

Education Off the Grid:

Constitutional Constraints on Homeschooling

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Homeschooling in America is no longer a fringe phenomenon. Estimates indicate that well over one million children are currently being homeschooled. Although homeschoolers are a diverse group, the movement has come to be defined and dominated by its fundamentalist Christian majority. Many Christians who choose to homeschool do so in order to shield their children from secular influences and liberal values. In response to political pressure from this group, states are increasingly abdicating control and oversight in this realm. Modern-day homeschooling thus raises important questions concerning the obligations of states toward children raised in illiberal subgroups. Surprisingly, the legal and philosophical issues raised by homeschooling have been almost entirely ignored by scholars. This Article seeks to begin to fill this void by examining the constitutional implications of state abdication in this area. The Article relies on federal state action doctrine and state constitution education clauses to argue that states must regulate homeschooling to ensure that parents provide their children with a basic minimum level of education. Further, the Article argues that the Equal Protection Clause imposes limits on the degree of sexist homeschooling that states may permit. In other words, while there is

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an upper constitutional limit on states' ability to regulate and control children's education, there is a lower limit as well. States may not avoid this mandated minimum with constitutional impunity.

INTRODUCTION

Ann and Bob Smith are a devoutly religious couple who choose to homeschool their seven-year-old twins Susan and Sam. In accordance with their religious beliefs, they teach their children only religious doctrine, refusing to provide their children with a basic education in reading, writing and arithmetic. The Smiths are permitted by the laws of their state to adopt such a plan. My guess is that the visceral response of many, if not most, readers is that a state simply cannot permit non-education of this sort be it by state or private actors. The question is of more than academic importance. In response to strong lobbying from homeschoolers, states have increasingly deregulated homeschooling and relinquished any oversight and control.

Homeschooling is no longer a "fringe" phenomenon.¹ Homeschooling was common in the United States before the nineteenth century, but by the early 1980s the practice was illegal in most states.² Since then, homeschooling has enjoyed a dramatic rebirth.³ Today, homeschooling is legal in all states.⁴ Estimates of the number of children currently homeschooled range from 1.1 to 2 million.⁵ The 1.1 million estimate represents 2.2 percent of the school-age

1. See ROB REICH, BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION 145 (2002) (describing the tremendous increase in homeschooling since the 1970s); John Cloud & Jodie Morse, *Home Sweet School*, TIME, Aug. 27, 2001, at 46 (noting that when "John Holt began pushing home schooling as an alternative to conformist public schools, his ideas were seen as fringe").

2. See Patricia M. Lines, *Homeschooling Comes of Age*, 140 PUB. INT. 74, 77 (2000) ("Not until the nineteenth century did state legislatures begin requiring local governments to build schools and parents to enroll their children in them."); *Home-Schooling: George Bush's Secret Army*, ECONOMIST, Feb. 28, 2004, at 52 (noting that in 1981 homeschooling was illegal in most states).

3. Estimates suggest that there were 10,000 to 15,000 children being homeschooled in the late 1970's, and that there were 60,000 to 125,000 children being homeschooled in 1983. See PATRICIA M. LINES, U.S. DEP'T OF EDUC., OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, HOMESCHOOLERS: ESTIMATING NUMBERS AND GROWTH 1 (web ed. 1999), available at <http://www.ed.gov/offices/OERI/SAI/homeschool/homeschoolers.pdf> (last visited Jan. 30, 2008).

4. Lines, *supra* note 2, at 77.

5. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., ISSUE BRIEF No. 2004-115, 1.1 MILLION HOMESCHOOLED STUDENTS IN THE UNITED STATES IN 2003 (2004), <http://nces.ed.gov/pubs2004/2004115.pdf>; *Home-Schooling: George Bush's Secret Army*, *supra* note 2. This range is so large and the estimates are so imprecise because several states do not require homeschooling parents to notify the state of their intention to homeschool, and many homeschoolers living in states that do require notification do not comply. See LINES, *supra* note 3, at 2-3 (discussing problems with getting good data on the actual number of homeschooled students); see also MITCHELL L. STEVENS, KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT 13-14 (2001); Kurt J. Bauman, *Home Schooling in the United States: Trends and Characteristics*, 10 EDUC. POL'Y ANALYSIS ARCHIVES 26 (2002), <http://epaa.asu.edu/epaa/v10n26>; Lines, *supra* note 2, at 77-78.

population in the country.⁶ Even conservative estimates place the number of homeschooled children at twice the number of students enrolled in conservative Christian schools and more than the number of students enrolled in Wyoming, Alaska, Delaware, North Dakota, Vermont, South Dakota, Montana, Rhode Island, New Hampshire, and Hawaii—the ten lowest states in terms of student enrollment—combined.⁷ Moreover, scholars estimate that the number of children receiving their education through homeschooling is growing at a rate of ten to twenty percent per year.⁸

The modern homeschool movement arose in the 1950s and was originally dominated by liberals and educational progressives.⁹ These early pioneers came to homeschooling from a range of leftist causes and organizations: the women's movement, the alternative schools movement, and the La Leche League.¹⁰ Many believed that traditional schools were rigid and intellectually

6. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 5, at 1. Demographic data suggests that homeschooling parents are likely to be at or slightly above the national mean in terms of household wealth and parental education. Compare Lawrence M. Rudner, *Scholastic Achievement and Demographic Characteristics of Home School Students in 1998*, 7 EDUC. POL'Y ANALYSIS ARCHIVES 8 (1999), <http://epaa.asu.edu/epaa/v7n8> (last visited Jan. 30, 2008) (finding that median household income of homeschool families was higher than the median household income of families with children nationwide), and Stacey Bielick, Kathryn Chandler & Stephen P. Broughman, *Homeschooling in the United States: 1999*, 3 EDUC. STATISTICS Q. 3-2 (2001), http://nces.ed.gov/programs/quarterly/vol_3/3_3/q3-2.asp (last visited Jan. 30, 2008) (finding that parents of homeschooled students had slightly more education than parents of non-homeschooled children but finding no difference in household income of homeschooling and non-homeschooling parents), with Clive R. Belfield, *Home-Schooling in the U.S.* (Nat'l Ctr. for the Study of Privatization in Educ., Occasional Paper No. 88, 2004) (finding that homeschooling families tend to be in the middle range socially in terms of education and income). Homeschooling parents are also significantly more likely to be white, married, and religious than non-homeschooling parents. See Bauman, *supra* note 5 ("Home schooled children are more likely to be non-Hispanic White, they are likely to live in households headed by a married couple with moderate to high levels of education and income. They are more likely to live in households with three or more children and they are likely to live in a household with an adult not in the labor force."); Bielick, Chandler & Broughman, *supra* (finding that 75 % of homeschoolers were white as compared to 65% of non-homeschoolers; 62% of homeschoolers and 44% of non-homeschoolers came from families with three or more children); Lines, *supra* note 2, at 78 ("According to the surveys, the typical homeschooling family is religious, conservative, white, middle-income, and better educated than the general population."). Homeschooling does, however, seem to be increasing among African Americans. See *Home-Schooling: George Bush's Secret Army*, *supra* note 2 (noting that "the number of black home-schoolers is growing rapidly"); *Home Schools Are Becoming More Popular Among Blacks*, N.Y. TIMES, Dec. 11, 2005, § 1, at 52 (describing the increasing but still low numbers of blacks homeschooling).

7. REICH, *supra* note 1, at 145. Additionally, more children are homeschooled than are in charter schools or school voucher programs combined. See Cloud & Morse, *supra* note 1 (estimating that over 850,000 students are homeschooled, while "only half a million kids are in charter schools, and just 65,000 receive vouchers").

8. See Cloud & Morse, *supra* note 1 (estimating growth at eleven percent per year); Lines, *supra* note 2, at 75 (estimating growth at fifteen to twenty percent per year).

9. See Lines, *supra* note 2, at 75 ("The contemporary homeschooling movement began sometime around mid century as a liberal, not conservative, alternative to the public school.").

10. See STEVENS, *supra* note 5, at 23-25 (describing one homeschooling pioneer who began

stifling.¹¹ They were followers of progressive school reformer John Holt, one of the early advocates of “unschooling.”¹² Holt believed that children had a natural proclivity for learning and learned best when encouraged to pursue their own interests rather than being forced to follow an established curriculum as in traditional schools.¹³ Holt argued that traditional schools failed to educate children and destroyed their capacity to learn.

By the early 1990’s, however, homeschooling had expanded and divided into two distinct movements: one secular and the other conservative Christian.¹⁴ Mitchell Stevens, who has performed the most extensive sociological study of contemporary homeschooling to date, explains: “[H]ome schoolers were divided into two quite different movement worlds. They read different publications, attended different support groups, and heeded different kinds of advice about how to act politically.”¹⁵ These two factions were not, however, of equal size and strength. The Christian homeschooling movement came to dominate its secular counterpart in size, profile and political influence. In other words, while homeschoolers themselves continue to be a diverse lot,¹⁶

with alternative schools and eventually organized other parents who knew each other through La Leche League). The La Leche League is an organization committed to encouraging and supporting breastfeeding. See La Leche League International, <http://www.llli.org> (last visited Jan. 30, 2008).

11. See Lines, *supra* note 2, at 75-76.

12. See *id.* at 75-76; STEVENS, *supra* note 5, at 24 (explaining that unschooling is a pedagogy that “required neither classrooms nor teachers”). See also Cloud & Morse, *supra* note 1 (“About 7% of home schoolers today describe themselves as using no particular curricular plan, according to the National Home Education Research Institute.”); Carolyn Kleiner, *Home School Comes of Age*, U.S. NEWS & WORLD REP., Oct. 16, 2000, at 52 (“[Unschooling is] based on the idea that education should be a natural process. There is no structure and no set curriculum; parents simply allow their children to determine what they want to study and when, offering guidance only when necessary.”).

13. Holt argued that all children are born with an “extraordinary capacity for learning,” but that traditional schools defeat it:

What happens is that it is destroyed, and more than by any other one thing, by the process that we misname education We adults destroy most of the intellectual and creative capacity of children by the things we do to them or make them do. We destroy this capacity above all by making them afraid, afraid of not doing what other people want, of not pleasing, of making mistakes, of failing, of being *wrong*.

JOHN HOLT, *HOW CHILDREN FAIL* 167 (1964), see also JOHN HOLT, *INSTEAD OF EDUCATION* 3 (Sentient Publ’ns 2004) (1976) (endorsing a pedagogy of “*doing*—self-directed, purposeful, meaningful life and work”). For a discussion of the contemporary unschooling movement see Susan Saulny, *Home Schoolers Content to Take Children’s Lead*, N.Y. TIMES, Nov. 26, 2006, § 1, at 1.

14. See STEVENS, *supra* note 5, at 28 (“By the mid-1980s there were two somewhat distinct support networks, one nominally Christian and the other explicitly ecumenical, that operated according to somewhat different rules.”).

15. *Id.* at 144-45. Stevens explains that, “[b]y the mid-1990s, in cities across the country, mothers and fathers typically were obliged to choose between explicitly Christian groups and explicitly nonsectarian ones.” *Id.* at 106.

16. Kleiner, *supra* note 12 (quoting Linda Dobson of the National Home Education Network as saying, “Today’s home-schoolers run the gamut of educational, economic, religious, ethnic, and geographic variations.”).

the homeschooling movement has become defined and driven by its conservative Christian majority.¹⁷

At the heart of the Christian homeschooling movement is the Home School Legal Defense Association (HSLDA).¹⁸ HSLDA's commitment to ensuring parents' unfettered right to homeschool flows from two core ideological beliefs. The first is a belief in parental control—indeed ownership—of children. “Parental rights are under siege,” HSLDA warns.¹⁹ “The basic fundamental freedom of parents to raise their children hangs in the balance. Have we forgotten whose children they are anyway? They are a God-given responsibility to parents,” HSLDA proclaims.²⁰ Indeed, Michael Farris, an HSLDA founder and its former president, argues 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.”²¹ The second is a belief in the need for Christian families to separate and shield their children from harmful secular social values. Public schools, Farris cautions, have been “promoting values that are questionable or clearly wrong: the acceptability of homosexuality as an alternative lifestyle; the acceptability of premarital sex as long as it is ‘safe’; the acceptability of relativistic moral standards.”²² Such indoctrination, he argues, is “probably more dangerous to our ultimate freedom than armed enemies.”²³ Fortunately, according to Farris, the moral obligation to protect one's child from such indoctrination is protected by a constitutional right. “[P]arents have the constitutional right to obey the dictates of God concerning education of their children.”²⁴

Motivated by these beliefs, HSLDA—along with the National Center for Home Education (NCHE), HSLDA's service arm designed to link, inform and organize state homeschool leaders, and the Congressional Action Program

17. *Id.* (noting that “the religious right remains the loudest, most organized voice in the home-schooling movement” and describing the HSLDA as a “70,000-family organization run by Christian fundamentalists”).

18. Founded in 1983, the organization provides homeschooling-related legal services for member families and in large part defines the legal and political agenda for conservative Christian homeschoolers. Michael Farris, a founder of the HSLDA describes the organization as a Christian organization. See MICHAEL FARRIS, HOMESCHOOLING AND THE LAW 148 (1990); see also STEVENS, *supra* note 5, at 122-23 (noting that HSLDA is the largest and most visible homeschooling organization and provides legal services to its members); Lines, *supra* note 2, at 81 (noting that HSLDA is a conservative Christian organization).

19. Home Sch. Legal Def. Ass'n, Why Do We Need Parental Rights Legislation? (Nov. 11, 2004), <http://www.hslda.org/docs/nche/000000/00000027.asp> (last visited Jan. 30, 2008).

