests permitted it to prescribe regulations for the length and content of education, but found its interest in education, no matter how highly weighted, insufficient to overcome the parents’

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194. *Herndon ex rel. Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 178–79 (4th Cir. 1996).

195. *Hutchins v. District of Columbia*, 188 F.3d 531, 540–41 (D.C. Cir. 1999).

196. 530 U.S. 57, 65–67 (2000).

197. *Id.* at 80 (Thomas, J., concurring).

198. *See id.* (noting that, though six other Justices had joined or written opinions confirming the fundamentality of the interest “curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights”); *see also* *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008) (interpreting *Troxel* as not “applying either rational basis or strict scrutiny”); *Heck*, 327 F.3d at 518 (“Despite the sweeping language used by the Supreme Court in describing the ‘fundamental constitutional liberty interest parents have . . . the appropriate standard of review for claims alleging a violation of this interest is less than clear.”); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001) (“While the Supreme Court in *Troxel* recognized that there exists a fundamental right of parents to direct their children’s upbringing, it failed to articulate a standard of judicial scrutiny to be applied.”).

199. 406 U.S. 205, 207 (1972).

200. *Id.* at 207–09.

201. *Id.* at 210–11.

“fundamental rights and interests” in their children’s education.<sup>202</sup> The Court reiterated that the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>203</sup> Yet, in describing the rights infringed and applying strict scrutiny to the statutes, the court conflated claims based upon the parents’ educational decisions and the free exercise of their Amish beliefs.<sup>204</sup> In so doing, it left uncertain the extent to which the case can be seen as a reiteration or clarification of the rights originally outlined in *Meyer* and *Pierce*.

*B. Parental Due-Process Rights Coupled with Free Exercise Rights:  
The Hybrid-Rights Conundrum*

The *Yoder* Court failed to maintain the distinction between the parental due process and free exercise strands of both its reasoning and its holding.<sup>205</sup> Nonetheless, it is clear that the then-prevailing free exercise standard outlined in *Sherbert v. Verner*, requiring that significant state burdens on the free exercise of sincere religious beliefs survive strict scrutiny, played a central role.<sup>206</sup> This test, however, was later severely limited, if not entirely repudiated, in *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>207</sup> Yet, even while abjuring one of its central doctrinal bases, the *Smith* Court expressly preserved *Yoder* as a “hybrid situation,” in which the right to free exercise and another, interlocking right were simultaneously violated.<sup>208</sup> The “right of parents . . . to direct the education of their children,” the *Smith* Court stated, was among those rights for which a claimed violation, when conjoined with a free

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202. *Id.* at 213–14. Even the state’s “paramount responsibility” must be “made to yield to the right of parents to provide an equivalent education . . .” *Id.*

203. *Id.* at 232; see also *Parker v. Hurley*, 514 F.3d 87, 98 (1st Cir. 2008) (noting the *Yoder* Court “did not analyze separately the due process and free exercise interests of the parent-plaintiffs, but rather considered the two claims interdependently.”).

204. In addition to impinging upon rights in the free exercise of their religion, the Court found the statute infringed upon “the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, ‘prepare [them] for additional obligations.’” *Yoder*, 406 U.S. at 214 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

205. See *id.* at 234 (“[W]e hold . . . that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.”).

206. See, e.g., *id.* at 215, 220, 221, 230, 236 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

207. 494 U.S. 872, 884 (1990) (refusing to “breathe life” into *Sherbert*).

208. *Id.* at 881–82.

exercise claim, would incur strict judicial scrutiny under the so-called hybrid-rights theory.<sup>209</sup>

Relying upon *Yoder's* extensive discussion of the unique interplay between Amish religious doctrine and the community's objection to compulsory secondary education, courts applying the decision to other religious denominations have construed it narrowly, both before and after creation of the hybrid-rights claim.<sup>210</sup> The *Yoder* majority itself noted that the showing the Amish made was "one that probably few other religious groups or sects could make . . ."<sup>211</sup> Homeschoolers' attempts to analogize their choices to those of the *Yoder* plaintiffs, arguing they rest on a biblical imperative to personally educate their children<sup>212</sup> and religiously based objections to the values taught in public schools,<sup>213</sup> have almost universally been rejected.<sup>214</sup>

At least three circuits have expressly rejected the hybrid-rights theory, regarding the pertinent *Smith* language as dicta.<sup>215</sup> These

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209. *Id.* Some commentators contend the hybrid claim "was created for the sole purpose of distinguishing *Yoder* . . ." Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990).

210. *See, e.g.*, *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 250 (3d Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 1013 (2009) ("[T]he unique burden suffered by the Amish, combined with the Supreme Court's limiting language" rendered the case inapposite to determination of whether testing, reporting, and curricular requirements violated the rights of homeschooling parents in their religious beliefs, their decisions on how to educate their children, or some conjunction of the two.); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1057 (6th Cir. 1987) ("*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule . . .").

211. *Yoder*, 406 U.S. at 236. Some courts have gone so far as to label the decision as establishing an "Amish exception," wholly inapplicable to other groups seeking to provide their children with a religiously oriented education. *See, e.g.*, *Johnson v. Charles City Cmty. Sch. Bd. of Educ.*, 368 N.W.2d 74, 82–83 (Iowa 1985) (using phrase "Amish exception").

212. *See, e.g.*, *Combs*, 540 F.3d at 234, 250, 254–55 n.34 (countering parents' contention that submitting their homeschooling curricula and results to state authorities was sinful in a fashion similar to the Amish complaint by stating *Yoder* does not "appl[y] to all citizens" and was restricted to showings akin to the "exceptional" one made in that case).

213. *See, e.g.*, *Blackwelder v. Safnauer*, 689 F. Supp. 106, 113 (N.D.N.Y. 1988), *aff'd on question of mootness*, 866 F.2d 548 (2d Cir. 1989) (rejecting parents challenge to home visitation, curricular, and other requirements on basis of their objection to the values inherent in public schools and a degree of imposition of those values on their home education program by finding the holding in *Yoder* "must be limited to its unique facts").

214. *But see* *People v. DeJonge*, 501 N.W.2d 127, 137 (Mich. 1993) (determining that, by analogy to *Yoder* and on the basis of a hybrid-rights analysis, a teacher certification requirement that compelled homeschooling parents to send their children to institutional schools "compel[led] them] to sin," and was therefore unconstitutional as applied).

215. *See* *Combs*, 540 F.3d at 244 ("[W]e believe the hybrid-rights theory to be dicta"); *Leebaert v. Harrington*, 332 F.3d 134, 143–44 (2d Cir. 2003) (refusing to use a stricter standard of scrutiny to a parental rights-free exercise hybrid claim on grounds the theory was dicta); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Stratton*, 240 F.3d 553, 561–62 (6th Cir. 2001) (holding hybrid-rights theory to be dicta), *rev'd on other grounds*, 536 U.S. 150 (2002).



decisions are bolstered by the absence of any Supreme Court decision applying the theory in the nearly two decades since its creation.<sup>216</sup> Some courts have acknowledged hybrid-rights claims, but only when a free exercise claim is asserted alongside an independently viable companion right.<sup>217</sup> Others contend that such an approach “makes no sense” because it makes conjunction of the two claims unnecessary.<sup>218</sup> At least two other circuits instead require a “colorable claim that a companion right has been violated,” basing this determination on a “fair probability or a likelihood, but not a certitude of success on the merits” with respect to the companion claim, in addition to demonstration of a burden on free exercise.<sup>219</sup>

Homeschooling parents regularly argue, both in courts and legislatures,<sup>220</sup> that homeschooling regulations violate either their due process rights to direct the education of their children or a combination of that right with their free exercise rights. Yet it is far from certain whether there is any real constitutional basis for homeschoolers’ claims, and, if so, what standard should apply to state actions that implicate those constitutional protections. Courts generally have been unwilling to countenance such claims, but legislatures appear to take them more seriously.<sup>221</sup>

#### IV. AROUND AND AROUND: AN ANALYSIS

The morass of uncertainty about the constitutional implications of homeschooling has contributed significantly to legislative snarl, undermined ability to strike the appropriate balance

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216. Indeed, a search reveals that the only mention made of the theory since *Smith* has been critical. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Brennan, J., concurring) (“[T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . .”).

217. See, e.g., *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (finding no valid First Amendment claim and, consequently, no valid hybrid-rights claim and also rejecting the notion that “two untenable claims equals a tenable one”). Compare *Combs*, 540 F.3d at 245 & n.21 (reciting several First Circuit decisions as establishing a requirement that the conjoined claims be independently viable), with *Parker v. Hurley*, 514 F.3d 87, 98 (1st Cir. 2008) (arguing its previous decisions had not established the existence of a separate hybrid-rights claim or an independently viable standard for the existence of such a claim while determining not to “enter[] the fray over the meaning and application of *Smith*’s ‘hybrid situations’ language” and, instead, examining a joint parental rights free exercise claim under *Yoder*).

218. *Axon-Flynn v. Johnson*, 356 F.3d 1277, 1296–97 (10th Cir. 2004).

219. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004); see also *Axon-Flynn*, 356 F.3d at 1297 (10th Cir. 2004) (employing the colorable claim theory).