20. *Id.* The HSLDA also explains on its website that it has “opposed the UN Treaty on the Rights of the Child because it would strip parents of much of their authority to educate, train, and nurture their children according to the dictates of their conscience.” Home Sch. Legal Def. Ass'n, About HSLDA, <http://www.hslda.org/about/default.asp?q016> (last visited Jan. 30, 2008).

21. FARRIS, *supra* note 18, at 53.

22. *Id.* at 59-59.

23. *Id.* at 9-10.

24. *Id.* at 11.

(CAP), HSLDA's lobbying organization—has become a powerful political force. For the last two decades HSLDA has opposed virtually all state oversight and regulation of homeschooling.²⁵ The clout of HSLDA and its grassroots Christian activists is now well-recognized in political circles. Indeed, in 2000 former U.S. Representative Bill Godling from Pennsylvania, the former chair of the House Committee of Education and the Workforce, called homeschoolers "the most effective educational lobby on Capitol Hill."²⁶

HSLDA first publicly flexed its muscles in February of 1994, in opposition to a proposed amendment to the Elementary and Secondary Education Act. HSLDA contended that the amendment would require homeschooling parents to be certified teachers.²⁷ It sent a dire warning about the proposed amendment to its members and began courting other organizations for support. Within days of the HSLDA warning, some members of Congress had received hundreds of thousands of calls in opposition to the amendment. Volunteers personally visited the office of every Representative on the Hill to explain their opposition to the amendment. Not only did the amendment fail, but Congress added language to the Education Act stating that the Act did not authorize any federal control over homeschools.²⁸

State lawmaker Michael Switalski encountered a similarly strong and well-organized lobby in 2001 when he introduced legislation into the Michigan State Senate requiring all homeschoolers to be registered with the state and take a standardized test. Switalski received more than 100 calls a day from homeschoolers opposed to the legislation, his cosponsors withdrew their support, and the legislation died in the House Education Committee.²⁹

In addition to preventing the passage of new state laws regulating homeschooling, HSLDA has effectively challenged existing state laws. Over the past 15 years, HSLDA has devoted its resources to challenging teacher certification requirements for homeschool teachers, subject matter requirements for homeschools, testing requirements for homeschooled children, and home inspection visits of homeschools.³⁰ As a result of HSLDA's work, state laws

25. See STEVENS, *supra* note 5, at 123-25 (describing the sophisticated organizational structure of HSLDA, NCHE and CAP which allows the groups to quickly and effectively mobilize large numbers of Christian homeschoolers).

26. Daniel Golden, *Home Schoolers Learn How to Gain Clout Inside the Beltway*, WALL ST. J., Apr. 24, 2000, at A1.

27. See Lines, *supra* note 2, at 85 (describing HSLDA's opposition to H.R. 6 an amendment to an education spending act); STEVENS, *supra* note 5, at 161 (noting that the amendment probably would not have applied to homeschoolers and several secular homeschooling organizations did not view H.R. 6 as the threat that HSLDA did).

28. See STEVENS, *supra* note 5, at 157-65 (describing HSLDA's lobbying effort to defeat H.R. 6).

29. See Lori Higgins, *Michigan Asks Little of Teaching Parents*, DETROIT FREE PRESS, Feb. 19, 2002, at 1A.

30. See Home Sch. Legal Def. Ass'n, *Marking the Milestones: The History of HSLDA* (1983), <http://www.hsllda.org/about/history/timeline.asp> (last visited Jan. 30, 2008) [hereinafter

regulating homeschooling have become increasingly lenient.³¹ According to HSLDA, only twenty-five states presently require standardized testing and evaluation of homeschooled students.³² Moreover, ten states labeled by HSLDA as having the lowest regulation of homeschooling do not even require homeschooling parents to notify the state of their intent to homeschool.³³ For

HSLDA, Marking the Milestones] (for descriptions of HSLDA's legal victories between 1983-1998 select each year from the drop-down menu and click "GO"); *see also* Chris Klicka, Home Sch. Legal Def. Ass'n, The Myth of Teacher Qualifications (Oct. 16, 2006), <http://www.hslda.org/docs/nche/000002/00000214.asp> (last visited Jan. 30, 2008) (discussing HSLDA's opposition to teacher qualification requirements for homeschooling parents); Home Sch. Legal Def. Ass'n, Issue: Testing – State, http://www.hslda.org/docs/nche/Issues/T/Testing_state.asp (last visited Jan. 30, 2008) (describing HSLDA's opposition to state testing requirements).

31. *See* STEVENS, *supra* note 5, at 14 (noting the trend from the 1980's to present of states becoming more permissive toward homeschooling); *Home-Schooling: George Bush's Secret Army*, *supra* note 2 ("The main reason why legal restrictions on home-schooling have been swept away across so much of America is the power of the Christian right."); HSLDA, Marking the Milestones, *supra* note 30 (describing the legal and political victories of HSLDA and focusing on the repeal of state laws regulating homeschooling).

32. *See* REICH, *supra* note 1, at 147 (citing CHRISTOPHER KLIKA, HOME SCH. LEGAL DEF. ASS'N, HOMESCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS (1999)).

33. HSLDA divides states into four categories based on the degree of strength of their homeschooling laws. HSLDA labels the ten states requiring no state notification of the intent to homeschool as Category One states signifying their extremely lenient response to homeschooling. According to the HSLDA, the states in this category are Alaska, Idaho, Texas, Oklahoma, Missouri, Illinois, Indiana, Michigan, Connecticut, and New Jersey. *See* Home Sch. Legal Def. Ass'n, Home School Laws, <http://www.hslda.org/laws/default.asp> (last visited Jan. 30, 2008). While most states in this category require that homeschooled students be taught specific subjects or be given an education that is comparable to that in the public schools, these subject matter requirements are often undercut by state laws exempting religious homeschoolers from statutory requirements that burden their exercise of religion. Missouri, for example, provides as part of its compulsory education law: "Nothing in this section shall require a private, parochial, parish or home school to include in its curriculum any concept, topic, or practice in conflict with the school's religious doctrines or to exclude from its curriculum any concept, topic, or practice consistent with the school's religious doctrines." MO. ANN. STAT. § 167.031(3) (West 2000). Several Category One states have also undercut their substantive education requirements by passing Religious Freedom Restoration Acts. Connecticut, for example, has a Religious Freedom Act that provides: "The state . . . may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest." CONN. GEN. STAT. ANN. § 52-571b(b) (West 2005). The HSLDA interprets this law to mean that, "[i]f the parents' free exercise of religion is substantially burdened by having to comply with the homeschool law, the parents may use the religious freedom law as a defense or file suit against the state." *See* HOME SCH. LEGAL DEF. ASS'N, HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS (CONNECTICUT) (2007-08), <http://www.hslda.org/laws/analysis/Connecticut.pdf> (last visited Jan. 30, 2008). Idaho, Illinois, Missouri Oklahoma and Texas all have Religious Freedom Act's with similar language. *See, e.g.*, IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); MO. ANN. STAT. §§ 1.302, 1.307 (West Supp. 2007); OKLA. STAT. ANN. tit. 51, § 253 (West 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon 2005). Indiana, Michigan and New Jersey have not passed Religious Freedom Acts. Even in Category One states, in which substantive requirements remain in effect, however, the practical import of the requirements is dubious given that these states do not require parents to notify the state of their intent to homeschool.

example, Alaska—one of the most explicitly hands-off states with regard to homeschooling—exempts homeschooled students from its compulsory education laws and imposes no subject matter or testing requirements on homeschooled students.³⁴ “Homeschooling” of virtually any sort is legal under Alaska law. In short, oversight of homeschooling in several states is so lax as to be nonexistent.³⁵ Moreover, the trend points toward even less state oversight and regulation of homeschooling. States are not only looking the other way when homeschoolers do not comply with state laws, but actually changing their laws to grant even greater freedom to homeschoolers.

Surprisingly, the social and legal implications of this phenomenon have received almost no scholarly attention. For decades political theorists have worried and argued about what steps a liberal society must take to protect children being raised in illiberal communities.³⁶ They have focused their attention on the extent to which a liberal society must permit or condemn such practices as polygamy, clitoridectomy, and child marriage.³⁷ Virtually absent

34. Alaska is one of the most explicitly hands-off states with regard to homeschooling. See ALASKA STAT. § 14.30.010(b)(12) (2006). Likewise, Indiana law exempts homeschools from any subject matter requirements. Indiana law provides: “A school that is (1) nonpublic; (2) nonaccredited; and (3) not otherwise approved by the Indiana state board of education; is not bound by any requirements set forth in IC 20 or IC 21 with regard to curriculum or the content of educational programs offered by the school.” IND. CODE ANN. § 20-8.1-3-17.3(a) (West 1995).

35. Federal law does not itself impose any substantive obligations on homeschoolers. The No Child Left Behind Act, which imposes stringent test performance requirements on public schools, explicitly exempts homeschools. The Act provides: “Nothing in this Act shall be construed to affect a home school, whether or not a home school is treated as a home school or a private school under State law, nor shall any student schooled at home be required to participate in any assessment referenced in this chapter.” 20 U.S.C. § 7886(b) (Supp. 2004).

36. By liberal and illiberal I refer to the political-philosophical commitments of classical liberalism emphasizing individual rights, equal opportunity in the public sphere, toleration, neutrality toward private conceptions of the good, and, arguably, individual autonomy. See Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998); Kimberly A. Yuracko, *Enforcing Liberalism: Liberal Responses to Illiberal Groups*, in HANDBOOK OF GLOBAL LEGAL POLICY 485 (Stuart S. Nagel ed., 2000).

37. See GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Katherine Wing ed., 2000); MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* (1999); SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* 14-18 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999); JAYA SAGADE, *CHILD MARRIAGE IN INDIA* (2005); Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136 (1997); Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT’L L. REV. 483 (2002); Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992); Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171 (1993); Stanlie M. James, *Shades of Othering: Reflections on Female Circumcision/Genital Mutilation*, 23 SIGNS 1031 (1998); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001); Eugenie Anne Gifford, Essay, *“The Courage to Blaspheme”: Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN’S L.J. 329 (1994).

from the debate has been any discussion of the extent to which a liberal society should condone or constrain homeschooling, particularly as practiced by religious fundamentalist families explicitly seeking to shield their children from liberal values of sex equality, gender role fluidity and critical rationality. The notable exception among political scientists is Rob Reich.³⁸ Reich has cautioned that homeschooling in some cases may be incompatible with the state's obligation to ensure that children receive a liberal multicultural education that promotes at least minimal autonomy.³⁹ He argues that, as a result, "the state must not forbid homeschooling but regulate it, and strictly enforce such regulations, so as to ensure that the interests of the state and the child are met."⁴⁰ His argument about state obligation, though, is one of pure normative political theory (what a state should do) rather than one of positive legality (what a state must do).

Legal academics have also remained silent in the face of homeschooling's dramatic rise. Most articles on homeschooling focus on the narrow question of whether public schools must allow homeschooled students to participate in extracurricular activities.⁴¹ Very few have provided any critical evaluation or assessment of current homeschooling laws more generally.⁴² None have

38. See REICH, *supra* note 1, at 142-72; Rob Reich, *The Civic Perils of Homeschooling*, 59 EDUC. LEADERSHIP 56 [hereinafter Reich, *Civic Perils*]; Rob Reich, *Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling*, in MORAL AND POLITICAL EDUCATION (NOMOS XLIII) 275 (Stephen Macedo & Yael Tamir eds., 2002) [hereinafter Reich, *Testing the Boundaries*].

39. See REICH, *supra* note 1, at 145-172; Reich, *Civic Perils*, *supra* note 38, at 58 (cautioning that customized homeschool curriculums may not prepare children to be conscientious citizens); Reich, *Testing the Boundaries*, *supra* note 38, at 297 (noting that the outer boundary of parental authority over education lies where "its exercise compromises the development of children into independently functioning adults or when it disables or retards the development of minimal autonomy in children"); see also Michael W. Apple, *Away with All Teachers: The Cultural Politics of Home Schooling*, 10 INT'L STUD. SOC. EDUC. 61 (2000) (discussing the potential civic dangers raised by the rise of illiberal homeschooling).

40. REICH, *supra* note 1, at 163.

41. See, e.g., Eugene C. Bjorklund, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 EDUC. L. REP. 1 (1996); David W. Fuller, Note, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599 (1998); William Grob, Note, *Access Denied: Prohibiting Homeschooled Students from Participating in Public-School Athletics and Activities*, 16 GA. ST. U. L. REV. 823 (2000); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913 (1996).

42. See Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75 (2002) (assessing shortcomings of current regulation of homeschooling and arguing for more modest state regulation); Laura J. Bach, Note, *For God or Grades? States Imposing Fewer Requirements on Religious Home Schoolers and the Religion Clauses of the First Amendment*, 38 VAL. U. L. REV. 1337 (2004) (challenging the constitutionality of state homeschool statutes that favor religious homeschoolers over non religious homeschoolers); Jon S. Lerner, Comment, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363 (1995) (exploring the upper bound on state regulation of homeschooling by arguing that state homeschool regulations should be analyzed under an undue burden test and that many existing regulations would be invalid under

addressed the significant constitutional questions raised by state abdication of control over homeschooling.

This Article seeks to begin to fill this important void. It explores the constitutional limits that the state action doctrine places on states' ability to delegate unfettered control over education to homeschooling parents. First, it argues that states must—not may or should—regulate homeschooling to ensure that parents provide their children with a basic constitutionally mandated minimum education. Second, it argues that states must check rampant forms of sexism in homeschooling so as to prevent the severe under-education of girls by homeschooling parents who believe in female subordination.⁴³

This argument about the constitutionally mandated minimum education that states must require of homeschools is critically important for two reasons. Conceptually, it rejects the dominant HSLDA view that parents possess absolute control over their children's education. It highlights the legal distinctness of parents and children and emphasizes that parental control over children's basic education flows from the state (rather than vice versa). States delegate power over children's basic education to parents, and the delegation itself is necessarily subject to constitutional constraints. Certainly there is an upper limit to states' control over children's education.⁴⁴ Parents do have constitutionally protected liberty interests in their relationship with their children.⁴⁵ This article does not address the upper limits on state regulation. What it emphasizes, however, is that there is a lower limit as well—a minimum

this standard).