220. See, e.g., *Combs*, 540 F.3d at 244–45; see also *infra* note 270, Part IV.C and accompanying notes.

221. See *infra* Part IV.C.

between the interests implicated by homeschooling, and led to deeply unsatisfying lower court decisions. Courts generally have held that homeschooling parents are not exempt under the Constitution from state regulation of their education decisions.<sup>222</sup> Nonetheless, the reasoning in many of these decisions presents serious doctrinal and practical problems. Further, the marked disjunction between the language the Supreme Court has used to define parental due process rights and the doctrine applied at lower levels has exacerbated some imbalances in the political and social debate over homeschooling. In addition, the uncertainty regarding the viability of the hybrid-rights theory or *Yoder* as a freestanding precedent presents a further set of complicating issues.

### A. Doctrinal and Analytical Issues

In defining the scope of the parental due process right to direct the education of one's children to exclude homeschooling decisions or in applying a standard of review different than that normally applied to violations of fundamental rights, courts have taken several doctrinally troubling steps. Because homeschooling occurs in the home and between a parent and child, it is distinct from more traditional schooling decisions to which the doctrines traditionally apply in ways that may have constitutional significance. However, in analogizing existing due process standards to the homeschooling context, courts often seem to ignore these distinctions or utilize them in doctrinally suspect ways.

In *Washington v. Glucksberg*, the Supreme Court set forth a two-pronged test for determining whether a particular activity falls within the protections of the Due Process Clause.<sup>223</sup> The Court required a “ ‘careful description’ of the asserted fundamental liberty interest”<sup>224</sup> and that the interest be “objectively, ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’ ”<sup>225</sup> in order to be considered fundamental and so qualify for strict scrutiny protection.

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222. See generally Miller, *supra* note 166 (collecting challenges to homeschooling laws, less than 5 percent of which have been successful).

223. 521 U.S. 702, 720–21 (1997). Note that some commentary suggests that this two part test is on shaky ground and may, in fact, no longer be good law after the Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). See, e.g., Yale Kamisler, *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453, 1456–57 (2008). However, as the argument here is that homeschooling would meet that more stringent test and, hence, presumably any less stringent test, this should not affect the analysis.

224. *Glucksberg*, 521 U.S. at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

225. *Id.* (internal citations omitted).

Defined carefully, the liberty interest homeschooling parents assert is the right to create and provide education to their children directly and exclusively, without state oversight or approval.<sup>226</sup> For most of the nation's history, this was indeed the most common method of education.<sup>227</sup> Homeschoolers often point out that the Founding Fathers "were all taught at home."<sup>228</sup> John Locke described parental rights over children as necessary to the familial unit as a fundament of civil government,<sup>229</sup> and *Pierce* itself rested on an extensive common law history of parental rights.<sup>230</sup> Compulsory education and widely available institutional education, by contrast, are relative newcomers.<sup>231</sup> Even at the time *Pierce* was decided, the percentage of school-age children attending institutional schools "was approximately one half what it is today" with the relative percentage of students enrolled in high schools significantly lower.<sup>232</sup> Indeed, the *Troxel* plurality called the "liberty interest . . . of parents in the care, custody, and control of their children . . . perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>233</sup> And the Court has stated that the Constitution enshrines "parents' claim to authority in their own household to direct the rearing of their children [as] basic in the structure of our society."<sup>234</sup> Hence, homeschooling decisions appear "objectively" to satisfy the *Glucksberg* requirements for due process

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226. See, e.g., *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 233–34 (3d Cir. 2008) (per curiam) (describing the plaintiff's objection to Pennsylvania's homeschool regulations in substantially similar fashion).

227. See *In re Peirce*, 451 A.2d 363, 367 (N.H. 1982) ("Home education is an enduring American tradition and right having produced such notables as Abraham Lincoln; Woodrow Wilson; and Thomas Edison." (internal citations omitted)); McMullen, *supra* note 25, at 76–77 (describing the history of homeschooling).

228. Isabel Lyman, *Homeschooling: Back to the Future?*, 294 CATO POLY ANALYSIS, Jan. 7, 1998, available at <http://www.cato.org/pubs/pas/pa-294.html>.

229. JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT 55–66 (Dublin, 1798).

230. See Woodhouse, *supra* note 40, at 482, 498 (describing *Meyer* and *Pierce* as "constitutionalizing the common law powers of parents" and this "power of parents to control the education of their own" as a "hallowed tradition"); see also *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (stating that the extensive "history and culture of Western civilization" had "established beyond debate as an enduring American tradition" the "primary role of the parents in the upbringing of their children").

231. See McMullen, *supra* note 25, at 77 (noting that even schools that did exist through most of the nineteenth century were very unlike those today and that compulsory education laws "were not universally adopted until the early twentieth century").

232. Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice*, 32 J.L. & EDUC. 139, 178 (2003).

233. *Troxel v. Granville*, 120 U.S. 57, 65 (2000).

234. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

protection as fundamental liberty interests and, therefore, would seem to be protected by heightened scrutiny.

However, in a recent challenge to the relatively stringent standards Pennsylvania imposes on its homeschoolers, the Third Circuit recast the claims of the homeschooling parents as asserting the “particular right . . . to be free from all reporting requirements and ‘discretionary’ state oversight”—a right that had “never been recognized.”<sup>235</sup> The court relied upon language in *Runyon* for this creative recharacterization.<sup>236</sup>

This formulation has several doctrinal and analytical problems. To begin, it is circular and doctrinally incoherent to define the right being asserted by reference to the regulation being challenged. Whether a right is fundamental determines whether it can be subjected to reasonable regulation or whether such regulation must undergo a more searching analysis.<sup>237</sup> Commentators and courts alike have noted this seeming conflation of the two doctrinal steps with consternation, yet some courts continue to utilize this analytical maneuver.<sup>238</sup>

More importantly, *Runyon* is factually distinct in several ways that limit its applicability to homeschooling claims. First, it involved application of federal civil rights law<sup>239</sup> promulgated under the affirmative authority of the fifth section of the Fourteenth Amendment, not state police powers.<sup>240</sup> Additionally, the underlying issue involved the racial segregation of private schools and only indirectly the educational choices of parents;<sup>241</sup> the suit was brought by the parents of two black students against several private schools.<sup>242</sup>

235. *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 1013 (2009).

236. *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (“[Parents] have no constitutional right to provide their children with . . . education unfettered by reasonable government regulation.”), *quoted in Combs*, 540 F.3d at 248.

237. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE* § 15.5 (4th ed. 2007) (stating that, though there remains a great deal of uncertainty, “significant impairment” of fundamental rights is generally the trigger for strict scrutiny).

238. See, e.g., *Meyer*, *supra* note 29, at 547 (“[T]he Supreme Court’s tendency to reduce parent-state conflicts to a question of ‘reasonableness’ has left a number of lower federal judges scratching their heads and wondering out loud whether there really is a ‘fundamental right’ of parents . . .”).

239. Civil Rights Act of 1866, 42 U.S.C. § 1981 (2006); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006); see *Runyon*, 427 U.S. at 164, 175–79 (finding that application of the civil rights law did not impinge on parent’s protected liberty interests in choosing private education or choosing specialized instruction).

240. *Runyon*, 427 U.S. at 171–73.

241. *Id.* at 163.

242. *Id.* at 163–66.

Indeed, the basis of the factual distinction, and potentially the constitutional distinction, is explicit in the opinion. The Court noted that, as there was no effect on the parents' right "to send their children to a particular private school" or on the "subject matter which is taught," "no parental right" under the Constitution was implicated.<sup>243</sup> Further, parental rights "may be no more than verbal variations" of the privacy right,<sup>244</sup> and the statute in question did "not represent governmental intrusion into the privacy of the home" or the parent-child relationship.<sup>245</sup>

By contrast, the statute at issue in *Combs* was state law not enacted under any specific constitutional grant of authority.<sup>246</sup> It directly affected parental choices and the implementation of educational decisions by requiring that homeschooling parents submit evidence of their plans and progress to their local superintendent. Subsequently, the superintendent, upon finding that an "appropriate education [was not] taking place," could override their choice to homeschool, leaving them to face criminal prosecution if they failed to comply.<sup>247</sup> The statute operated within the home as the homeschoolers' place of education and directly affected the parent-child relationship, rather than governing institutional policy, as was the case in *Runyon*.<sup>248</sup> It determined the subject matter to be taught, and parents who failed to strictly comply, in the view of the local superintendent, could find their homeschooling choices overridden by state policy.<sup>249</sup> Hence, regardless of whether the claimed liberty interest is characterized as spatial (within the home),<sup>250</sup> relational (as between

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243. *Id.* at 177.

244. *Id.* at 179 n.15.

245. *Id.* at 178.

246. See *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 250 (3d Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 1013 (2009) (discussing the reporting and review requirements of Pennsylvania's compulsory education law challenged by the plaintiffs).

247. Act 169, 24 PA. CONS. STAT. § 13-1327.1 (2006). The statute requires that parents maintain a portfolio of materials including a log of any reading materials, samples of writing, and workbooks; submit an affidavit outlining their educational plans; teach certain designated subjects; provide immunization records; submit to outside standardized testing; and submit their children to annual evaluations of education progress made by a psychologist or institutional school official. *Id.* The statute requires annual submission of the material in the portfolio, test scores, and evaluation to the local superintendent. *Id.* If not satisfied, the superintendent can enroll the student in a school. *Id.*

248. Compare *id.*, with *Runyon*, 427 U.S. at 163 ("The principal issue presented . . . is whether a federal law, namely, 42 U.S.C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes.").

249. See 24 PA. CONS. STAT. § 13-1327.1.

250. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (stating that the opinion rested in part on "liberty of the person . . . in its spatial . . . dimensions").

family members),<sup>251</sup> or as a special weight to be granted parental choice,<sup>252</sup> these regulations would appear to have a much more direct and constitutionally relevant impact. The Third Circuit's recast of the parents' claims as asserting a "constitutional right to avoid reasonable state regulation" lacking "[s]ufficient constitutional dimension"<sup>253</sup> perverts the constitutional doctrine and warps *Runyon* beyond its breaking point.

### B. Practical Issues

A host of practical problems accompanies the current legal uncertainty about the due process rights of homeschooling parents. On the one hand, leaving parental interests in home education outside the "tortuous and bizarre" boundaries of the fundamental right<sup>254</sup> or recasting them so as to leave their curtailment subject only to rational basis scrutiny seriously undermines autonomy, granting government authority "to indoctrinate other people's children . . ."<sup>255</sup> On the other, granting parental decisions broad constitutional imprimatur would hamstring state efforts to protect both children themselves and important societal interests in proper child-rearing and education.<sup>256</sup>

The lack of clear constitutional protections for homeschooling parents threatens to deprive children of the real and substantial benefits a homeschool education can provide. Many homeschooling parents argue homeschooling protects their children from the "negative socialization" that occurs in institutional educational atmospheres, which can be severely detrimental to the learning process.<sup>257</sup> Further, the available data, though perhaps marred by

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251. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that the right of privacy may be inherent in a protected family relationship).

252. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (stating that the constitutional violation occurred when the parent's "determination of her daughter's best interests" were given "no special weight").

253. *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 249 (3d Cir. 2008) (per curiam), cert. denied, 129 S. Ct. 1013 (2009).

254. Meyer, *supra* note 29, at 562.

255. See Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 130–33 (2000) (arguing *Pierce* should be seen as affirming the liberal value of citizens' autonomy and that pursuit of that ideal requires that society restrict its impulse to require parents submit their children to the government for civic teaching).

256. Woodhouse, *supra* note 40, at 484 (dubbing these problems the "dark side of parental rights").

257. See MICHAEL FARRIS, *THE FUTURE OF HOME SCHOOLING: A NEW DIRECTION FOR CHRISTIAN HOME EDUCATION* 123–24 (1997) (noting that children are confronted with social pressure and distractions such as early sexualization, drugs, alcohol, and violence); see also *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136, 1137, 1145 (Miss. 1999) (finding state

selection biases and the difficulty of tracking homeschoolers,<sup>258</sup> suggest homeschoolers score at least as well as public school students on standardized tests.<sup>259</sup> Homeschooled children, advocates argue, have “systemic and fundamental” advantages: homeschool educators deal with smaller class sizes and thus can provide a more hands-on approach to teaching, are able to more easily adapt their methods to the particular characteristics of the student, and have personal, rather than professional, incentives to educate each student.<sup>260</sup> While no state has functionally prohibited homeschooling in over a decade, some worried the above-discussed (and now de-published) California appellate case<sup>261</sup> briefly did just that.<sup>262</sup>

Further, the rights recognized in *Meyer* and *Pierce* serve as a crucial bulwark of liberalism “hailed by modern scholars as standing for a commitment to pluralism and the proposition that individuals must be free to ‘heed the music of different drummers.’”<sup>263</sup> The *Pierce* and *Yoder* opinions forcefully undergird this conception: “A way of life that is odd or even erratic . . . is not to be condemned because it is different.”<sup>264</sup> Justice Thomas has implied that the availability of a choice among alternatives is a crucial element of the balance of rights between states as providers of public education, children, and

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liable for negligent supervision to public school student sexually and physically assaulted by other students at public school).

258. See McMullen, *supra* note 25, at 84–85 (noting the real concern that what data exists about the adequacy of homeschooling is subject to possibly fatal selection biases because “one suspects the better students are the ones volunteering to [take tests]”); Reich, *supra* note 30, at 116 (because so much homeschooling occurs under the radar, even if researchers and public officials “wished to test or monitor the[ir] progress . . . they would not even know how to locate them”).

259. See Yuracko, *supra* note 17, at 134 & nn.47–50 (citing studies showing homeschoolers scoring significantly higher than average on the SAT, ACT, and Iowa Basic Skills tests, but noting the problems inherent in the data); see also Lines, *supra* note 12, at 82 (stating that studies show homeschooled children “score above average, sometimes well above average” on standardized tests). In some cases, homeschooled students have higher acceptance rates at top colleges. Rebecca Winters, *From Home to Harvard*, TIME, Sep. 11, 2001, at 55.

260. See Bruce D. Page, Note, *Changing Our Perspective: How Presumptive Invalidity of Home School Regulations Will Further the State’s Interest in an Educated Citizenry*, 14 REGENT U. L. REV. 181, 193–94 (2002) (outlining the instrumental benefits of homeschooling); see also Stevens, *supra* note 36, at 94 (stating that homeschoolers tend to be more civically active than their public school counterparts).

261. *In re Rachel L.*, 73 Cal. Rptr. 3d 77, 79 (Ct. App. 2008) (depublished), *vacated, reh’g granted sub. nom. Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571 (Ct. App. 2008); see *supra* notes 77–81, 147–49 and accompanying text.

262. See, e.g., Hersher, *supra* note 78, at 27 (stating that *In re Rachel L.* could be understood “as holding that it is illegal for parents . . . to teach their own children at home”).

263. Woodhouse, *supra* note 40, at 483 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-6, at 1319 (2d ed. 1988)).

264. *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972).

parents.<sup>265</sup> Also, as scholars have noted, a determination that a claimed constitutional right to make certain family choices is outside the scope of family privacy or parental rights effectively denigrates those choices, stamping them with a mark of social inferiority alongside the constitutional inferiority.<sup>266</sup> A current and potentially troubling manifestation of this denigration can be seen in recent custody decisions that suggest a parent's decision to homeschool can weigh against that parent.<sup>267</sup>

Yet, fully affording parents' choices to homeschool and how to homeschool fundamental liberty interest status would require that all homeschooling regulations survive strict scrutiny—that they serve a compelling state interest using the least restrictive means available.<sup>268</sup> This conclusion could have dire consequences. States would be severely restricted in the means at their disposal to protect child welfare and promote an educated, productive citizenry. Further, states would find it difficult to provide students themselves with any effective recourse if their parents' educational methodology deprived them of the freedom to chart their own futures.<sup>269</sup>

While a state may be able to show that protecting the safety of children is a compelling interest, it may be difficult to show that home

265. *Morse v. Frederick*, 551 U.S. 393, 419–20 (2007) (Thomas, J., concurring) (stating that schools' authority over student speech is justified in part by parental ability to opt out by, among other things, "send[ing] their children to private schools or home school[ing] them").

266. See Meyer, *supra* note 29, at 565–68 (describing the destructive social, familial, and legal impact of "sorting" privacy-rights claims into a "hierarchy" that "may inflict a very substantial injury on those it denigrates" by declaring certain family decisions and relationships not "worthy of 'traditional respect in our society'").

267. See, e.g., *Donna G.R. v. James B.R.*, 877 So. 2d 1164, 1168–69 (La. Ct. App. 2004) (finding that homeschooling was not in the best interests of the children); *Anderson v. Anderson*, 56 S.W.3d 5, 9 (Tenn. Ct. App. 1999) (same); *N.J. Div. of Youth & Family Servs. v. F.P.*, No. FG-02-65-06, 2007 WL 1753553, at \*2–3 (N.J. Super. App. Div., June 20, 2007) ("F.P. argues, however, that she has a constitutional and statutory right to choose the educational plan for her child . . . F.P. asserts that the Division does not have the right to seek termination of parental rights because of its view that an educational plan other than home schooling would be better for the child. We disagree."), *cert. denied*, 937 A.2d 979 (N.J. 2007). Compare, e.g., *Taylor v. Taylor*, 758 N.W.2d 243, 243 (Mich. 2008) (denying leave to appeal trial court order to send child involved in custody proceeding to public school), *with id.* (Markman, J., dissenting) (noting the trial court's decision showed a "predisposition that . . . public schooling is invariably preferable to homeschooling . . .").

268. This is the traditional formulation of strict scrutiny applied to state actions that infringe on fundamental liberty interests. See, e.g., 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE* § 15.5 (4th ed. 2007).