43. As this paragraph makes clear, the focus of this paper is positive, not normative. I do not join in the general debate about the degree to which a liberal state should intrude into illiberal subgroups in order to protect individual rights and promote liberal values. Nor do I take a position about optimal levels of homeschool regulation generally. These discussions address core questions of social justice, group identity, and individual autonomy. They are essential to wise public policy, yet they are also often indeterminate and unsatisfying, preaching to the converted but doing little to build consensus among in-group and out-group members. My purpose in this paper is different. It is to argue about what states must do as a matter of law.

44. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that Oregon state law requiring attendance at public schools went beyond the constitutionally permitted upper bound on state regulation of children's education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down as unconstitutional a state law prohibiting the teaching of foreign languages to schoolchildren before the eighth grade). As James Dwyer has explained: "[T]he Supreme Court has yet to articulate any specific guidelines for how far states may go" in regulating religious schools. James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1345 (1996). Yet, as Dwyer notes, courts have consistently interpreted "state laws requiring state approval of all private schools, certification of private school teachers, instruction in core subjects, and reporting of attendance information" as falling below the upper bound and within states' discretionary range of regulation. *Id.* at 1345-46.

45. See *Pierce*, 268 U.S. at 534-35 (explaining that the Constitution guarantees the "liberty of parents and guardians to direct the upbringing and education of children"); see also *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (noting that parents have a "fundamental" right to direct the education of their children).

level of regulation and oversight over children's education that states may not avoid.⁴⁶ This lower limit belies the claim that parents have absolute educational control.

Practically, and perhaps more importantly, the argument demands that states bring homeschooling families into the regulatory structure. This demand is critical, even apart from concern over the quality of homeschool education. It means that homeschooling parents cannot separate themselves entirely from society; they cannot exist "off the grid." The required oversight puts a real as well as a symbolic break on anti-secular separatism. Moreover, it may, in turn, remind legislators of the area of discretion between the lower and upper bounds of state control over education wherein they wield significant power, thereby making normative discussions about the optimal level and type of education regulation both more likely and more useful.

In Part I, I consider whether states may permit homeschooling parents to deprive their children of a basic minimum education. I argue, as a matter of state and federal constitutional law, that states are required to oversee and regulate homeschooling parents so as to ensure that they provide their children with the same basic minimum education as their state's own schools. In Part II, I consider whether states may permit homeschooling parents to provide their sons with far better and more sophisticated educations than their daughters. I argue that in order to comply with the federal Equal Protection Clause, states must prohibit extreme forms of sexist homeschooling. Finally, in Part III, I explore the steps that states must take in order to ensure that their educational obligations are being met within homeschooling families. I argue that states are constitutionally obligated not only to formally recognize children's educational rights, but also to take affirmative steps to make such rights real.

46. Necessarily, there is also an in-between range in which state regulation is permitted but not required. The Supreme Court has readily acknowledged this zone of discretion. *See Runyon v. McCrary*, 427 U.S. 160, 178 (1976) ("The Court has repeatedly stressed that . . . [parents] 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."); *Pierce*, 268 U.S. at 534 ("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."). Indeed, state permission of homeschooling itself seems to fall within this discretionary zone. *See Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 246-47 (1968) ("[T]he State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes."); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 496-98 (8th Cir. 1987); *Duro v. District Attorney*, Second Judicial Dist. of N.C., 712 F.2d 96, 97-99 (4th Cir. 1983); *Hanson v. Cushman*, 490 F. Supp. 109 (W.D. Mich. 1980). *See also* Dwyer, *supra* note 44, at 1350 ("[M]ost court decisions indicate that states are constitutionally free to regulate [homeschools] to a substantial degree.").

I

CONSTITUTIONAL CONSTRAINTS ON THE DEPRIVATION OF EDUCATION

Much has been written in the popular press about the superior academic achievement of homeschooled children.⁴⁷ However, the widely-touted studies showing that homeschooled children outperform their public school peers deserve skepticism. They generally suffer from selection biases among homeschoolers and do not control for the family characteristics of the homeschooling and non-homeschooling families being compared.⁴⁸ With only half of all states requiring standardized testing or evaluation of homeschooled students,⁴⁹ and with poor enforcement of such requirements where they do exist,⁵⁰ there is simply no good data on what and how much homeschooled students are learning.

47. See, e.g., Grant Pick, *Home Rooms: Whether Conservative or Liberal About Education, More Parents Than Ever Think They Can Teach Their Children Better Than Conventional Schools Can*, CHI. TRIB., Jan. 19, 2003, (Magazine), at 8, available at 2003 WLNR 15410239 (“[H]ome schoolers are finding more tolerance—if not mainstream acceptance—as studies show home-schooled children generally do as well or better than others on standardized tests”); see also McMullen, *supra* note 42, at 85 (citing Cloud & Morse, *supra* note 1, for the proposition that, “[i]n 2000, the average SAT score for home schoolers was 1100, eighty-one points higher than the general population average of 1019” and that another study “showed that home schoolers averaged in the 75th percentile on the Iowa Test of Basic Skills,” but adding that, “not all home schoolers take standardized tests, and one suspects the better students are the ones volunteering to do so”); Brian D. Ray, *Home Schooling in Twentieth Century America*, http://www.bobsheppard.com/Home_School/brian_ray_article.htm (last visited Jan. 30, 2008) (asserting that “[r]egardless of race, gender, socioeconomic status, parent education level, teacher certification, or the degree of government regulation, the academic achievement scores of home educated students significantly exceed those of public school students,” but basing his findings on responses from surveys mailed directly to homeschooling families).

48. See Belfield, *supra* note 6, at 10-11 (noting the difficulties in assessing the relative performance of homeschoolers and explaining that “review of the data available across nine states with ‘high regulation’ of home-schooling yields very limited information” particularly because in five of those states “home-school students are not required to take state assessments or their results are not recorded,” and criticizing existing studies for not controlling for family background characteristics); see also STEVENS, *supra* note 5, at 13 (reporting that a study funded by the HSLDA and performed by Lawrence Rudner found that homeschoolers had higher median scores than the national norm on basic skills tests for every subject and every grade but noting that the test was based on a non-random convenience sample); Lines, *supra* note 2, at 80-81 (“[V]irtually all of the reported data show that homeschooled children score above average, sometimes well above average. Self-selection may affect this result, just as it affects other aspects of homeschooling research.”); Kariane Mari Welner & Kevin G. Welner, *Contextualizing Homeschooling Data: A Response to Rudner*, 7 EDUC. POL’Y ANALYSIS ARCHIVES 13 (1999), <http://epaa.asu.edu/epaa/v7n13> (last visited Jan. 30, 2008) (criticizing the methodology of the Rudner/HSLDA study); *Home-Schooling: George Bush’s Secret Army*, *supra* note 2 (noting the difficulty of getting a good sense of homeschoolers’ academic performance because “[h]omeschoolers do not have to report bad results. Moreover, home-schoolers may simply come from the more educated part of the population.”).

49. See REICH, *supra* note 1, at 147 (citing CHRISTOPHER KLUICKA, HOME SCH. LEGAL DEF. ASS’N, HOMESCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS (1999)).

50. See LINES, *supra* note 3, at 2-3 (discussing problems with getting good data on homeschooled students because of their failure to comply with existing state regulations).

Anecdotal evidence suggests that at least some homeschooled children, by design or accident, may not be receiving even a basic minimum education.⁵¹ The fact that one cannot know for sure how rare such occurrences are is itself a problem. I contend in this Part that, as a matter of federal and state constitutional law, states may not permit such deprivation.

A. Constitutional Guarantees of a Basic Education

Every state constitution includes an education clause requiring the state to provide a system of free public education.⁵² While the language of these clauses differs, they can be divided into four categories of increasing strength and expanding state obligation.⁵³

Education clauses in the first category contain “only general education language.”⁵⁴ North Carolina’s education clause falls into this first category. The North Carolina Constitution provides: “The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”⁵⁵

51. See, e.g., Cloud & Morse, *supra* note 1 (quoting a 15-year-old homeschooler who described her educational experience by saying, “I make pretty much all the decisions about what to study. I wasn’t interested in math or composition, so I didn’t really do it. I liked to dance.”); Kleiner, *supra* note 12 (describing a 15-year-old homeschooler who responded to a question about what he studied by saying, “To be perfectly honest, I snowboard a lot.”). See also *Yarborough v. Ark. Dep’t of Human Servs.*, 96 Ark. App. 247 (2006) (affirming termination of parental rights of a woman with an IQ of 85, diagnosed personality disorder, and mood disorder who insisted on homeschooling her children); *In re William AA.*, 807 N.Y.S.2d 181 (App. Div. 2005) (involving an educational neglect action against a mother who withdrew her child from special education placement in order to homeschool the child and then left the child home alone for eight hours a day saying that she would teach him in the evenings); Sam Howe Verhovek, *6 Siblings Make a Lonely Stand, Minus Mother, Father and Power*, N.Y. TIMES, June 1, 2001, at A1 (describing a standoff between police and six siblings “[l]iving without electric power, heat or a source of clean water, and apparently schooled at home in name only,” after their mother was arrested for neglect and their father died).

52. See Quentin A. Palfrey, *The State Judiciary’s Role in Fulfilling Brown’s Promise*, 8 MICH. J. RACE & L. 1, 6 (2002) (“Every state constitution contains an education clause requiring the state legislature to establish a system of free public schools.”); James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL’Y REV. 463, 466 (2004) (“[E]very state constitution contains an education clause mandating the provision of a free, public education.”); Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 408 (2000) (noting that “all fifty states’ constitutions contain clauses providing for free public education”).

53. See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815-16 (1985).

54. *Id.* at 815.

55. N.C. CONST. art. IX, § 2, cl. 1. Other states whose constitutional education provisions fall in this category are: Alaska, Arizona, Connecticut, Hawaii, Kansas, Louisiana, Nebraska, New Mexico, New York, Oklahoma, South Carolina, Utah, Vermont. For a complete list of these constitutional provisions see Ratner, *supra* note 53, at 815 n.143.

Education clauses in the second category not only speak of a general requirement to provide public education but also "emphasize the quality of public education."⁵⁶ West Virginia's education clause falls into this category. The West Virginia Constitution provides: "The legislature shall provide, by general law, for a thorough and efficient system of free schools."⁵⁷

Education clauses in the third category "contain a stronger and more specific education mandate" than those in the first two groups.⁵⁸ Wyoming's education clause falls within this category. The Wyoming Constitution provides:

The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary."⁵⁹

Education clauses in the fourth category "mandate the strongest commitment to education."⁶⁰ Washington's education clause falls into this last category. The Washington Constitution provides: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders"⁶¹

During the third wave of school financing litigation, courts have interpreted clauses of every type as obligating states to establish and operate public schools that provide children with a basic minimum or adequate education.⁶² In *Leandro v. State*, for example, the Supreme Court of North

56. Ratner, *supra* note 53, at 815.

57. W. VA. CONST. art. XII, § 1. Other states whose constitutional educational clauses fall into this category include: Arkansas, Colorado, Delaware, Florida, Idaho, Kentucky, Maryland, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Wisconsin. For a complete list of these constitutional provisions see Ratner, *supra* note 53, at 815 n.144.

58. Ratner, *supra* note 53, at 815.

59. WYO. CONST. art. VII, § 1. Other states whose constitutional education clauses fall into this category include: California, Indiana, Iowa, Massachusetts, Nevada, Rhode Island, South Dakota. For a complete list of these constitutional provisions see Ratner, *supra* note 53, at 816 n.145.

60. Ratner, *supra* note 53, at 816.

61. WASH. CONST. art. IX, § 1. Other states whose education clauses fall in this category include: Illinois, Maine, Georgia, Michigan, Missouri, and New Hampshire. For a complete list of these constitutional provisions see Ratner, *supra* note 53, at 816 n.146.

62. William Thro originated the wave metaphor for school financing cases which has now become ubiquitous. See William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990). The first wave of cases began in the late 1960's and involved challenges to state school financing policies brought under the federal Equal Protection Clause. See Palfrey, *supra* note 52, at 13; Ryan & Saunders, *supra* note 52, at 465-66. The second wave of cases, roughly from 1973 to 1988, also involved equal protection challenges to state school financing policies but this time the cases were brought under state constitutions. See Palfrey, *supra* note 52, at 17. The

Carolina interpreted its state education clause requiring the provision of a “uniform system of free public schools” as establishing “a right to a sound basic education.”⁶³ “An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work,” the court explained, “is devoid of substance and is constitutionally inadequate.”⁶⁴ In *Pauley v. Kelly*, the Supreme Court of West Virginia interpreted its education clause requiring the creation of a “thorough and efficient system of free schools” as one that “develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.”⁶⁵ In *Campbell County School District v. State*, the Wyoming Supreme Court interpreted that state’s education clause “as a mandate to the state legislature to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.”⁶⁶ Finally, in *Seattle School District No. 1 of King County v. State*, the Supreme Court of Washington explained that its education clause stating that education is the “paramount duty” of the state meant that “the State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our

third wave of cases began with *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), finding that a school financing plan violated state constitutional requirements that states provide students with an adequate basic education. See Palfrey, *supra* note 52, at 22 (noting that, “[a]dequacy plaintiffs contend that students are constitutionally entitled to a minimum quality of education”); Ryan & Saunders, *supra* note 52, at 467 (explaining that, “[t]he third wave began, according to traditional accounts, in 1989 when the Kentucky Supreme Court declared the entire state system of education unconstitutional under the state education clause. The Kentucky Supreme Court relied on an adequacy theory rather than an equity theory.”); see also Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995) (describing the three waves of school finance litigation).