269. See *Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) (noting that in cases of the exercise of parental authority there "is at a minimum a third individual, whose interests are implicated . . . [.] the child"); see also *Yoder*, 406 U.S. at 244–45 (Douglas, J., dissenting) ("While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views.").



visits, for example, are necessary to protecting that interest.<sup>270</sup> The *Yoder* Court acknowledged Wisconsin's strong interest in providing equal access to secondary education in order to prevent children from "becom[ing] burdens on society because of educational shortcomings."<sup>271</sup> But reporting, standardized testing, and curricular requirements, as well as mechanisms to ensure compliance, do infringe on the autonomy of a parent's educational decisions. Hence, regulations implementing such requirements could be determined constitutionally unsound. *Pierce* recognized the importance of requiring "that certain studies plainly essential to good citizenship . . . be taught, and that nothing be taught which is manifestly inimical to the public welfare,"<sup>272</sup> yet how states could ensure a basic civic curriculum consistent with strict scrutiny is far from clear. Similarly, if registration and reporting requirements infringe on parental decisions, states may have no means to ensure that children receive proper vaccinations, a problem with potentially significant impacts on public health.<sup>273</sup>

Additionally, granting parents plenary authority to make educational determinations threatens to infringe upon the rights of the children themselves. In his *Yoder* dissent, Justice Douglas noted that "[i]t is the future of the student, not the future of the parents, that is imperiled" by giving parents full power to determine the student's education.<sup>274</sup> He argued that an overly comprehensive parental right could allow parents to render their child's own chosen goals forever beyond reach, leaving "his entire life . . . stunted and deformed."<sup>275</sup> Commentators have noted that this area of constitutional jurisprudence, perhaps more than any other, "often pose[s] a clash between conflicting individual rights" and "resolving

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270. See, e.g., *Brunelle v. Lynn Pub. Sch.*, 702 N.E.2d 1182, 1184–87 (Mass. 1998) (invalidating home visit requirement as infringing on the "basic constitutional right of parents to direct the education of their children," in a way not "essential to protection of the State's interest in seeing that children receive an education"); see also Woodhouse, *supra* note 40, at 488–90 (recounting the case of two boys removed from school even after their teachers reported bruises to child protection authorities because their father asserted a "right to homeschool" and authorities, consequently, "felt they had no choice but to capitulate," the boys subsequently killed their father, feeling they had "no other option but to kill or be killed" and ultimately plead guilty to manslaughter because they could not face "the trauma of reliving their story in open court").

271. *Yoder*, 406 U.S. at 224.

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

273. See generally Khalili & Caplan, *supra* note 111, at 471–76 (discussing the difficulty of tracking homeschooling children and enforcing existing vaccination requirements and the possibility this could contribute to epidemics).

274. *Yoder*, 406 U.S. at 245 (Douglas, J., dissenting).

275. *Id.* at 246.

one claim necessarily conclude[s] the other.”<sup>276</sup> Without clarity as to the scope and nature of the parental rights implicated in homeschooling decisions, the instances in which those rights should be constitutionally protected or should instead yield to societal or student interests cannot be coherently determined.

### C. Political Issues

The lack of clarity in the Supreme Court’s definition of parental rights also may have exacerbated or even caused malfunctions in the political process that have led to harmful deregulation of homeschooling. “[B]y its exaggerated rhetoric about the Constitution’s service of ‘family autonomy’ and its insistent adherence to the illusion of traditional fundamental-rights strict scrutiny,” the Court has simultaneously given rhetorical fodder to homeschooling advocates and left them feeling persecuted when court decisions, as they often do, fail to vindicate their claims.<sup>277</sup> Courts and commentators alike have noted that, “[d]espite the sweeping language”<sup>278</sup> and “near-absolutist pronouncements”<sup>279</sup> the Court has often used to describe the parental right, “there is an important and unfortunate disjunction between what the Court says . . . and how it actually goes about protecting [the] right[] in real cases.”<sup>280</sup> While courts charged with applying the seeming inconsistency between rhetoric and practice admit to being flummoxed, advocates and legislators are charged with forming and promulgating sound homeschooling policy under an inscrutable constitutional cloud.

At least one model of how political actors interact to create legal rules demonstrates how this constitutional uncertainty may skew the regulations ultimately produced. Public choice theory posits that small, intensely interested groups have organizational advantages that allow them to exert disproportionate influence on politicians and to secure laws benefiting them to the detriment of society at large.<sup>281</sup> Larger groups upon whom the impact of legislation will be relatively minor or not readily apparent face collective-action problems that leave them effectively underrepresented.<sup>282</sup> Legislators

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276. Meyer, *supra* note 29, at 551–53.

277. *Id.* at 558.

278. *Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003).

279. *Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000).

280. Meyer, *supra* note 29, at 529.

281. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 37–43 (1991) (outlining the basic tenets of public choice theory).

282. See *id.* (further outlining public choice theory).

rationality will author and support legislation that maximizes their political support.<sup>283</sup> This suggests that legal change “is likely to harm the general public” when concentrated benefits accrue to some, but harms, even if greater in the aggregate, accrue only diffusely. Similarly, legal change may fail to occur even though benefits outweigh costs when those costs are borne by a small, vigorous interest group.<sup>284</sup>

As discussed in Part II.A, homeschoolers have been described as having one of the most powerful educational lobbying machines in the country.<sup>285</sup> In legislative contests in state houses across the country, they regularly deploy the Court’s unqualified statements of parental rights to oppose even the most basic homeschooling regulation.<sup>286</sup> An example of the potential impact can be seen in the previously discussed Montana Senate bill.<sup>287</sup> In statement after statement, homeschoolers and advocates opined to the education committee that the proposed bill was unconstitutional,<sup>288</sup> though its effect, in fact, would have been relatively slight.<sup>289</sup> At the close of the

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283. See, e.g., Jonathan R. Macey, 56 GEO. WASH. L. REV. 50, 68 (1987) (describing politicians’ incentives under this theory of legislation).

284. See, e.g., OLSON, *supra* note 50, at 3 (describing the “surprising tendency for the ‘exploitation’ of the great by the small” in legislative battles).

285. See *supra* Part II.A; see also McMullen, *supra* note 25, at 99 (describing the ferocity of the homeschooling lobby as a bar to new homeschooling regulation).

286. See, e.g., KLIČKA, *supra* note 2, at 155–78 (detailing dozens of legislative battles, most of which directly involved assertions of Fourteenth Amendment rights); *Proposed Nebraska Homeschooling Bill: Hearing on L.B. 1141 Before the Comm. on Educ.*, 100th Leg., 2d Sess. 21–22 (Neb. 2008) (statement of Michael Donnelly, Staff Attorney, Home School Legal Defense Association, Adjunct Professor of Constitutional Law, Patrick Henry College) (quoting from both *Pierce* and *Yoder* in opposition to bill requiring annual standardized testing), available at <http://uniweb.legislature.ne.gov/FloorDocs/100/PDF/Transcripts/Education/2008-02-26.pdf>; *id.* at 32 (statement of Carson Holloway, Professor of Political Science, University of Nebraska at Omaha) (stating the same bill ran afoul of the “principles of our free society” announced in *Pierce*); Transcript of Public Hearing on Home Schooling Regulations: Hearing Before the District of Columbia State Board of Education at 45 (Mar. 5, 2008) (statement of Jonathan Zischkua, Chief Administrative Judge, District of Columbia Contract Appeals Board) (quoting extensively from *Troxel* to oppose a proposed bill that required submission of a portfolio of materials and state approval to homeschool), available at [http://sboe.dc.gov/sboe/frames.asp?doc=/sboe/lib/sboe/3-5-08\\_Home\\_School\\_Regulations\\_Public\\_hearing\\_transcript.pdf](http://sboe.dc.gov/sboe/frames.asp?doc=/sboe/lib/sboe/3-5-08_Home_School_Regulations_Public_hearing_transcript.pdf).

287. Farrell, *supra* note 72 (quoting the bill’s sponsor). Currently and at the relevant time Montana effectively required only notice of intent to homeschool. MONT. CODE ANN. §§ 20-5-102, -109 (2009). See *supra* notes 71–76 and accompanying text.

288. See, e.g., *Montana Minutes*, *supra* note 75, at 4 (testimony of Dewitt Black, Senior Counsel, Home School Legal Defense Association) (stating that the bill violated “well-settled law” under the Fourteenth Amendment); *id.* (testimony of Brian Ray, Ph.D., President, National Home Education Research Institute), available at <http://data.opi.mt.gov/legbills/2005/Minutes/Senate/Exhibits/eds36a100.PDF> (claiming that the bill violates the Fourteen Amendment).

289. The legislation would have required standardized testing in three grades, registration of children homeschooling, and monitors for the first two years for parents having only a high

session, the bill's sponsor was the lone vote in favor of sending the bill to the floor.<sup>290</sup>

Timorous, misled, or misinformed legislators faced with the Court's conflicting pronouncements face a situation "in which the Constitution may provide guidance but does not provide rules."<sup>291</sup> According to public choice theory, they may rationally adopt a constitutional interpretation, regardless of whether it comports with their own views, that is propounded by a vocal contingency of constituents for whom absolute protection of a claimed constitutional right to homeschool is a *sine qua non*.<sup>292</sup> Further, legislators can conveniently cloak a policy choice to leave homeschooling largely unregulated in the inflated rhetoric with which the Court has described the parental right. Relying on overblown constitutional statements of rights, the precise nature and scope of which are likely far narrower than they appear at first blush—but which even courts, much less the public at large, do not fully comprehend—legislators can duck the responsibility to implement legislation that protects the interests of the state and homeschooled children and thereby avoid the political costs that would inhere in doing so.<sup>293</sup>

Indeed, at least two state homeschooling statutes, both the subject of vigorous lobbying by homeschoolers,<sup>294</sup> declare it the "primary right and obligation of the parent" to choose and provide for

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school diploma or less. Quality Home School and Children Protection Act, S.B. 291, 54th Leg., Reg. Sess. (Mont. 2005), available at <http://data.opi.mt.gov/bills/2005/BillPDF/SB0291.pdf>.

290. *Minutes, Hearing on S.B. 291 Before the Montana S. Comm. on Educ. and Cultural Res.*, 59th Leg., Reg. Sess. 8 (2005), available at [http://data.opi.mt.gov/legbills/2005/MinutesPDF/Senate/050214EDS\\_Sm1.pdf](http://data.opi.mt.gov/legbills/2005/MinutesPDF/Senate/050214EDS_Sm1.pdf).

291. Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 531 (2000).

292. See Tsvi Kahana, *Legalism, Anxiety and Legislative Constitutionalism*, 31 QUEEN'S L.J. 536, 564–66 (2006) (describing how legislators policy choices and personal interpretations of the constitution can be warped by their prime directive of re-election); see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 108 (1999) (noting that "politicians have other incentives . . ., such as the desire for reelection, [that] may distort the politicians' judgment" in interpreting the constitution); Reich, *supra* note 24, at 279–80 (describing as one of the two primary factors responsible for fueling expansion of homeschooling the fact that "the *Yoder* decision inspired many homeschool advocates to press their claims in state legislatures . . ., a strategy which has yielded significant victories").

293. See Whittington, *supra* note 291, at 540 ("Risk aversion, combined with collective action problems, may tend to keep some constitutional issues off the legislative agenda entirely.").

294. See KLICKA, *supra* note 2, at 160–63 (recounting the successful campaign, and its constitutional dimensions, that resulted in the current Colorado homeschooling statute); Scott W. Somerville, *The Politics of Survival: Home Schoolers and the Law*, <http://www.hslda.org/docs/nche/000010/PoliticsofSurvival.asp> (last visited Jan. 30, 2010) (describing, in the legislative victories section, the New Hampshire showdown, and ascribing a date showing this indicates the current statute).

the education of “a child under his care and supervision”<sup>295</sup>—language likely fashioned from the most regularly cited sections of several Supreme Court cases.<sup>296</sup> The Court has noted on several occasions that extension of due process protection to a liberty interest can “place the matter outside the arena of public debate and legislative action.”<sup>297</sup> The employment of arch rhetoric to describe the parental right, even though it imprecisely defines it, may have an equivalent political impact.

Furthermore, the uncertainty surrounding homeschooling’s constitutional status may intensify the stake homeschoolers have in legislative battles, thereby giving them an overwhelming organizational advantage. As scholars have noted, redefining the constitutional boundaries of family privacy or parental rights to exclude certain groups inherently expresses a negative value judgment of that group.<sup>298</sup> Homeschoolers view lower court decisions refusing to recognize any constitutional dimension in their choices as a kind of discriminatory persecution—denying them the constitutional protections afforded specialized instruction or private school decisions<sup>299</sup>—for which redress must be sought in state legislatures.<sup>300</sup>

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295. COLO. REV. STAT. ANN. § 22-33-104.5(1) (West 1998); N.H. REV. STAT. ANN. § 193:A (2008).

296. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the *right*, coupled with the *high duty*, to recognize and prepare him for additional obligations.” (emphasis added)); see also MICH. COMP. LAWS ANN. § 380.10 (West 2005) (“It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children.”).

297. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

298. See *Meyer*, *supra* note 29, at 576 (suggesting the Court be more candid in its description of privacy rights and analysis of claims to them to avoid “expressive regulation of the family” that may have serious social ramifications).

299. See, e.g., *Pierce*, 268 U.S. at 534–35 (substantive due process protects parents’ choice of private schools); *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923) (parental rights prevent prohibiting the choice of specialized instruction).

300. See CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS’ RIGHTS IN EDUCATION* 181–90 (3d ed. 2002) (providing a series of the Supreme Court’s more lofty descriptions of the parental rights and then outlining, with a clear tone of outrage, a series of cases in which lower courts have “ignore[d] U.S. Supreme Court precedent”); *id.* at 203–06 (describing *Troxel* in detail and stating that “[p]arents battling oppressive state regulations and invasions of their families have a clear decision which upholds their parental rights”); KLICKA, *supra* note 2, at 161 (recounting the lobbying battle to get the minimally restrictive Colorado bill discussed in notes 295 and 296 and describing conversations with, and letters to, legislators calling homeschoolers a “‘minority’ who were being ‘picked on’ by the government”); *id.* at 168–69 (describing North Dakota “Bismarck Tea Party” of homeschoolers flooding the state legislature because the Supreme Court of North Dakota refused to respect their constitutional

While “parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction,”<sup>301</sup> homeschoolers can depend upon no authoritative pronouncement of constitutional protection. They may fear that even the slightest regulation is tantamount to elimination of their ability to homeschool altogether, a choice they feel fundamental to the well-being of their children.<sup>302</sup> Indeed, HSLDA Senior Counsel Christopher Klicka has analogized any homeschooling regulation to the creation of a “totally state-controlled educational system” in Nazi Germany during the 1930s.<sup>303</sup> While the tenor of this rhetoric seems highly exaggerated, it nonetheless indicates how the lack of clear definition of homeschoolers’ rights accentuates any perceived threats. A clear statement of constitutional protection for some or all of their decisions would quell these fears and may, in turn, help rectify the asymmetry in lobbying power that has resulted in such low levels of regulation in many states.

#### *D. The Yoder Problem*

The uncertainty surrounding the continuing precedential value of *Yoder*, either as an instance of a hybrid-rights situation involving the conjunction of parental and free exercise rights or on its own merits, presents many of the same issues addressed in the preceding sections as well as its own particular set of problems. Lower courts continue to recognize *Yoder*’s employment of strict scrutiny.<sup>304</sup> Yet those who reject the hybrid-rights claim provide no alternative theory

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rights, leaving them “suffering under the chains” of strict regulation without the “consent of the governed”; “[t]he Legislature wouldn’t move to ‘let my people go.’”).

301. *Runyon v. McCrary*, 427 U.S. 160, 178 (1976).

302. See, e.g., *Prevention and Treatment of Child Abuse and Neglect: Policy Directions for the Future*, Hearing Before the Subcomm. on Select Educ. of the H. Comm. on Educ. and the Workforce, 107th Cong. 10–13, 21–24, app. D, at 81–99 (statement of Christopher J. Klicka, Senior Counsel, Home School Legal Defense Association), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_house\\_hearings&docid=f:80041.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:80041.pdf) (describing how proposed reauthorization and extension of the Child Abuse Prevention and Treatment Act would infringe on the constitutional rights of parents and homeschooling parents in particular); see also 140 CONG. REC. 18,660–703 (1994) (transcribing the confirmation hearing of Justice Stephen Breyer, during which no fewer than eight senators directly asked his views on, as Senator Pressler put it, whether “it would be constitutional for a State government to ban home schooling” based upon concerns expressed about Breyer’s judicial record raised by their homeschooling constituents).

303. KLICKA, *supra* note 2, at 46–48.

304. See, e.g., *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 250–51 (3d Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 1013 (2009) (not disputing *Yoder*’s continued validity, but contending homeschooling parents’ claims were readily distinguishable).

upon which use of that standard would rest.<sup>305</sup> If parents homeschool and choose their curricula on the basis of sincerely held religious beliefs,<sup>306</sup> no court has developed an analytically coherent rationale to explain why their rights should be entitled to any lesser protection than *Yoder's* Amish.<sup>307</sup> An estimated 1.3 million students, fully 83 percent of the homeschooling population, are homeschooled for religious reasons.<sup>308</sup> Consequently, the existence of a special category of constitutional claims for religious homeschoolers is of particular importance to legislators, homeschooling parents, students, and the general public.

Nonetheless, there are clear differences between the *Yoder* decision's exemption of the Amish from a mere two years of secondary education, subject to reasonable quality-assurance regulations,<sup>309</sup> and the claims made by homeschoolers.<sup>310</sup> Justice White made explicit the limits of the *Yoder* holding in his concurrence: "This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State."<sup>311</sup> Further, any legal distinction in treatment based upon whether homeschooling is religiously motivated could violate the Establishment Clause or the Equal Protection Clause.<sup>312</sup> Yet several

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305. See, e.g., *id.* at 252 (stating that the religiously-based parental liberty interest to homeschool free from required government approval was distinct from *Yoder*, but providing no basis beyond factual differences).

306. See, e.g., *id.* at 234 (accepting as legitimate parents' "religious belief that 'education of their children, not merely the religious education, is religion' and that God has assigned religious matters to the exclusive jurisdiction of the family").

307. See generally, Recent Case, *Constitutional Law—Due Process, Right to Privacy and Free Exercise—First Circuit Denies Parents a Constitutional Right to Prevent Children From Receiving School-Sponsored AIDS Education*: *Brown v. Hot, Sexy & Safer Prods., Inc.*, 110 HARV. L. REV. 1179, 1179–84 (1987) (arguing the First Circuit misconstrued *Yoder*, *Pierce*, and *Meyer* such that factual distinctions of little analytical significance became the basis for a doctrinally unsound holding that parents' religious objections were not constitutionally protected).