63. *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997).

64. *Id.*

65. 255 S.E.2d 859, 861, 877 (W. Va. 1979). Indeed, the West Virginia Supreme Court was very specific about the nature of the education that was constitutionally required. According to the Court:

Legally recognized elements in this definition are development in every child of his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Id.

66. 907 P.2d 1238, 1259 (Wyo. 1995).

children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas."⁶⁷ As Gershon Ratner concludes, "[e]ach of the four kinds of state constitutional education provisions can and should be construed to require, at a minimum, that states provide an adequate education in basic skills."⁶⁸

Although a matter of greater debate, some scholars argue that the federal Constitution, specifically the substantive Due Process Clause, also creates a right to a basic minimum level of public education.⁶⁹ Susan Bitensky, for example, has pointed to the Supreme Court's decision in *Michael H. v. Gerald D.* as analytical support for such a right.⁷⁰ *Michael H.* involved an unwed father's claim to a constitutionally protected right to a relationship with his child, who was born into a preexisting marital unit. In rejecting *Michael H.*'s contention that such a relationship was a fundamental right, the justices discussed the methodology for finding such a right. Writing a plurality opinion, Justice Scalia proposed the most restrictive test. According to Justice Scalia, in order for an interest to be a fundamental due process right, the interest "need not take the form of an explicit constitutional provision or statutory guarantee," but there must be some evidence that the interest has been an "important traditional value[.]"⁷¹ Justice Scalia emphasized that the critical inquiry is whether the interest is "rooted in history and tradition."⁷² Bitensky argued that

67. 585 P.2d 71, 94-95 (Wash. 1978).

68. Ratner, *supra* note 53, at 818; see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332 (2006) ("Educational adequacy claims, in particular, have lately found a receptive audience, and the available evidence shows that successful litigation has resulted in a modest reduction of inequality between school districts within states.") (footnotes omitted). For information on school finance litigation in all fifty states see Nat'l Access Network, School Funding Litigation, <http://www.schoolfunding.info/litigation/litigation.php3> (last visited Jan. 30, 2008).

69. See, e.g., Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 612 (1992) ("What *Slaughter-House* stanchd under the Privileges or Immunities Clause was merely rerouted through the Due Process and Equal Protection Clauses. Throughout the twentieth century, the Court has frequently relied on one or the other of these two clauses to strike down state laws as violative of federally enforceable rights under the Constitution."). See also Ratner, *supra* note 53; Matthew A. Brunell, Note, *What Lawrence Brought for "Show and Tell": The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343 (2005); Patricia W. Morrison, Editorial Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796 (1975); Peter S. Smith, Note, *Addressing the Plight of Inner-City Schools: The Federal Right to Education After Kadrmas v. Dickinson Public Schools*, 18 WHITTIER L. REV. 825 (1997).

70. See Bitensky, *supra* note 69, at 584 (discussing the different opinions in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

71. 491 U.S. at 122 n.2.

72. *Id.* at 123. Justice Scalia outlined the criteria for finding a fundamental right most clearly in footnote six of his opinion. Justice Scalia explained in this footnote that tradition should be determined by "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 128 n.6. Chief Justice Rhenquist joined in the opinion. Justices O'Connor and Kennedy joined the opinion in all but footnote six. Joined by

the right to a basic minimum education satisfies this criterion. “[S]chool-age children,” she explained, “are blessed with a rich legacy of historical tradition, continued to this day, specifically protective of an entitlement to government-provided public elementary and secondary education.”⁷³ Moreover, Bitensky argued that since the alternative methods for determining a fundamental right set forth in the concurring and dissenting opinions of *Michael H.* are more flexible than the standard set forth by Justice Scalia, a fundamental right to a basic minimum level of education should be recognized under those standards as well.⁷⁴

While the Supreme Court has not ruled directly on the issue, its dicta in several cases suggests a willingness to recognize a federal constitutional right to a basic minimum level of education. In *San Antonio Independent School District v. Rodriguez*, for example, the Supreme Court considered a challenge to a property tax-based school funding policy that resulted in poor children attending schools inferior to those attended by wealthy children.⁷⁵ In upholding the policy’s constitutionality the Court held that poor children did not have a constitutionally protected right to an education of equal quality to that of their wealthier peers. Nonetheless, the Court emphasized that the right to a basic minimum level of education was not at issue in the case and that the outcome might have been different had that right been at stake.⁷⁶ Indeed, some scholars have called the Court’s suggestion that it might recognize such a right the “unheld holding” of *Rodriguez*.⁷⁷

Justice Kennedy, Justice O’Connor wrote an opinion concurring in part. Justice Brennan wrote a dissent in which Justices Marshall and Blackmun joined.

73. Bitensky, *supra* note 69, at 590.

74. See *id.* at 584 (“Although the Justices’ methodological models of substantive due process rights selection are at variance with each other, each model can be legitimately construed to support recognition of an affirmative due process right to public elementary and secondary education.”). Justice O’Connor agreed that historical traditions were relevant in determining whether an interest was a fundamental right under the Due Process Clause but thought Justice Scalia’s focus on “‘the most specific level’ available” was too narrow. *Michael H.*, 491 U.S. at 132 (O’Connor, J., concurring in part). Justice Brennan also agreed that tradition should play a role in identifying fundamental rights but favored a more expansive and flexible concept of tradition. *Id.* at 137-41 (Brennan, J., dissenting).

75. 411 U.S. 1 (1973).

76. The Court explained:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to free speech or the right to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id. at 36-37.

77. See Penelope A. Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access, and*

The Court did address a more absolute denial of education in *Plyler v. Doe* and again suggested that a basic minimum level of education might indeed be a fundamental right.⁷⁸ *Plyler* involved a challenge, brought by Mexican children who had entered the country illegally, to a Texas statute that authorized public school districts to deny free enrollment to undocumented children and withheld state funds from public schools for their education.⁷⁹ Although the Court repeated its dicta from *Rodriguez* that education was not a "right," the Court also emphasized that a basic minimum level of education was more than a privilege or "benefit."⁸⁰ Importantly, in assessing the constitutionality of the challenged statute, the Court applied a heightened standard of review that fell somewhere below strict but above rational review.⁸¹ The Court explained that in light of the significant harms at stake, the state could justify denying children a basic minimum level of education only if this denial furthered some substantial goal of the state.⁸² Because the Court found that the state had no such interest, it held the Texas statute unconstitutional.⁸³

Alternatively, some scholars have looked to the Privileges or Immunities Clause as the source of a constitutional right to a basic minimum level of education.⁸⁴ Although the Supreme Court was widely regarded as having

the Right to Adequate Education, 20 SANTA CLARA L. REV. 75, 78-83 (1980); see also Bitensky, *supra* note 69, at 595 ("[T]he Rodriguez Court's 'unheld holding'—hypothesizing a positive right to some quantum of education—comes close to acknowledging that such means must be provided as a constitutional matter.").

78. 457 U.S. 202 (1982).

79. *Id.* at 205-06.

80. *Id.* at 221. According to the Court:

Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Id. (citation omitted)

81. *Id.* at 223-24; see also Bitensky, *supra* note 69, at 568 (explaining that although "the Court did not opt to review the legislation under a strict scrutiny standard, the Court also did not choose the least rigorous standard of review—the rational relationship test—which had been employed in *Rodriguez*. Instead, the *Plyler* Court invoked the intermediate or, as it is sometimes called, heightened scrutiny standard of review based, in part, on the status of education under the Constitution.").

82. The Supreme Court explained:

In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.

Plyler, 457 U.S. at 223-24. Chief Justice Burger, in dissent, challenged the majority for engaging in what he called a "quasi-fundamental-rights analysis." *Id.* at 244 (Burger, C.J., dissenting).

83. *Id.* at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

84. See, e.g., Bitensky, *supra* note 69, at 615 ("[T]he time seems long overdue for bringing the Privileges or Immunities Clause out of idle obscurity and into the fray as the legitimate source

eviscerated the Privileges or Immunities Clause in the *Slaughter-House Cases*,⁸⁵ Kara Millonzi, for example, has argued that the Supreme Court resurrected the original meaning of the clause⁸⁶ in *Saenz v. Roe*.⁸⁷ In *Saenz*, the Supreme Court used the Privileges or Immunities Clause to invalidate a California law that limited welfare benefits of new residents to the level of benefits they would have received in their prior state of residence.⁸⁸ The Court found that the law violated that component of the right to travel that included the right of “travelers who elect to become permanent residents . . . to be treated like other citizens of that State.”⁸⁹ This right, the Court held, stemmed from the Privileges or Immunities Clause.⁹⁰ According to Millonzi, “the legislative history of the Privileges or Immunities Clause suggests that these rights are defined by their importance to the survival of our nation.”⁹¹ This return to original meaning, Millonzi argued, should also lead the Court to find a federal right to a basic education. Just as “[t]he framers envisaged the right to travel as integral to the development and growth of our nation[,] [l]ikewise,” she contended, “the framers recognized the necessity of an educated public to the functioning of a successful democracy.”⁹²

of a positive right to education.”); Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, 1972 WASH. U. L.Q. 405, 419 (“With all due respect to those who have labored so hard in the vineyard, equal educational opportunity is not the essence of the claim. It is not equality but quality with which we are concerned. For equality can be secured on a low level no less than a high one. The claim that will have to be developed will be a claim to adequate and appropriate educational opportunity. And this, I submit, derives more cogently from concepts of privileges and immunities rather than equality of treatment.”); Kara A. Millonzi, Recent Development, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1311 (2003) (“The recognition of the right to education under the Privileges or Immunities Clause suggests that public school systems that fail to provide an adequate education to our nation’s youth are unconstitutional.”). The Privileges or Immunities Clause of the Fourteenth Amendment provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1.

85. 83 U.S. (16 Wall.) 36 (1873). In the *Slaughter House Cases*, the Supreme Court upheld a Louisiana law establishing a slaughterhouse monopoly against plaintiffs’ challenge that the monopoly interfered with their right to carry on trade as protected by the Privileges or Immunities Clause. Scholars generally view the *Slaughter House Cases* as turning the Privileges or Immunities Clause into surplusage by limiting its protection to rights already protected elsewhere in the Constitution. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22-23 (1980); Bitensky, *supra* note 69, at 607 n.334; Lino A. Graglia, *Do We Have an Unwritten Constitution? – The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 83 (1989).

86. See Millonzi, *supra* note 84, at 1311.

87. 526 U.S. 489 (1999).

88. *Id.* at 503.

89. *Id.* at 500.

90. *Id.* at 503 (“[M]ost notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, it has always been common ground that this Clause protects the third component of the right to travel.”) (citation omitted).

91. Millonzi, *supra* note 84, at 1311.

92. *Id.* at 1303.

Goodwin Liu has found a federal constitutional right to a basic minimum education by reading the Privileges or Immunities Clause in tandem with the Fourteenth Amendment's Citizenship Clause.⁹³ The Citizenship Clause provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."⁹⁴ The two clauses together, Liu argued, create an affirmative right to national citizenship and obligate "the national government to secure the full membership, effective participation, and equal dignity of all citizens in the national community."⁹⁵ He wrote that this obligation "encompasses a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship."⁹⁶

While the question of whether there is a federal constitutional right to a basic minimum level of education remains unsettled, there is reason to believe that such a fundamental right does exist. Moreover, the existence of state constitutional rights to this effect is considerably more certain.

B. State Action Doctrine and the Basic Minimum

The state and federal educational obligations discussed above are by their own terms limited to government actors. Nonetheless, federal state action doctrine binds even private actors by state constitutional obligations when these entities act like the state in performing a public function. For at least sixty years, education has been recognized as a core public function. Indeed, as the Supreme Court asserted in 1954 in *Brown v. Board of Education*, "[E]ducation is perhaps the most important function of state and local governments."⁹⁷ Moreover, as the prior discussion has shown, it is one which entails, as a matter of state and perhaps also federal constitutional law, providing children with the opportunity for a basic minimum level of education.⁹⁸

To the extent that homeschooling parents control the public function of providing a basic minimum level of education, they are bound by the state's own constitutional obligations. Two related but conceptually distinct state action arguments lead to this conclusion.⁹⁹

93. Liu, *supra* note 68, at 334 (arguing that, "the Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation").

94. U.S. CONST. amend. XIV, § 1.

95. Liu, *supra* note 68, at 335.

96. *Id.*

97. 347 U.S. 483, 493 (1954); *see also* *Martinez v. Bynum*, 461 U.S. 321, 329 (1983) ("The provision of primary and secondary education, of course, is one of the most important functions of local government."); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a state.").

98. See discussion *supra* Part I.A.

99. The next two sections separate out several muddled strands of the Supreme Court's state action doctrine. As Stephen Gardbaum explained, "Standard treatments variously identify three or four strands within the labyrinth of the Court's doctrine." Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 412 (2003). "The first is the

1. Public Function Doctrine

The monopolistic power of the state and its ability to foreclose exit options for those who disagree with its policies are core reasons to impose constitutional restraints on state conduct, as opposed to private conduct.¹⁰⁰ State policies bind all citizens and preclude conflicting private conduct.¹⁰¹ In contrast, when private parties act, both the scope of their power and the effect of their conduct are less severe. Private individuals are diverse and do not, as a rule, operate monopolistically.¹⁰² Private conduct is unlikely to be uniform or coherent. As a result, private conduct is unlikely to foreclose options in the same way or to the same degree that state action does.¹⁰³

When, however, private actors exercise monopolistic control over a traditionally public function, courts treat the private actor as if it were the state for the purposes of constitutional challenge.¹⁰⁴ The private actor then becomes

'public function' test, which . . . holds that when a private actor exercises functions 'traditionally exclusively reserved to the State,' its actions will be deemed state action for constitutional purposes." *Id.* (citation omitted). "The second strand asks . . . whether the state is significantly entangled with, or jointly participating in, the actions of a private actor. If such a 'nexus' is found, the actions will be attributed to the state." *Id.* The third strand "makes the state responsible for private action when it 'has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.'" *Id.* at 413 (citation omitted). "Under the final strand . . . court orders enforcing certain voluntary private actions have been deemed to be state action triggering constitutional scrutiny, but not others." *Id.* at 414.