308. See BIELICK, *supra* note 19, at 2–3 (estimating that there are 1.5 million homeschoolers in the United States and noting that in 2007, based upon an NHES survey, the percentage of students whose parents cited religious or moral instruction as the reason for homeschooling was 83 percent).

309. *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1976).

310. See, e.g., *Combs*, 540 F.3d at 249–51 (noting that parents were claiming full exemption from any state oversight of educational programs administered at home).

311. *Yoder*, 406 U.S. at 238 (White, J., concurring). Note also that this concurrence was joined by two other Justices and, because Justices Powell and Rehnquist took no part in the determination, would have garnered a majority with Justice Douglas, who dissented on grounds suggesting he would agree with this limitation. *Id.* at 236–37, 241–43.

312. See Michael Kavey, Note, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743, 779 (2003) (stating that, if rights are provided "a higher degree of protection when . . . religiously motivated, then [that] would seem to put religious actors in a

state legislatures, presumably attuned to the possible constitutional distinctions between religious homeschoolers and the minority of other homeschoolers, have provided special statutory accommodations for religious homeschoolers, at times exempting them entirely from all oversight.<sup>313</sup> However, if regulations are aimed at preventing parent-teachers from teaching material “manifestly inimical to the public welfare”<sup>314</sup> or providing substantively inferior education to female children<sup>315</sup> based upon idiosyncratic but otherwise genuine religious beliefs, heightened constitutional protection for religiously motivated homeschoolers may exempt some of the very children most at risk.

Hence, the Supreme Court’s failure to clearly articulate the doctrinal bases, scope, and protections to be accorded the parental right alone or when conjoined with the right to free exercise has left the constitutional landscape murky, infirm, and deeply problematic.<sup>316</sup> At one pole, the current standards leave homeschooling, an educational method with demonstrated benefits, beneath a legal sword of Damocles. At the other, they threaten to evict the state from any say whatsoever in the fulfillment of what has rightly been called its “most important function”<sup>317</sup>—education—with respect to an increasingly large portion of its children, and to remove from children any voice in determinations that will decide the future courses of their lives.<sup>318</sup> Additionally, the mismatch between the Court’s exalting rhetoric and its practical pragmatism serves to enhance gridlock in the political debate about re-regulating homeschooling. Without

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constitutionally favored position, in possible violation of the Establishment Clause and the Equal Protection Clause”).

313. See, e.g., VA CODE ANN. §§ 22.1-254(B)(1), 22.1-254.1(D) (West 2009) (excusing “[a]ny pupil who, together with his parents, by reason of bona fide religious training or belief” from compliance with reporting, minimum qualifications, and standardized testing requirements applicable to other homeschoolers).

314. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925); see, e.g., *T.A.F. v. Duval County*, 273 So. 2d 15, 18 (Fla. App. 1973) (per curiam) (discussed *supra* note 160 and accompanying text).

315. See, e.g., Yuracko, *supra* note 17, at 156–68 (cataloging a few examples of homeschooling parents who, based upon religious beliefs that education was spiritually dangerous for women, provided significantly inferior education to homeschooled girls and arguing state permission of this could violate the Equal Protection Clause).

316. Meyer, *supra* note 29, at 545 (“[T]he Court’s parental-rights cases remain profoundly murky regarding the balance they strike between private and communal interests in childrearing . . . .”); see also Reich, *supra* note 24, at 286–96 (contending that a religious exemption or plenary parental rights would have marked deleterious impacts on the interests of the state and the child).

317. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

318. See *Wisconsin v. Yoder*, 406 US. 205, 244–45 (Douglas, J., dissenting) (“It is the student’s judgment, not his parents’, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.”).



clarification, the prospects of dealing with the sensitive social, familial, personal, and political issues inherent in the practice of homeschooling seem dim.

#### V. TEACH (Y)OUR CHILDREN WELL: A PROPOSAL

States have undertaken a remarkable deregulation of homeschooling as an educational alternative over the last twenty-five years,<sup>319</sup> largely as a consequence of the organizational prowess of the homeschooling lobby. To address the problems outlined above, states should reexamine their homeschooling regulations, a process that has already begun in some places. Attempts to move toward re-regulation face monumental challenges, but these challenges are not insurmountable if the constitutional uncertainty is lessened and the political imbalance ameliorated. Candor in defining the scope and nature of parental rights would set a clearer constitutional backdrop, free of the distortions caused by the “rhetorical clout of rights talk,”<sup>320</sup> and foster a political process for formulating sensible and balanced homeschooling regulations.<sup>321</sup> Similarly, elimination of the apparent disparity in the constitutional standards applicable based upon whether homeschooling is religiously motivated would allow states to formulate uniform regulations, rather than conferring special status on religious homeschoolers.

Homeschooling has proven to be a viable educational alternative with real and substantial benefits for many students and one that an increasingly large proportion of the population chooses. The choices parents make to homeschool their children deserve the same constitutional protections afforded parents who choose to send their children to private schools or German lessons. The availability of that choice promotes salutary diversity in viewpoint and experience. Yet, just as there is little question as to the constitutionality of

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319. See Yuracko, *supra* note 17, at 128–30 (describing the remarkable downward trend in homeschool regulations creating laws that, in some instances, leave “oversight . . . so lax as to be nonexistent”).

320. Woodhouse, *supra* note 40, at 484–45.

321. The idea that the Court should be attuned to and act to counteract the existence of defects in the political process is far from novel. See Elhauge, *supra* note 281, at 44–46 (outlining the alterations to the process of judicial review advocated by multiple scholars and theorists of the public choice and interest group theory schools); see also STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 27–34 (2006) (“[W]e can find in the Constitution’s structural complexity an effort to produce a form of democracy that would prevent any single group of individuals from exercising too much power, helping to protect an individual’s (modern) fundamental liberty.” “[T]his constitutional understanding helps interpret the Constitution . . .”).

required accreditation, core curricular requirements, and forms of assurance that minimum numbers of hours are spent in the classroom in private schools,<sup>322</sup> states should similarly be assured of clear constitutional authority to protect their “ ‘paramount’ interest in education”<sup>323</sup> and compelling interests in the health, safety, and well-being of their homeschooled youth.<sup>324</sup>

A parent’s choice to send her children to private school or to enroll her child in a course of specialized instruction are constitutionally protected exercises of a fundamental liberty interest in the education and upbringing of those children.<sup>325</sup> Similarly, courts should state unequivocally that the parental right to choose home education and choose subjects taught in that context is an exercise of a fundamental liberty interest protected by strict scrutiny under the Due Process Clause.<sup>326</sup> However, such a determination should make clear that the protected liberty is binary: absolute deprivation of choice would infringe on parental rights, but adding requirements to the parental obligation while not precluding the choice to homeschool or to teach certain matters would not be.<sup>327</sup> Similarly, regulations that

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322. See, e.g., Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 381–97 (detailing a comprehensive survey of state regulatory regimes for private schools and cases establishing their constitutionality).

323. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972)).

324. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (recognizing states’ “important—indeed, perhaps compelling” interest in deterring drug use as necessary to protecting “the health and well-being of young people”); *Yoder*, 406 U.S. at 221 (suggesting that, at least “in the generality of cases,” the state’s interests in protecting the “physical or mental health of the child” and preserving “the welfare of the child and society as a whole” will be sufficiently compelling to justify regulation to those ends); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control . . . in many . . . ways.”).

325. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (“The Court has repeatedly stressed that . . . parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction . . . .”); *Hutchins v. District of Columbia*, 188 F.3d 531, 540–41 (D.C. Cir. 1999) (gleaning from the Court’s pronouncements in the *Meyer-Pierce-Yoder* line of substantive due process cases the idea that the parent’s “fundamental right” includes “controlling . . . the formal education of children”).

326. Substantive due process analysis that focuses on the effect of governmental regulation solely upon choice itself is not without precedent. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (1992) (setting forth the undue burden standard for analysis of abortion regulations under the substantive due process clause under which state actions that have the purpose or effect of foreclosing the right to make the ultimate decision are unconstitutional but regulations designed to further legitimate state interests that do not impinge upon the “right of choice” are not).

327. Some lower courts already seem to have come to a similar conclusion in other educational contexts. See, e.g., *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1205–06 (9th Cir. 2005) (stating that the parental right should properly be read to confer on parents the right to

effectively foreclose the opportunity to homeschool to a large proportion of parents, such as requiring that parent-teachers be certified teachers or hold a bachelor's degree, would undergo rigorous scrutiny, requiring the state show that they are necessary to the protection of compelling interests in education or child welfare.

Such a rule would ensure that parents are free to transfer their beliefs, even if socially unpopular or idiosyncratic, to their children, preserving educational choice as a crucial bulwark of liberalism.<sup>328</sup> Parents could opt to convey their values to their children via homeschooling in a way that otherwise may be unavailable through the institutional educational alternatives in a family's location. Protecting homeschooling parents' basic decisions in this fashion also should eliminate some of homeschoolers' concerns that their ability to make basic educational choices, which many view as crucial to their family identities, hang in the balance at every hearing on a new homeschooling regulation.<sup>329</sup>

Some have instead advocated an intermediate form of review that would allow balancing of state and parental interests in all educational decisions.<sup>330</sup> However, such a standard would do little to mitigate the unpredictability of decisions under the current, uncertain constitutional doctrine. Consequently, it would do little to alleviate the fears of homeschoolers and the constitutional concerns of legislators that have distorted the political debate over homeschooling regulation.

Simultaneously, courts should make clear that the state's interest in ensuring the provision of an adequate education and preventing children from "becom[ing] burdens on society because of educational shortcomings"<sup>331</sup> is compelling in the constitutional sense.

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inform their children in any way they wish, but not prevent states from requiring they be provided with additional information); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) ("The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language. . . . We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum . . .").

328. See, e.g., William A. Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516, 528 (1995) ("Toleration means . . . the principled refusal to use coercive state instruments to impose one's own views on others, the commitment to competition through recruitment and persuasion alone.").

329. See, e.g., Christopher J. Klicka, *Homeschooling Under Fire Around the Country (From the Trenches)*, *PRACTICAL HOMESCHOOLING*, Jan. 2005, at 19, 20 (describing how the Montana bill—described *supra* notes 70–75, 144–45, 288–91 and accompanying text—would "prohibit[] homeschooling by step-parents and legal guardians!" despite there being no clear language suggesting as much in the bill).

330. See, e.g., *Meyer*, *supra* note 29, at 575–76 (arguing in favor of such a standard).

331. *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972). Note that the Court saw as crucial to rejection of this point, argued by the state against exemption of the Amish from compulsory

The Supreme Court has stated that, while parents have fundamental liberty interests in the upbringing of their children, these can be overridden, even to the point of deprivation of custody, by the state's *parens patrie* interests in child welfare, given sufficient evidence of neglect or abuse.<sup>332</sup> Similarly, courts should make explicit that when homeschooling monitoring mechanisms uncover similarly "clear and convincing"<sup>333</sup> evidence of abuse, neglect (educational or otherwise), or substantially unequal learning opportunities, the state has authority to override parents' choices and possibly require that children be sent to institutional schools. This should obviate concerns raised by some that overly stringent constitutional protections of the decision to homeschool may allow intransigent parents to provide seriously inferior educations, no education at all, or unequal educations to their male and female children.<sup>334</sup>

Further, states should be able to put in place procedures to adjudicate disputes between the educational desires of parents and students. If such procedures determine that the parent's choice hinders or forecloses the student's educational goals, states should be permitted to order such additional education, even outside the home, as necessary to accommodate the student's ambitions. Generally, an order to allow for or provide additional education under such a system would not necessarily deprive parents of any choice, but would simply require that additional elements be incorporated into a student's education. However, even if a ruling overrode parental choice, courts should hold that such procedures and the determinations they make serve a compelling state interest "in seeking to develop the latent talents of its children [and] in seeking to prepare them for the life style that they may later choose . . ."<sup>335</sup> If an order directing that a student be placed in a school of some variety were necessary to provide the student with education essential to her goals as uncovered

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education laws, the fact that "the Amish accept the necessity for formal schooling through the eighth grade level [and] provide . . . an 'ideal' vocational education for their children in the adolescent years." *Id.*

332. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 747–48, 759 (1982) (requiring a state to provide "clear and convincing evidence," but not questioning its authority to absolutely sever the parent-child relationship in a neglect proceeding).

333. *See id.* (requiring "clear and convincing" evidence in deprivation of custody circumstances).

334. *See, e.g., Yuracko, supra* note 17, at 132–33 (discussed *supra* Part II.B.1).

335. *Yoder*, 406 U.S. at 240 (White, J., concurring). As mentioned *supra* note 311, it seems there was a majority of the Justices who took part in the *Yoder* determination in favor of allowing States to overcome even the undefined higher level of scrutiny that might come from a coupling of parental and free exercise claims for this purpose.

by such a process, then the expression of the student's goals, coupled with the compelling state interest, should survive strict scrutiny.

The described standard also would be directly applicable to the situation at issue in *Yoder*, thereby harmonizing that decision with other educational rights cases and eliminating the necessity for a unique (and uncertain) standard of review based upon the religious motivations of homeschoolers.<sup>336</sup> Religiously motivated homeschoolers would remain protected against discriminatory treatment by the general standard for free exercise claims, which requires that state actions specifically directed at religious activities survive strict scrutiny.<sup>337</sup> Providing homeschool education could thereby be governed by uniform, generally applicable regulations because it is not objectively and universally an instance of religious expression. Parents' choice to educate their children consistent with their religious convictions simply would be a specialized, subjective iteration of the parental right to choose how to educate their children, to which states later could add further curricular requirements. Consequently, courts should outline the standard so as to make clear that the choices of religiously motivated homeschoolers are afforded the same constitutional protections as other educational choices, but have no special constitutional status.<sup>338</sup>

The concomitant standard for regulations that do not foreclose free choice, then, would merely require that they be rationally related to the state's interests in education and child welfare. They would be presumptively constitutional absent an affirmative showing that the regulations could not possibly further those interests.<sup>339</sup> If the touchstone of a parent's fundamental liberty interest in her child's education is choice among educational alternatives, regulations that merely add requirements and do not prevent the teaching of other subjects by means parents choose would not infringe upon those

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336. Specifically, the Amish in *Yoder* could be ensured their choices to school their children at home would be protected by a stringent standard of review under the Due Process Clause.

337. See *City of Boerne v. Flores*, 521 U.S. 507, 513–14 (1997) (describing and affirming the “neutral, generally applicable” standard governing free exercise claims).

338. This standard is not meant to define the substantive policy choices a state may make in, for example, ensuring that homeschooling parents do not provide higher quality education to males than females. Rather, it is intended to create a clearly defined sphere in which states can set regulatory policy consistent with the will of their people. Just as state regulations that forbid teaching rhetoric could impermissibly foreclose a homeschooling parent's choice to teach that subject absent demonstration of a compelling interest and a least restrictive means, so too regulations that forbid teaching in line with a parent's religious beliefs would be invalid unless required to serve one of the compelling interests enumerated in the preceding two paragraphs.

339. See RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 15.5 (4th ed. 2007) (describing the rational basis standard of review).

choices. This would allow states with concerns over educational quality or breadth to impose curricular requirements or require regular testing or other types of evaluation. States with concerns that parents may teach, for example, supremacist ideologies or may refuse to teach female children could thereby counteract, to a degree, the dangers those practices pose by requiring that they be supplemented by contrary views. As repugnant as sexist, racist, or separatist teaching may be to the public at large, refusal to prohibit the diffusion of such ideas is among the commitments of a liberal, pluralistic society. If a state could impose curricular requirements that contrary perspectives be taught simultaneously (and enforced by testing or other means of oversight),<sup>340</sup> the differences between a homeschooled student being inculcated with these ideas and a public school student being taught them in the evenings would be minimized.<sup>341</sup> Moreover, in extreme instances the state could override the parents' educational choices if they refused to abide by these curricular requirements in a fashion "manifestly inimical to the public welfare"<sup>342</sup> or taught in a way that amounted to educational neglect.

State monitoring mechanisms, like home visits or educational evaluations by independent personnel, also would lie outside of the scope of the liberty interest protected by strict scrutiny under this proposal.<sup>343</sup> As these types of requirements would not, in and of

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340. As an example, state science testing might assess a homeschool student's familiarity with the basic tenets of evolutionary theory, astronomy, or psychology if the state made the policy choice that students exclusively taught material contrary to the generally accepted principles of these disciplines should be exposed to other perspectives. States could further similar policy objectives by requiring that homeschooled students regularly have conversations with designated educational officials who could evaluate a student's familiarity with a variety of viewpoints, perhaps on political or social subject matters. In so doing, the state need not impose a viewpoint, which would be unquestionably unconstitutional, but ensure that homeschoolers are given opportunities to appraise information with which they disagree and discuss it cogently. See generally Reich, *supra* note 24, at 307 (stating that "education that promotes [a child's] critical thinking and capacities for reflection on their own and others' ends" is "necessary for citizenship" and in "the interests both of the child and of the state").

341. This type of requirement may raise constitutional free speech problems that are beyond the scope of this Note. However, if parents are performing a surrogate public function, see *supra* part II.B.1, that might render such curricular requirements beyond the scope of First Amendment speech protections. In any event, these requirements could be made (as they are for public and some private schools) part of the compulsory attendance laws, such that criminal truancy sanctions would attach for ignoring them. It may also be the case that these types of requirements would be necessary to protect the state's compelling interests in children receiving an adequate, civically beneficial education such that homeschooling choices could be conditioned on agreement to abide by them in a fashion consistent with strict scrutiny, obviating at least some of the constitutional concerns.