100. When a state legislates it must, by necessity, adopt a single coherent policy. The state cannot, for example, simultaneously say that public schools must and must not teach creationism, or that private homeowners must and must not sell to blacks in particular neighborhoods. As Maimon Schwarzschild explains: "Government, to be sure, cannot coherently pursue conflicting ends at one and the same time. Government is a monopoly." Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129, 137.

101. See *id.* at 145 ("When the state adopts its own policy, there can be no pluralism: the citizens have no choice but to submit. . . . The essence of state action is thus the preclusion of private pluralism."); Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the "Batson Function" to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147, 178 (1990) ("In effect, the state action doctrine creates a presumption of limited harm when there is an 'exit option' available to the victim of a private party's conduct.").

102. Schwarzschild explained the importance of this distinction:

If government is one, however, nongovernmental "persons" are many. Certainly the individual citizens are many, with individual tastes, interests and values. Nongovernmental institutions are many, as well: under American law, none—at least in principle—may operate monopolistically unless the monopoly is actually established and regulated by the government.

Schwarzschild, *supra* note 100, at 137.

103. As Schwarzschild has argued:

The Constitution properly requires the government—a monopoly which must act upon one principle or another—to act upon the principle of racial equality. But private persons, who are many, should not be constitutionally precluded from acting upon conflicting values, lest some authentically good values be suppressed altogether.

Id. at 154.

104. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (explaining that, "[w]e have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State.").

subject to the same federal and state constitutional obligations that bind the state in its performance of the public function.

Consider, for example, the Supreme Court's ruling in *Marsh v. Alabama*.¹⁰⁵ *Marsh* raised the question of whether the company-owned town of Chickasaw, Alabama, could prohibit a Jehovah's Witness from distributing religious literature in the town. The plaintiff argued that such a prohibition violated her First and Fourteenth Amendment rights. In its analysis, the Court emphasized the company's monopolistic control over the town's streets and sidewalks, as well as the fact that the company was operating as a public entity normally would.¹⁰⁶ Because of these facts, the Court treated the company's conduct as if it were state conduct and held that the company violated the plaintiff's First Amendment rights. The Court explained that "[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."¹⁰⁷ "The managers appointed by the corporation," the Court concluded, "cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees"¹⁰⁸

A similar argument has been made, with more limited success, with regard to modern day homeowners' associations. Several scholars have argued, for example, that because of the range of traditional municipal functions that homeowners' associations perform and control, they should be treated as state actors.¹⁰⁹ This argument has gained some traction in the courts, with its success

105. 326 U.S. 501 (1946).

106. The company owned the town's streets and sidewalks. It rented retail space to businesses and paid for the town's policeman. *Id.* at 502. As the Court noted, the town "is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town." *Id.*

107. *Id.* at 507.

108. *Id.* at 508. The Court noted that the company was subject not only to Fourteenth Amendment obligations but to Commerce Clause restrictions as well. *Id.* at 507 n.4. *See also* *Evans v. Abney*, 396 U.S. 435, 438 (1970) ("[T]he public character of [the park left in trust for the use of white people only] 'requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.'" (quoting *Evans v. Newton*, 382 U.S. 296, 302 (1966))).

109. *See* Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 *RUTGERS L.J.* 947, 960-61 (1998) (arguing in favor of treating common interest communities as state actors subject to constitutional requirements because "[i]f grass roots organizers cannot go to the new town squares or go door to door in gated communities to disseminate their messages, their opportunity to be heard is greatly reduced in the modern age"); Brett Jackson Coppage, Article, *Balancing Community Interests and Offender Rights: The Validity of Covenants Restricting Sex Offenders from Residing in a Neighborhood*, 38 *URB. LAW.* 309, 328 n.129 (2006) (noting numerous similarities between municipalities and common interest communities, including: "(1) both usually operate under a central constitution or other document; (2) both have elected members to represent their contingency; (3) the homeowner's association is able to enforce covenants and restrictions and enforce fines like a municipal actor; (4) members of homeowner's associations pay fees similar to taxes; and (5) homeowner's associations often provide services

tied largely to the scope and degree of control exercised by a homeowners' association in any particular case.¹¹⁰

The Supreme Court has made clear that what is important for the public function doctrine is not only that the private actor control a public function but that it control a public function that has been "traditionally the *exclusive* prerogative of the State."¹¹¹ This makes sense. When private entities supersede the state in controlling a public function exclusively and monopolistically, third parties no longer have diverse private options. They need constitutional protections to ensure access. Thus such private actors should be treated as state actors.

Certainly, education has never been the exclusive domain of the state.¹¹² Private schooling preceded public education and continues to exist alongside it. Nonetheless, in the absence of state regulation, homeschooling parents do exercise precisely the kind of monopolistic control over education with which

commonly offered by the public, like road maintenance, the maintenance of water and sewer systems, security services, trash removal, etc."); *see also* EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 122-149 (1994) (referring to common interest communities as "private governments"); ROBERT H. NELSON, *PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT* 73-80 (2005) (comparing common interest communities with municipalities because of the range of typically governmental services they provide); Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 362-65 (2005) (comparing common interest communities and cities); David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 782 (1995) ("[T]he transfer of authority from government to [homeowner] association endows the latter with the status of a state actor.").

110. *See* *Riley v. Stoves*, 526 P.2d 747, 751-54 (Ariz. Ct. App. 1974) (holding that a residential association was a state actor but its age-restrictive covenants were nonetheless not impermissible discrimination); *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947, 960 (N.J. Super. Ct. App. Div. 2006) (holding a homeowners' association is a "constitutional actor" required to "respect fundamental rights protected by the New Jersey Constitution" like the right to free speech); *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n*, 688 A.2d 156, 159 (N.J. Super. Ct. Ch. Div. 1996) (holding that, "[a] level playing field requires equal access to this condominium because it has become in essence a political 'company town' . . . in which political access controlled by the Association is the only 'game in town.'"); *but see* *Brock v. Watergate Mobile Home Park Ass'n*, 502 So. 2d 1380, 1382 (Fla. Dist. Ct. App. 1987) (finding "[a] homeowner's association lacks the municipal character of a company town"); *Devine v. Fischer*, No. 941808B, 1996 WL 1249885 (Mass. Super. Ct. Mar. 29, 1996) (holding that a condominium complex was not a state actor); *Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio*, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (holding that a condominium association was not a state actor under *Marsh v. Alabama*).

111. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). As the Supreme Court explained:

[O]ur holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State."

Rendell-Baker, 457 U.S. at 842.

112. *See* Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race*, 68 MO. L. REV. 559, 580 (2003) ("[I]t is plain that private, not public schools, are the historical norm in the United States").

the public function doctrine is concerned. Homeschooling parents make all the decisions about what educational materials and messages their children will be exposed to. Moreover, particularly for young children, there are no exit options. Young children do not have the power to bypass their parents' educational decisions and pursue different educational paths. Homeschooling parents, in short, exercise exclusive control over education, not with respect to all children, but with respect to their own children. As a result, they are appropriately bound by the state's own educational obligations.¹¹³

2. *Delegation as State Action*

An additional, conceptually distinct argument for subjecting homeschooling parents to constitutional restraints also exists. This argument focuses on states' delegation of their power over education to private actors.

As a general matter, states cannot avoid their own constitutional obligations by delegating control over public functions to private actors.¹¹⁴ Consider, for example, the Supreme Court's rulings in the white primary cases of *Smith v. Allwright*¹¹⁵ and *Terry v. Adams*.¹¹⁶ In *Allwright*, a black citizen of Harris County, Texas, challenged his race-based exclusion from the state's Democratic Party primary as unconstitutional.¹¹⁷ The Texas Democratic Party limited its membership and the right to vote in its political primaries to white citizens of the state.¹¹⁸ In response to plaintiff's claim that the state had violated his Fourteenth, Fifteenth and Seventeenth Amendment rights by failing to redress the discrimination, the state argued that "the Democratic party of

113. What is important here is not only that homeschooling parents are acting with monopolistic control over their children but that they are exercising control over a function that has traditionally been reserved for the state. The argument is not, therefore, that homeschooling parents, or parents more generally, should be treated as state actors for all purposes because of the totalistic control they exercise over their children. Rather, the argument is narrower and doctrinally grounded, namely that because of homeschooling parents' total control over their children's education, they are appropriately treated as state actors with regard to that particular function.

114. As Frank Goodman has explained: "When the state authorizes a private individual to perform some action on its behalf—when, that is, it delegates the performance of a governmental function—constitutional responsibility for that action rests essentially on agency principles." Frank I. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1338 (1982); see also Laurence H. Tribe, *Commentary, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 334 (1985) ("[I]t is equally clear that government's freedom to leave distribution to the market does not extend, under our Constitution, to *all* the things someone might need in order to exercise various constitutional rights—even those not clearly rendered affirmative by the constitutional text itself. Access to the franchise, for example, cannot be treated by government as a commodity, left to be bought and sold at a private auction. Access to basic education may well be of the same character.") (footnotes omitted).

115. 321 U.S. 649 (1944).

116. 345 U.S. 461 (1953).

117. *Allwright*, 321 U.S. at 650-51.

118. *Id.* at 656-57.

Texas is a voluntary organization” that is not bound by the constitutional obligations imposed on state actors.¹¹⁹ The Supreme Court rejected the state’s arguments. In doing so, it emphasized the public function at issue and the state’s inability to avoid its own constitutional obligations by delegating control over voting to private parties. “[S]tate delegation to a party of the power to fix the qualifications of primary elections is,” the Court explained, “delegation of a state function that may make the party’s action the action of the State.”¹²⁰ While “[t]he privilege of membership in a party may be . . . no concern of a State[,] . . . when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.”¹²¹ The Democratic Party was, in other words, bound by the state’s own constitutional obligations with respect to the public function of voting.

Terry involved yet another constitutional challenge to racial disenfranchisement effectuated by private rather than state conduct.¹²² The plaintiffs in *Terry*, black citizens of Fort Bend County, Texas, alleged that they were denied their Fifteenth Amendment right to vote by being excluded from the Jaybird Party primaries because of their race. The state argued in defense that the Jaybird Party was a private club not bound by constitutional obligations.¹²³ Rejecting the state’s defense, the Court emphasized the degree

119. *Id.* at 657.

120. *Id.* at 660.

121. *Id.* at 664-65. *Allwright* was one in a series of cases challenging the disenfranchisement of blacks from Texas elections through increasingly indirect means. In *Nixon v. Herndon*, 273 U.S. 536 (1927) the Supreme Court held unconstitutional a Texas state statute that denied African Americans the right to vote in Democratic party primary elections. In *Nixon v. Condon*, 286 U.S. 73 (1932), the Supreme Court held unconstitutional a decision by the Texas Democratic Party to exclude African Americans from voting in party primaries because it was the State Executive Committee of the party that had adopted the exclusionary policy. In *Grove v. Townsend*, 295 U.S. 45 (1935), however, the Supreme Court upheld against constitutional challenge the exclusion of African Americans from Democratic Party primaries where the decision to exclude blacks had been made by a convention of the membership of the party rather than by the State Executive Committee. In denying the plaintiff’s claim, the Court framed the case as one in which only the right to membership in a private party, rather than the right to vote, was at stake. *Id.* at 54-55. In response to the plaintiff’s claims, the Court explained:

The argument is that as a negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself

Id. In *Allwright*, the Supreme Court overruled *Grove* recognizing that the exclusion of African Americans from participation in Democratic Party Primaries did not simply implicate the right of blacks to membership in private parties but directly implicated their fundamental right to vote as well. See *Allwright*, 321 U.S. at 665-66.

122. 345 U.S. at 462.

123. *Id.* at 462-63 (“The Jaybirds deny that their racial exclusions violate the Fifteenth Amendment. They contend that the Amendment applies only to elections or primaries held under

of control that the state had permitted the Jaybirds to exercise over the traditionally public function of voting in county elections.¹²⁴ Again, the Court held that the state could not absolve itself of its Fifteenth Amendment obligations by effectively delegating control over its public elections to a private party.¹²⁵ Instead, the state was constitutionally required to protect its black citizens "from future discriminatory Jaybird-Democratic-general election practices which deprive citizens of voting rights because of their color."¹²⁶

A similar issue has arisen in cases in which prisoners have alleged constitutional rights violations by private prisons. In this context as well, courts have held that states cannot absolve themselves of their constitutional obligations by delegating the traditionally public function of prison management to private handlers. In *Rosborough v. Management & Training Corp.*, for example, the Fifth Circuit concluded that a prisoner in a private prison could file suit under 42 U.S.C. § 1983 alleging cruel and unusual punishment in violation of the Eighth Amendment.¹²⁷ In holding that the private prison management company and its employees were acting under "color of state law," as required for a § 1983 action, the court stated that "[c]learly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function."¹²⁸ The Sixth Circuit permitted a similar § 1983 suit against a private prison in *Skelton v. Pri-Cor*, again emphasizing that the private prison was "performing a public function traditionally reserved to the state."¹²⁹

state regulation, that their association is not regulated by the state at all, and that it is not a political party but a self-governing voluntary club.").

124. The Court explained:

The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded.

Id. at 469.

125. The Court held that, "the combined Jaybird-Democratic-general election machinery has deprived these petitioners of their [Fifteenth Amendment] right to vote on account of their race and color." *Id.* at 470.

126. *Id.*

127. 350 F.3d 459, 461 (5th Cir. 2003).

128. *Id.* at 460-61. The Supreme Court has repeatedly interpreted § 1983's "under color of state law" requirement as requiring the same showing as the Fourteenth Amendment's state action requirement. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."). Cf. *Polk County v. Dodson*, 454 U.S. 312, 322 n.12, 325 (1981) (noting that the actions of a public defender are not under color of state law and suggesting that there might be some distinction in certain cases between the state action and under color of state law analyses but declining to elaborate on what it might be).

129. 963 F.2d 100, 102 (6th Cir. 1991); see also *Plain v. Flicker*, 645 F. Supp. 898, 907

A similar analysis has been applied in the context of education. In *Griffin v. County School Board of Prince Edward County*,¹³⁰ Prince Edward County, in an attempt to avoid racial desegregation, closed its public schools and delegated control over education to private parties. The private parties then chose to operate exclusively white private schools.¹³¹ The plaintiffs, black school children living in Prince Edward County, claimed that the County's delegation of educational authority to private entities deprived them of equal protection.¹³² As in *Marsh*, the Court agreed, holding that the state could not avoid its constitutional obligations with respect to education by delegating its provision to private parties.¹³³

Certainly, it was important to the court in *Griffin* that the success of the private schools in that case depended on county programs providing tuition grants and tax credits to students in such schools.¹³⁴ Yet, the Court's remedy in the case indicates that what bothered the Court most was not the continued state entanglement with private conduct, but the nature of the good over which the state had attempted to delegate control. In ruling for the plaintiffs and remanding the case, the Court did not simply order that the county either take

(D.N.J. 1986) ("[I]f a state contracted with a private corporation to run its prisons it would no doubt subject the private prison employees to § 1983 suits under the public function doctrine."); *Scott v. District of Columbia*, No. 98-01645 HHK, 1999 U.S. Dist. LEXIS 21616, at *15-16 (D.D.C. Nov. 22, 1999) (stating that just as "[c]ontracting out medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody" . . . the District may not avoid its *Eighth Amendment* obligations to its prisoners by delegation to an independent contractor") (quoting *West v. Atkins*, 487 U.S. 42, 56 (1988)). Although the Supreme Court has not ruled directly on whether private prisons should be treated as state actors, it has suggested as much. In *West v. Atkins*, 487 U.S. 42 (1988) the Supreme Court held that a private doctor under contract with a state prison to provide medical care acted under color of state law and was subject to the requirements of the Eighth Amendment. In reaching this conclusion, the Court emphasized the state's monopolistic control over the petitioner in the case and over his medical care. The Court explained that:

If [the doctor] misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care.

Id. at 55; *see also* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 n.5 (2001) (stating in dicta that "state prisoners . . . already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983") (emphasis omitted).

130. 377 U.S. 218 (1964).

131. The background facts of *Griffin* are as follows. In 1959, following *Brown v. Board of Education*, the Fourth Circuit ordered Prince Edward County to desegregate its formally racially segregated public schools. In response, the supervisors of Prince Edward County closed the schools. Private schools were then established for white students and tuition grants for private schools were made available by the city for children of all races. *Id.* at 221-23.

132. *Id.* at 220.

133. *Id.* at 232 ("[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws.").

134. *Id.* at 233 (noting that the county's payment of tuition grants and tax credits had been essential for the success of its program to close the public schools).

back control of education and desegregate its public schools or disentangle itself entirely from private educational choices. Instead, the Court remanded the case to the district court "with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools."¹³⁵ Disentanglement, the court made clear, would not itself provide absolution for the state.¹³⁶

State delegation of control over a public function to a private party is most troubling when the delegatee exercises monopolistic control over the function in question. This was the case in *Allwright, Terry and Griffin*. Private parties controlled all access to voting and education in the relevant counties. Certainly, states have not delegated control over the entire field of education to parents. Homeschooling remains one option alongside which public and private schools continue to operate. Yet, as the public function analysis above suggests, the delegation of power to homeschooling parents is similar to that in *Allwright, Terry and Griffin* in one important respect. As in those cases, the state has delegated homeschooling parents the power to control completely (at least certain) third parties' access to the public good of education. With respect to their own children, homeschooling parents have control over a public good that is as monopolistic and absolute as was the case in *Allwright, Terry*, and

135. *Id.* at 234.

136. The Supreme Court in *Griffin* also emphasized that by closing its public schools, Prince Edward County was trying to accomplish via private action what it could no longer do via public action—namely, maintain racially segregated schools. The Supreme Court emphasized the importance of this discriminatory motive to its holding that the delegation was unconstitutional. The Supreme Court explained:

[T]he record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

377 U.S. at 231. Nonetheless, in *Palmer v. Thompson*, 403 U.S. 217 (1971), the Supreme Court made clear that simply because a state had a discriminatory motive for its authorization of private conduct did not mean that the private conduct would be subject to constitutional obligations. In *Palmer*, the Supreme Court held that the City of Jackson, Mississippi's decision to close its public pools rather than desegregate them, and to permit private parties to operate all the pools on a racially segregated basis, did not violate the equal protection rights of black citizens. According to the Court, "the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike." *Id.* at 226 (emphasis omitted). The Supreme Court noted that there was evidence of a racially discriminatory motive in *Palmer*, explaining: "Here, for example, petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the record appears to support this argument." *Id.* at 224-25. Nonetheless, the Court concluded: "Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of 'the equal protection of the laws.'" *Id.* at 226.

Griffin.¹³⁷

Both the public function and delegation analyses, then, strongly suggest that homeschooling parents should be bound by states' own constitutional obligations with respect to education. It is important to note, however, that homeschooling parents are only so bound to the extent that they control the public function of education. This public function cannot plausibly exceed the basic minimum level of education that public schools themselves are required to provide. Therefore, when homeschooling parents provide their children with schooling that exceeds the basic minimum, they are no longer acting as quasi-state actors and thus are no longer bound by the constitutional restraints imposed on state actors. Parents may, as a result, operate religiously oriented homeschools or send their children to religious private schools without constitutional limitations. Since the religious instruction provided occurs, at least theoretically, in addition to the basic education, the religious instruction does not implicate access to the public function.

In short, when access to a basic minimum level of education is not at stake, homeschooling parents are not providing a public function and are not subject to the constitutional constraints imposed on public schools. However, because homeschooling parents do control their children's entire education and have taken over the state's public function in this regard, they are bound by the state's own constitutional obligations to provide a basic minimum level of education.¹³⁸

C. Waiver

This article has argued thus far that states cannot free themselves of their own constitutional obligations regarding education by allowing homeschooling parents unfettered control over their children's educations. Parents, in other words, are bound by states' own basic minimum level of education obligations. However, whether this means that parents are in fact obligated to provide their children with a basic minimum level of education begs further analysis of states' own obligations. It depends in particular on whether states' education

137. The delegation of power to private prisons is monopolistic in this same regard. With respect to individual prisoners, private prisons exercise complete control over their punishment and rehabilitation.

138. Private schools, as agents of parents, are bound by the same substantive obligations. Parents may not themselves send their children to a private school that does not provide the basic minimum level of education. Private schools are monitored and policed as a way to regulate parents. A similar phenomenon is at play in employment law where antidiscrimination laws prohibit discriminatory customer preferences by policing employers as customer agents. See Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 848 (2001) (arguing that employee's right to be treated "with regard only to their economic function, without regard to their status" is vindicated not by suing customers but by policing the conduct of their agents, the employers).

obligations are waivable by the intended beneficiaries.¹³⁹ If states' obligations are waivable, then states may allow homeschooling parents to decline education for their children while still satisfying the state's own constitutional obligations.

In its starkest form, the question about waivability is as follows: can a state, consistent with its own constitutional obligations, establish a system of public schools but make attendance at these schools—as well as participation in any other form of education—wholly optional for children of any age? Certainly, states may make many educational opportunities optional for students. Students may choose whether to take advanced placement calculus or basic algebra, whether to take physics or stop at chemistry, and whether to take typing or drivers' education. The question here, however, is whether states may also make the learning of basic skills optional for children. As a practical matter, the waiver that is relevant here is not children's, but that of parents acting on their behalf. Young children have neither the cognitive ability nor the legal authority to make important decisions.¹⁴⁰ Parents are expected to speak for and on behalf of their children.¹⁴¹

139. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining waiver as "an intentional relinquishment . . . of a known right or privilege").

140. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.").

141. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); *Parham v. J.R.*, 442 U.S. 584, 621 (1979) (Stewart, J., concurring) ("For centuries it has been a canon of the common law that parents speak for their minor children. So deeply embedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it.") (footnote omitted); see also John Alan Cohan, *Judicial Enforcement of Lifesaving Treatment for Unwilling Patients*, 39 CREIGHTON L. REV. 849, 860 (2006) ("It is well established that parents speak for their minor children in matters of medical treatment."); Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own"*, 11 CORNELL J.L. & PUB. POL'Y 481, 482 (2002) (describing the "power of parents to control the education of their own" as a "hallowed tradition . . . dating to the first decades of the twentieth century") (citation omitted). Indeed, parents have First and Fourteenth Amendment rights to make decisions about their children's upbringing. Yet these rights are not absolute. See *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (holding that the state's authority to restrict parents' freedom in child-rearing "is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death"); *Jehovah's Witnesses in State of Wash. v. King County Hosp. Unit No. 1*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (affirming order for blood transfusions for child of Jehovah's Witness parents over free exercise and due process objections of parents). Courts have consistently held, for example, that parents' First and Fourteenth Amendment rights to direct the upbringing of their children do not prevent or bar reasonable state intrusions mandating basic educational requirements for children. See *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 496-98 (8th Cir. 1987) (holding that state could apply its compulsory attendance law to fundamentalist Christians); *Duro v.*

Many, if not most, constitutional rights are waivable by their intended beneficiaries.¹⁴² Criminal defendants can, for example, waive their Fifth Amendment right against self-incrimination¹⁴³ and their Sixth Amendment rights to assistance of counsel¹⁴⁴ and trial by jury.¹⁴⁵ Likewise, individuals may waive their Fourth Amendment right to be free from unreasonable searches and seizures.¹⁴⁶ Permitting waiver of a constitutional right makes sense when the justification for the right is primarily to bolster and reinforce the autonomy of the right holder and where permitting waiver does not undermine any larger social goals.¹⁴⁷

However, waiver does not make sense, and is not permissible, when constitutional rights and obligations are intended to serve broader social functions, such as establishing a particular structure of government or reinforcing foundational social norms.¹⁴⁸ Consider for example, Article III limitations on federal court jurisdiction. The purpose of such limitations is not to protect individual autonomy but to define a federalist form of government. As such, Article III limitations on jurisdiction are not waivable by the parties involved in a dispute.¹⁴⁹ Similarly, the Establishment Clause of the First Amendment ensures a government in which church and state are separate. The

District Attorney, Second Judicial Dist. of N.C., 712 F.2d 96, 97-99 (4th Cir. 1983) (upholding compulsory school law against parents' free exercise of religion objection); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 112 (N.D.N.Y. 1988) (upholding New York state law requiring that educational services provided to a child "elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors . . . at the public schools" against a free exercise challenge brought by homeschooling parents); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340, 344 (D. Md. 1969) (upholding a state program to provide sex education in public schools over parents' objections on the grounds that "the State's interest in the health of its children outweighs claims based upon religious freedom and the right of parental control").

142. See Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981) (describing the vast range of instances in civil and criminal cases in which waiver of constitutional rights is permissible).

143. See *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Rogers v. United States*, 340 U.S. 367, 371-72 (1951).

144. See *Faretta v. California*, 422 U.S. 806, 807 (1975); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

145. See *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942).

146. Such waiver is permissible as long as it is deemed voluntary. See *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *Johnson v. United States*, 333 U.S. 10, 13 (1948).

147. See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1383 (1984) (noting that, "[i]f the constitutional right in question is designed to secure an area of autonomy for the citizen against the state, it would seem that the exercise or nonexercise within that area should be in the hands of the citizen"). Certainly the conditions under which a waiver is made must be scrutinized for voluntariness, but the permissibility of waiver itself is not problematic under such circumstances. See generally Rubin, *supra* note 142 (discussing the protections that should be required to make waivers valid).

148. See Kreimer, *supra* note 147, at 1387-88 (referring to all three rationales as justifications for various constitutional rights and protections); Tribe, *supra* note 114, at 333 ("[R]ights that are relational and systemic are necessarily inalienable: individuals cannot waive them because individuals are not their sole focus.").

149. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

goals and benefits of the Establishment Clause are primarily social and structural, not individual. As such, individuals may not choose to waive the protections of the Establishment Clause.¹⁵⁰

Other constitutional rights "define[] not the structure of government, but the structure of a decent society."¹⁵¹ These, too, are not waivable. The Thirteenth Amendment's prohibition on slavery is most clear in this regard.¹⁵² Individuals may not choose to become slaves no matter how knowing and voluntary their waiver of their Thirteenth Amendment right.¹⁵³ As Seth Kreimer explains, "Slavery is forbidden whether or not a person 'consented' to it."¹⁵⁴ The Eighth Amendment's protection against cruel and unusual punishments operates similarly. Individual defendants cannot, for example, choose to accept a particularly cruel punishment in exchange for lower jail time.¹⁵⁵

Likewise, state constitutional education obligations serve social goals and purposes that go well beyond the interests of any individual child. As many state constitution education clauses themselves emphasize, an educated citizenry is necessary for the maintenance of a stable, democratic, and free society. Several clauses refer to the duty to educate as the duty to preserve "the rights and liberties of the people."¹⁵⁶ Other clauses describe the purpose of

150. As Seth Kreimer explains, "[E]ven if a parolee were to agree to a parole conditioned on regular church attendance, the condition would be ineffective, for the government would be barred from seeking such a waiver." Kreimer, *supra* note 147, at 1391 (citing *Jones v. Commonwealth*, 38 S.E.2d 444 (Va. 1946) (holding that a state may not make probation contingent on defendant attending Sunday school and church)). Similarly, Laurence Tribe notes that, "it is plain that a church or church-related school could not, for example, 'waive' the right to avoid intrusive governmental entanglement in order to receive direct monetary aid from the public treasury." Tribe, *supra* note 114, at 333 n.14.