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

343. See, e.g., *id.* ("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 . . .").

themselves, preclude parents from making any educational choices, but merely add additional obligations, they would be accorded a presumption of constitutionality.<sup>344</sup> Such mechanisms could lessen concerns that parents may use homeschooling as a cover for abuse. They would also afford states a clear means by which to discover and deal with situations in which the public interest in the education and welfare of students is being flouted.<sup>345</sup> Visits or evaluations also could help counteract socialization concerns by ensuring that homeschooling children, who might otherwise be completely isolated, engage in some degree of interaction with those outside of the home.<sup>346</sup>

Defining the parental right so as to grant regulations of these varieties presumptive validity is far from radical and, indeed, seems well in line with several statements of the Supreme Court.<sup>347</sup> Full candor in defining the parameters of the parental right and the flexibility states have to regulate both inside and outside of those parameters could have a salutary effect on transparency in the political process. Legislators would no longer be able to abdicate their duty to consider and to enact, where necessary, further homeschooling regulation by hiding behind broad pronouncements of parental rights

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344. Such provisions could raise Fourth Amendment concerns, but these concerns could be obviated by conditioning approval of a homeschooling program on waiver of the right in the limited instance of home visits. See Yuracko, *supra* note 17, at 153 (“[I]ndividuals may waive their Fourth Amendment right to be free from . . . searches and seizures.”). More importantly, such concerns are beyond the scope of this Note.

345. Additionally, the state could impose and enforce, for example, immunization requirements, and failure to comply would then implicate the state’s compelling interest in child welfare, which could then overcome strict scrutiny to override the parents’ choice to homeschool. See generally *Prince v. Massachusetts*, 321 U.S. 158, 166–71 (1944) (holding that the state’s interest in child welfare could, in extreme instances, overcome both free exercise and parental rights claims).

346. Cf. Reich, *supra* note 24, at 300 (arguing that even minimal “informal opportunities to engage with difference” may be sufficient to prevent social isolation and ethical servility and thereby relieving some, if not all, of the socialization concerns homeschooling implicates). See generally MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* 57–63 (2002) (contending that interaction with places and persons “separate from the environment in which children are raised” are imperative elements of social, educational, and political development).

347. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (“The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”); *Prince*, 321 U.S. at 166 (“Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”); *Pierce*, 268 U.S. at 534 (allowing far reaching regulations protective of the public welfare and interests of the child while holding that the choice to send children to a private school could not be infringed upon).

that obscure their practical scope.<sup>348</sup> Doctrinal clarification from the Supreme Court may ultimately be the only way to fully vitiate the obstructive rhetorical force of assertions of absolute constitutional rights that have cowed legislators and skewed public debate. While a statement from the Court would be ideal, however, lower courts too can and should apply this constitutional framework. It is both consistent with Supreme Court precedent and more doctrinally and analytically consistent than reading the Due Process and Free Exercise Clauses to provide little or no protection to homeschooling. Moreover, even without an authoritative Supreme Court definition of the metes and bounds of the constitutional protections attached to homeschooling, lower court decisions adopting this framework would provide sound precedent as a backdrop against which legislators and interested groups could interact with relative certainty.

It may be that even as the homeschooling population of a state continues to grow and diversify, legislators will remain convinced that minimal or no regulation is in the best interests of their constituents. But clearing the constitutional haze surrounding homeschooling would help ensure that they own those decisions. Clear enumeration of the narrow, constitutionally compelling circumstances under which a state could order a child to be schooled in an institutional setting<sup>349</sup> would help alleviate both the fears of homeschooling parents and concerns that homeschooling could be used as a cover for abuse, educational neglect, or deprivation of the opportunity for a student to choose her own path in life.<sup>350</sup> Further, candid clarification that

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348. See, e.g., *Hearing on S.B. 276 Before the S. Comm. on Educ. and Cultural Res.*, 58th Leg., Reg. Sess. 20 (Mont. 2003) (recounting the debate on Senator Ryan's homeschooling re-regulation, during which Democratic Senator Mangan "stated his appreciation for Sen. Ryan's efforts, but noted he [was] concerned with the constitutionality of the bill"), available at [http://data.opi.mt.gov/bills/2003/MinutesPDF/030210EDS\\_Sm1.pdf](http://data.opi.mt.gov/bills/2003/MinutesPDF/030210EDS_Sm1.pdf); see also *supra* notes 70–72 and accompanying text.

349. This would heighten the standard announced in such cases as *Hanson v. Cushman*, 490 F. Supp. 109, 114–15 (W.D. Mich. 1980) ("Thus the state need not demonstrate a 'compelling interest' but only that it acted 'reasonably' in requiring children to attend school and that children be taught only by certified teachers.").

350. *Yoder*, 406 U.S. at 233–34 ("To be sure the power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."); *id.* at 240 (White, J., concurring) ("A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option . . ."); *id.* at 242 (Douglas, J., dissenting) (stating that if the parents are able to effectively impose their views upon children, "it would be an invasion of the child's rights" if states were unable to provide an effective mechanism for the child to choose otherwise). Clear enunciation of these interests could eliminate contentious and constitutionally questionable decisions such as that in a recent New Hampshire case that elicited national press. Joshua Rhett Miller, *Group Asks Court to Reconsider Removing Girl From Home School*, FOX NEWS.COM, Sept.



regulations protecting the public's interests and the homeschooled student's interests are presumptively constitutional unless they effectively foreclose a parent's choice to homeschool or teach certain subjects would force state legislators to accept accountability for the decision not to regulate. With overblown statements of constitutional right and undercooked, doctrinally unsound declarations of a lack of constitutional implications taken off the bargaining table, a rational debate about the appropriate level of regulation can more readily occur.

## VI. CONCLUSION

For much of the last decade, homeschooling around the country has been subject to little or no regulation. Until recently, it seemed unlikely that the trend toward deregulation would reverse.<sup>351</sup> Nonetheless, the drawbacks of an unregulated segment of the education system have reinvigorated the political debate about a more sensible level of homeschooling regulation.<sup>352</sup> The twenty-four states that currently require only that parents give notice of their intent to homeschool or no notice at all<sup>353</sup> should enact legislation to protect the health and well-being of homeschooled children and to ensure that they receive an education that will allow them to become productive citizens. The states that have varying degrees of testing and evaluation requirements should reexamine their current stance to ensure that their oversight sufficiently protects children and furthers

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1, 2009, <http://www.foxnews.com/story/0,2933,545340,00.html>. In that case, a New Hampshire family court judge ordered a mother who had homeschooled her daughter for most of the child's academic career to send her to a public school based upon the father's contentions and Guardian ad Litem findings that her schooling, largely based upon her mother's "rigid" religious beliefs, hampered her intellectual and social development. *In re Kurowski*, No. 2006-M-669, (N.H. Fam. Ct., Laconia Div. July 13, 2009), available at <http://www.nhfamilylawblog.com/stats/pepper/orderedlist/downloads/download.php?file=http%3A/www.nhfamilylawblog.com/uploads/file/KurowskiOrder.pdf>. This case will undoubtedly be appealed and has created a furor rife with constitutional uncertainty. Miller, *supra*. Clarification of the limited interests upon which such a decision could issue would mitigate the public outcry, give the judge far greater guidance in making a determination, and clarify the constitutional basis, if any, of both parents' claims.

351. See Yuracko, *supra* note 17, at 128–30 (describing the longstanding trend toward deregulation and predicting that this trend would continue).

352. See, e.g., H.B. 69, 26th Leg., 1st Reg. Sess. (Alaska 2009) (providing, in a recently introduced bill, for voluntary home visits for homeschooled children under the age of five); S.B. 472, 52d Leg., 1st Reg. Sess. (Okla. 2009) (changing current homeschooling law to require notification of intent to homeschool and periodic testing of homeschoolers).

353. See Yurako, *supra* note 17, at 129–30 (outlining the current legal landscape of homeschooling regulations).

their interests in an educated citizenry.<sup>354</sup> Both groups of states should engage in realistic debate about the reliability of enforcement mechanisms for any regulation they might impose.<sup>355</sup>

Courts, and ideally the Supreme Court, also have a critical role to play in fostering this dialogue. They should clarify the nature of the parental rights implicated by homeschooling regulation to allow this political process to function naturally and should provide homeschoolers unequivocal protection for their choice of educational alternative and curriculum, regardless of their motivations. This determination should make clear the scope of the parental rights under the Constitution by abandoning overbroad rights language and bringing above board the pragmatic accommodation of the multiple interests that, indeed, seems to be the true standard in practice. Doing so will tone down the pitch of the political conversation by reassuring homeschoolers that their bedrock decisions will be protected. Also, this determination would likely work to correct the imbalance between those interested in the impact on children and the public welfare of unregulated homeschooling and those who advocate for minimal or no regulations. It will also remove legislators' incentives to adopt the constitutional interpretations of homeschooling interest groups and remove from the debate any ability they may have to claim their hands are tied. Legislators should not be able to avoid responsibility for any harm or disservice resulting from overly lax regulations by relying upon exaggerated pronouncements of constitutional rights. With this clear constitutional backdrop in place, a reasoned and deliberative dialogue about how homeschooling ought to be regulated can occur and the trend toward more balanced homeschooling regulations that protect the interests of parents, children, and the public alike can, perhaps, bear fruit.

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354. See *id.* at 128–29 (“[O]nly twenty-five states presently require standardized testing and evaluation of homeschooled students.”).

355. See Reich, *supra* note 24, at 281–82 (noting among the myriad of problems with the current regulatory environment is that even regulations in place “often go unenforced”).

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