151. Kreimer, *supra* note 147, at 1387.

152. See *id.* at 1387-88 ("[O]ne of the messages of the Reconstruction Era was that a decent American society does not allow slavery. The burden of the thirteenth amendment was not only the protection of individual liberty, but the eradication of a social practice deemed incompatible with a free society.").

153. See *Bailey v. Alabama*, 219 U.S. 219 (1911); *Clyatt v. United States*, 197 U.S. 207 (1905).

154. Kreimer, *supra* note 147, at 1386.

155. See, e.g., *Davis v. Berry*, 216 F. 413, 418 (S.D. Iowa 1914) (holding that a state statute providing for mandatory vasectomies for twice convicted felons violated Eighth Amendment), *rev'd on other grounds*, 242 U.S. 468 (1917); *State v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985) (reversing trial court order sentencing defendants convicted of rape to a suspended prison term if they would submit to surgical castration on the grounds that the sentence violated the state constitution's prohibition on cruel and unusual punishment). See also Kreimer, *supra* note 147, at 1387 ("If a state were to grant inmates a choice between tolerable prison conditions and a five-year shorter term in an unreconstructed Arkansas prison farm, it seems unlikely that a court would sustain the program, however beneficial the inmates thought it.") (footnotes omitted).

156. See, e.g., CAL. CONST. art. IX, § 1; ME. CONST. art. VIII, pt. 1, § 1; see also MASS. CONST. pt. 2, ch. V, § 2 (recognizing the "preservation of their rights and liberties"); TEX. CONST. art. VII, § 1 (asserting that education is "essential to the preservation of the liberties and rights of the people").

education as protecting “a free government,”¹⁵⁷ while still other clauses emphasize the importance of education in maintaining the “stability of a republican form of government.”¹⁵⁸ Courts interpreting these state constitution clauses have similarly emphasized the democracy- and citizenship-promoting purposes of the clauses as well as their importance for economic prosperity.¹⁵⁹ Given these broad social purposes, state constitutional education obligations, like other constitutional obligations with broad social purposes, are appropriately nonwaivable.¹⁶⁰ Consequently, parents who have been delegated control over their children’s education are, in fact, bound by their states’ own non-waivable constitutional obligations to provide a basic minimum level of education to their children.

In sum, this Part has argued that states have an obligation, stemming from both state and federal constitutions to provide children with a basic minimum level of education. When homeschooling parents take on the public function of providing education, they become bound by this obligation. States violate their own constitutional obligations when they permit homeschooling families to reject this basic minimum.

157. See, e.g., IND. CONST. art. VIII, § 1; N.H. CONST. pt. 2, art. 83; see also ARK. CONST. art. XIV, § 1 (calling education the “safeguard[] of liberty and the bulwark of a free and good government”).

158. See, e.g., IDAHO CONST. art. IX, § 1; MINN. CONST. art. XIII, § 1.

159. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (concluding that a state must provide an education that will provide students with “sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation”); *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993) (holding that the state had a constitutional duty to educate in order “to prepare [children] to participate as free citizens of a free State to meet the needs and interests of a republican government”); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (emphasizing the importance of education in providing “knowledge of government” and preparing students for “citizenship”). Several courts have also emphasized the economic functions served by the education clauses. See also *Abbott v. Burke*, 575 A.2d 359, 369 (N.J. 1990) (ruling that the state education clauses require schools to prepare students to be “competitor[s] in the labor market”); *Seattle Sch. Dist. No. 1 of King County v. State*, 585 P.2d 71, 94-95 (Wash. 1978) (holding that the state education clause creates a duty that “goes beyond mere reading, writing and arithmetic” to include “broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the market place of ideas”).

160. Both Kreimer and Tribe have reached similar conclusions. Compare Kreimer, *supra* note 147, at 1388 & n.344 (“[T]he right to education, resurrected in *Plyler v. Doe*, might well not be subject to waiver by its beneficiaries . . . [because] [i]f the basis of the holding in *Plyler* is a constitutional aversion to the establishment of a permanent ‘underclass,’ reminiscent of the caste system imposed by slavery, the willingness of a particular child to decline education may be irrelevant.”) (citation omitted), with Tribe, *supra* note 114, at 334 (suggesting that government cannot treat basic education as a market good that individuals may either voluntarily or involuntarily lose access to based on their preferences and resources).

II

CONSTITUTIONAL CONSTRAINTS ON SEXIST EDUCATION

Given that states have a constitutional obligation to ensure that homeschoolers receive a basic minimum level of education, the next question becomes whether the federal Equal Protection Clause entitles at least some children to something more than this basic minimum. A review of popular Christian homeschooling curricula, books and websites reveals an ideology of female subservience and rigid gender role differentiation. Prominent homeschool curricula, for example, emphasize that girls should be subordinate to their fathers and later their husbands.¹⁶¹ 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.¹⁶² Several articles assert that women should not work outside the home,¹⁶³ with one contending that “God

161. For example, in a chapter on the Family, the Weaver Curriculum, a mail order homeschooling curriculum, provides the following lesson:

Using the patterns . . . outline them onto felt of various colors and cut them out. Also, cut out the word “GOD.” After cutting them out, place them in the order God intended for the family; God, father, mother, children. Point out that Daddy answers to God, Mother answers to Daddy and God, and children answer to Mother, Daddy, and God.

REBECCA L. AVERY, *THE WEAVER CURRICULUM*, VOLUME 1 at 213 (1986). A Family Life Skills coursebook provided by Bob Jones University provides the following description of the role of a wife:

God’s pattern for the Christian wife is clear. Beginning in Genesis 3:16, the Bible says that the wife’s desire shall be toward her husband, and he will ‘rule over’ her. This relationship is not a form of slavery but is God’s plan, meant for the wife’s best interests. . . . The wife’s responsibilities are different, then, from her husband’s. She is primarily responsible for the atmosphere in the home. . . . The daughter who does not respect and obey her father will find it difficult to be a submissive wife.

FAMILY LIFE SKILLS FOR CHRISTIAN SCHOOLS, *TEACHER’S ED.*, 2D ED. at 5-6 (2004). More is known about the sexist beliefs and practices of religious private schools. As James Dwyer explains:

Substantial evidence indicates that a great number of religious schools in this country . . . deliberately and systematically inculcat[e] in their students the belief that females are inferior to males, that a woman’s purpose in life is to serve a husband and raise children, and that only men should pursue careers outside the home, become active in public affairs, or assert opinions about matters beyond the home. The strongest evidence of sexist teaching pertains to fundamentalist Christian schools.

Dwyer, *supra* note 44, at 1343. It seems likely that religiously-oriented homeschools would ascribe to many of the same beliefs and practices adopted by religious schools of their denomination.

162. The President of Vision Forum Ministries, Doug Phillips, formerly worked for the Home School Legal Defense Association and served as Director of the National Center for Home Education. He also speaks regularly at homeschool conferences around the country. See Vision Forum Ministries, About the President, http://www.visionforumministries.org/home/about/about_the_president.aspx (last visited Jan. 30, 2008).

163. See Melissa Keen, Called to the Home—Called to Rule, Vision Forum Ministries, June 16, 2004, http://www.visionforumministries.org/issues/family/called_to_the_home_called_to_r.aspx (last visited Jan. 30, 2008) (“God did not intend for His women to pursue careers outside the home”);

does not allow women to vote.”¹⁶⁴ Not surprisingly, this ideology of constraint also has something to say about girls’ education. In *So Much More*, for example, a book written by two homeschooled sisters and currently popular in the Christian homeschool community, the authors argued that college is dangerous for young women because it diverts them from their God-ordained role as helpmeets for their fathers and husbands.¹⁶⁵ Under existing laws, it is impossible to know how often and to what extent such beliefs lead to significantly inferior substantive educations for homeschooled girls.¹⁶⁶ Yet this

Vision Forum Ministries Editorial Note, *The Tenets of Biblical Patriarchy*, http://www.visionforumministries.org/home/about/biblical_patriarchy.aspx (last visited Jan. 30, 2008) (“While unmarried women may have more flexibility in applying the principle that women were created for a domestic calling, it is not the ordinary and fitting role of women to work alongside men as their functional equals in public spheres of dominion.”).

164. See Brian M. Abshire, *Biblical Patriarchy and the Doctrine of Federal Representation*, Vision Forum Ministries, July 15, 2005, http://www.visionforumministries.org/issues/family/biblical_patriarchy_and_the_do.aspx (last visited Jan. 30, 2008).

165. See Anna Sofia Botkin & Elizabeth Botkin, *SO MUCH MORE: THE REMARKABLE INFLUENCE OF VISIONARY DAUGHTERS ON THE KINGDOM OF GOD* 136-137 (2005) (“For young women, college campuses have become dangerous places of ongoing anxiety, wasted years, mental defilement and moral derangement. . . . Today’s college experience can lead young women away from real knowledge and blessing and into estrangement from both their heavenly Father and earthly fathers.”); see also the Botkins’s website, <http://www.visionarydaughters.com> (last visited Jan. 30, 2008); see also Stacy McDonald, *RAISING MAIDENS OF VIRTUE: A STUDY OF FEMININE LOVELINESS FOR MOTHERS AND DAUGHTERS* (2005). McDonald explained that a girl’s education “should be focused on assisting her future husband as his valuable helpmate, not on becoming her ‘own person.’” *Id.* at 55. She counseled girls to “[r]emember that a strong desire to be a doctor or a seemingly God-given talent in math is not an indication of God’s will for you to have a career in medicine or engineering. Sometimes God gives us talents and strengths for the specific purpose of helping our future husbands in their calling.” *Id.* at 56. Kevin Swanson, Executive Director of Christian Home Educators of Colorado, has argued in his daily radio broadcast that women who focus on education and career will end up having multiple abortions and will be lonely and purposeless in their lives. See Kevin Swanson, *Raising Visionary Daughters—An Interview with the Botkin Sisters* (June 19, 2007), available at <http://www.kevinswanson.com> (last visited Jan. 30, 2008). Ideas about the inappropriateness of higher education for girls have clearly taken hold among some segment of the Christian homeschooling community. See Hanna Rosen, *God and Country: A College that Trains Young Christians to be Politicians*, *THE NEW YORKER*, June 27, 2005, at 48 (“A faction of homeschooling parents lobbied [Patrick Henry College President Michael] Farris not to admit girls to the college”), available at http://www.newyorker.com/archive/2005/06/27/050627fa_fact (last visited Jan. 30, 2008).

166. One study of academic achievement of homeschoolers concluded that “[t]here were no significant differences in overall academic achievement between” male and female homeschoolers. Lyn T. Boulter, *Academic Achievement in Home School Education* 12 (1999), available at <http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED446385> (last visited Jan. 30, 2008). The study suffers, however, from significant methodological problems, namely, its sample included only 110 homeschooled students, and all participants had parents who requested an individually administered assessment of their children’s academic progress. Certainly, parents who did not care about their daughters’ educational development or believed such development was improper, would be unlikely to request such an assessment. Accurate information about the scope and degree of sexist homeschooling does not exist and would probably be impossible to gather given present homeschooling laws.

Part contends that the Equal Protection Clause imposes limits on the degree of sexist homeschooling that states may permit, entitling some girls—those in households where boys receive far more extensive instruction—to a level of education above the basic minimum.

The Equal Protection Clause prohibits states from discriminating against protected group members in the delivery of goods, services, benefits, and privileges. The clause is importantly distinct from the substantive Due Process and Privileges or Immunities Clauses discussed in Part I. While the latter two clauses guarantee fundamental rights to all individuals, the Equal Protection Clause guarantees equal treatment across protected groups with respect to both fundamental rights and trivial interests. As a result, the Equal Protection Clause effectively guarantees individuals a constitutional right to goods and services to which they would not otherwise have a right.

Consider for example, the case of *Shapiro v. Thompson*.¹⁶⁷ In *Shapiro*, the Supreme Court held on equal protection grounds that it was unconstitutional to exclude individuals from participation in a welfare program because they had not lived in the state for one year.¹⁶⁸ Although the Court did not suggest that the state was obliged to provide welfare benefits to anyone, it made clear that if the government did provide such benefits to some people, it might be required to provide them to others as well. As David Currie explains, when an equal protection violation is found, “the practical effect may often be the same as if there were an absolute duty to provide services”¹⁶⁹

A. The State Action Doctrine and Private Inequality: Three Approaches to Interpreting Shelley

Like the constitutional clauses discussed in Part I, the Equal Protection Clause applies to state, not private, action. Nonetheless, in *Shelley v. Kraemer*, the Supreme Court made clear that even when a public function is not at stake, state authorization of private conduct may violate the Equal Protection Clause.¹⁷⁰ In *Shelley*, the Supreme Court held that state authorization and enforcement of racially restrictive private covenants violated the Equal Protection Clause of the federal Constitution.¹⁷¹

In the years since, there has been much discussion by courts and scholars about the continued viability of *Shelley*. Some argue that its precedential value

167. 394 U.S. 618 (1969).

168. *Id.* at 627.

169. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 881-82 (1986).

170. 334 U.S. 1, 20 (1948).

171. *Id.* (holding that, “in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand”).

is limited to race cases.¹⁷² Others argue that its holding has been limited to its own facts.¹⁷³ According to Mark Rosen, for example:

Courts have not extended *Shelley* beyond the context of racial discrimination, but instead have regularly enforced private agreements containing substantive provisions that the state could not have enacted into general law. Even more surprisingly, . . . the Supreme Court has repeatedly refused to apply *Shelley* even in situations of racial discrimination.¹⁷⁴

Shelley, Rosen concludes, “has not survived.”¹⁷⁵

Yet reports of *Shelley*’s demise are greatly exaggerated. *Shelley*’s core holding—that there are some forms of private conduct which a state simply cannot with constitutional impunity authorize and enforce—has in fact been repeated in numerous cases, either with or without explicit reliance on *Shelley* itself. Indeed, in an important recent article, Don Herzog has catalogued a vast array of cases in which courts have held unconstitutional state deference to and enforcement of wholly private preferences.¹⁷⁶

Consider, for example, *Griffin v. Maryland*.¹⁷⁷ In *Griffin*, black and white

172. See, e.g., *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (“The holding of *Shelley*, however, has not been extended beyond the context of race discrimination.”); *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995) (limiting *Shelley* to “the racial discrimination context”); *Lebron v. Nat’l R.R. Passenger Corp.*, 12 F.3d 388, 392 (2d Cir. 1993), *rev’d on other grounds*, 513 U.S. 374 (1995) (noting that race is treated differently under the state action doctrine); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 259-60 (1st Cir. 1993); *Parks v. “Mr. Ford”*, 556 F.2d 132, 135-36 n.6a (3d Cir. 1977) (noting that *Shelley* “has been limited to cases involving racial discrimination”); see also Askin, *supra* note 109, at 948 (explaining that, “the doctrine of *Shelley v. Kraemer* appears to have been limited by most courts to the enforcement of racially discriminatory provisions”); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1759 n.208 (2006) (noting that *Shelley*’s application “has been limited to racial contexts”).

173. See *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 810 (Cal. 2001) (“Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action, it has largely limited this holding to the facts of those cases.”); see also *Jojoia v. Wells Fargo Bank, No. C71-900 SAW*, 1973 WL 158166, at *4 (N.D. Cal. May 2, 1973) (holding that *Shelley* is limited to its facts); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 111 (1992) (stating that *Shelley* “has been interpreted as limited to its facts”); Kevin Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 353 (1990) (opining that *Shelley* has been limited to its own facts).

174. Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 458 (2007).

175. *Id.* at 454.

176. See Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 8, 46 (2006) (discussing the scope of what he calls the *Kerr* principle—derived from *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945)—noting that, “sometimes the state may not justify an action by appealing to the views of private third parties,” and emphasizing that “the *Kerr* principle doesn’t mean only that the state can’t serve as a conduit for malign preferences. . . . sometimes the state actively has to combat such preferences”).

177. 378 U.S. 130 (1964).

protestors were arrested and convicted for trespassing after refusing to leave a private amusement park that was racially segregated.¹⁷⁸ As in *Shelley*, but without reference to it, the Supreme Court held that the state could not enforce the defendant's discriminatory preferences consistent with its own Fourteenth Amendment obligations.¹⁷⁹ Likewise, in *NAACP v. Thompson*, the district court held that Frederick County, Maryland, violated the plaintiffs' constitutional rights when it granted the Ku Klux Klan (KKK) a permit to hold a public rally from which it knew the KKK would exclude nonwhites, despite the fact that the rally was to be held on private property.¹⁸⁰ The court found an equal protection violation¹⁸¹ even though the permit itself was facially neutral with regard to race,¹⁸² it explicitly disavowed any approval of the organization holding the permit,¹⁸³ and the County did not participate in the exclusion of nonwhites from the rally.¹⁸⁴ Simply by authorizing a private event at which the county knew that race discrimination would take place, the county had violated its constitutional obligations.¹⁸⁵

Moreover, as Herzog emphasized, the *Shelley* principle has not been limited to race cases.¹⁸⁶ Herzog pointed in particular to heckler's veto cases, in which courts held that the state may not, without violating the First Amendment, allow private preferences to govern what speech may be heard in a public forum.¹⁸⁷ Nor may states defer to private preferences in determining what kinds of signs may be displayed in a public setting.¹⁸⁸ Perhaps closer

178. *Id.* at 133.

179. *Id.* at 137. As Herzog asks with regard to the case: "Why . . . is it unconstitutional for an amusement park to invoke trespass against unwelcome blacks, but not for a white homeowner to?" Herzog, *supra* note 176, at 41.

180. 648 F. Supp. 195 (D. Md. 1986).

181. *Id.* at 224-25.

182. *Id.* at 197.

183. *Id.* at 197.

184. *Id.* at 198.

185. The court explained its holding as follows:

[W]hile "significant encouragement, overt or covert" of an affirmative type is absent, the within litigation does involve passive supervision and toleration by state and county law enforcement officers of physical exclusion of blacks, from the rally site, by Klan-directed personnel. . . . [H]ere, government has brought into being a permit system which the Klan has used to cause certain members of the public to be excluded from public rallies on private property because of race or religion. In essence, government has looked the other way while a racially discriminatory result has been originated and accomplished by private actors who have been subject to governmental supervision.

Id. at 224-25; see also *Spencer v. Flint Mem'l Park Ass'n*, 144 N.W.2d 622 (Mich. Ct. App. 1966) (holding that enforcement of a racially restrictive condition in a contract to purchase burial rights in a cemetery would violate the Fourteenth Amendment).

186. As Herzog explains, "That 'race is different' connects some dots in this puzzle, but it's not enough to stop there, partly because that point desperately needs some justification, and partly because we find the same odd turns when race has nothing to do with it." Herzog, *supra* note 176, at 40-41.

187. *Id.* at 12.

188. See *Boos v. Barry*, 485 U.S. 312, 316, 329 (1988) (striking down a statute prohibiting the display of signs within 500 feet of a foreign embassy if those signs would bring the embassy

analogies to the facts of *Shelley* itself are those cases holding unconstitutional state enforcement of non-race-related housing covenants. In *Franklin v. White Egret Condominium*, for example, the court held unconstitutional state enforcement of a restrictive housing covenant barring children under the age of twelve from living in the subdivision.¹⁸⁹ In *West Hill Baptist Church v. Abbate*, the court found that judicial enforcement of a restrictive covenant excluding houses of worship from a subdivision was unconstitutional.¹⁹⁰

While *Shelley* is not dead, its skeptics are correct that that its underlying rationale as well as its scope remain unclear. This Part considers three separate conceptions of *Shelley* and explores each account's implications for the limits states must impose on extreme forms of sexist homeschooling.

1. *All Private Action as State Action*

The first and most expansive interpretation of the Court's holding in *Shelley* is that the Court eviscerated the distinction between state and private action, rendering all private conduct, or at least all that which the state is called upon to recognize and enforce, bound by constitutional constraints.¹⁹¹ Several courts and scholars have recognized, if not necessarily endorsed, this possible interpretation of *Shelley*. As Ronald Krotoszynski explains:

Shelley has proven controversial because it could be read to mean that any court involvement in an essentially private dispute satisfies the state action requirement. . . . Under this interpretation of *Shelley*, court involvement will transform private contract or property disputes into matters subject to the constitutional restrictions applicable to the government's behavior.¹⁹²

Judge Skelly Wright in *Edwards v. Habib* expressed a similarly expansive

into "public odium" or "public disrepute"); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 363-64 (6th Cir. 1998) (holding that transit authority's policy excluding advertising that might adversely affect ridership violated the First Amendment).

189. 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977).

190. 261 N.E.2d 196, 202 (Ohio Ct. Com. Pl. 1969).

191. Whether the state has simply recognized or actually been called upon to enforce a particular private right seems immaterial since to have a right means definitionally that the state will protect one's expression of it. See Schwarzschild, *supra* note 100, at 135 ("[Y]ou have a 'right' to do anything you are not prohibited from doing, and if you have a 'right' to do it, then the state will enforce an obligation upon everyone else to respect your 'right.'").

192. Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 316 (1995); see also Robert W. Gordon, *The Elusive Transformation*, 6 YALE J.L. & HUMAN. 137, 148 n.26 (1994) ("*Shelley* appears to adopt Robert Hale's view that contract rights are a form of delegated state power."); Shelley Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 65 (1998) ("*Shelley* blurs the distinction between public acts, which are subject to constitutional restraints as state actions, and private acts, which are not subject to those restraints, by labeling as state action virtually all private acts brought to the court for enforcement.").

view of the Court's holding in *Shelley*.¹⁹³ In Judge Wright's view:

There can now be no doubt that the application by the judiciary of the state's common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government. This may be so even where the court is simply enforcing a privately negotiated contract.¹⁹⁴

Under this view of *Shelley*, homeschools would effectively be bound by the same antidiscrimination obligations as public schools. While homeschooling parents might be permitted to adopt different teaching styles or techniques for girls and boys, they would not be permitted to provide their daughters with overall inferior educations. Educational decisions could not be based on assumptions about appropriate roles for women and men; sex equality as a social goal would have to be both practiced and preached.¹⁹⁵ While the Constitution might permit some gender-based educational differences, it would not permit gender-based disadvantaging of homeschooled girls. States would be constitutionally required to prohibit virtually all forms of sexist homeschooling.

This expansive conception of the Court's holding in *Shelley* is, however, both normatively unappealing and clearly wrong as a statement of actual law. Probably very few people would favor having all their private dealings subject to constitutional obligations and protections.¹⁹⁶ Not only would such

193. *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968).

194. *Id.* at 691 (citations omitted).

195. In *United States v. Virginia*, the Supreme Court set forth three state interests that would satisfy the state's important, or "exceedingly persuasive," interest requirement so as to justify sex-based distinctions between girls and boys in public schools. According to the Court, sex-based classifications may be used 1) "to compensate women 'for particular economic disabilities [they have] suffered;'" 2) "to 'promot[e] equal employment opportunity,'" and 3) "to advance full development of the talent and capacities of our Nation's people." 518 U.S. 515, 533-34 (1996). Moreover, the Court emphasized that the state's important interests, in order to be constitutional, must undermine sex hierarchy and never reinforce hierarchy or promote sex stereotypes that foster hierarchy. As the Court explained: "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* at 533. "[S]uch [sex] classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534 (citation omitted). Years earlier in *Mississippi University for Women v. Hogan* the Supreme Court had similarly held:

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

458 U.S. 718, 724-25 (1982).

196. As Professor Saxer explained:

If court action to effect [private] rights is subject to constitutional considerations, then any private right under state law must adhere to constitutional norms. Common law actions such as nuisance, trespass, invasion of privacy, and contract breach will be potentially subject to assertions by defendants that court enforcement of these rights will violate some constitutional guarantee such as freedom of expression.

constraints be burdensome on individuals, they would, as Maimon Schwarzschild has argued, deprive society of a value pluralism that can be vibrant and enriching.¹⁹⁷ Moreover, although *Shelley* can certainly be read to suggest this expansive view of constitutional constraints on state authorization of private conduct, this view is certainly not the legal reality. As a practical matter, it is clear that states may authorize private individuals to engage in conduct that the state may not itself engage in directly. Catholic schools may teach the catechism even though public schools may not.¹⁹⁸ Private individuals may discriminate on the basis of race in allowing guests on their property even though the state itself may not. A narrower reading of *Shelley* is appropriate.¹⁹⁹

2. *Select Private Action as State Action*

A second interpretation of *Shelley* sees the case not as eviscerating the distinction between state and private conduct but as blurring it by subjecting some, but not all, state authorization of private conduct to constitutional restraint. Under this view, only state authorization of private conduct that itself substantially undermines the social and economic participation rights of protected group members is subject to constitutional constraint. For the state's authorization of the discriminatory private conduct to trigger constitutional review, the interests affected must be highly important. Harold Horowitz takes this view of *Shelley*. According to Horowitz, when deciding "whether the definition and enforcement by a state of legal relations between private persons was unconstitutional state action," one must "determine in each case the exact effect on the individual of the particular state action."²⁰⁰

Saxer, *supra* note 192, at 102.

197. Professor Schwarzschild argued for a state action doctrine that protects value pluralism:

The Constitution binds the public monopoly of government to the public values expressed in the Constitution. But there exist many other conflicting values. Private 'persons' are also many. The pluralist case for the state action doctrine is that there should be no constitutional bar to diverse persons pursuing diverse values—values that conflict, yet values that are all good in the eyes of at least some people some of the time.

Schwarzschild, *supra* note 100, at 138.

198. See, e.g., *Evans v. Newton*, 382 U.S. 296, 300 (1966) ("While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems.").

199. See Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 477 (1962) ("[*Shelley*] cannot stand for a universal proposition that a court cannot enforce a private discrimination if the state could not itself make that discrimination."); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 53 (1961) ("Most of the courts have resisted the ultimate potential applications of *Shelley v. Kraemer*").

200. Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 221 (1957). Horowitz continued to explain:

The cases which have been discussed have illustrated some of the factors which would be considered in deciding whether the definition and enforcement by a state of legal relations between private persons was unconstitutional state action. The primary inquiry would be to determine in each case the exact effect on the individual of the particular

Certainly there is language in *Shelley* to support this reading of the case. In the opinion, the Court emphasized the importance of the civil right at stake in the case—namely the right to participate on equal footing with whites in the economic marketplace. This suggests that had the rights at stake been less important, the Court would not have reached the same decision. The Court explained:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.²⁰¹

Indeed, the state courts in *Shelley* probably could have reached the ultimate outcome—prohibiting state enforcement of racially restrictive covenants—by relying on traditional common law property principles.²⁰² By the time it reached the Supreme Court, however, the case was framed as a constitutional one emphasizing the fundamental property rights at stake.²⁰³

state action. For example, in the realm of problems dealing with racial discrimination, does the state action compel, or only permit, discrimination against a person because of his race? In what context does the discrimination based on race arise? Does it concern opportunity to purchase or use land, or opportunity to be buried in a particular private cemetery, or opportunity to enjoy the facilities of a public inn or theatre, or opportunity to be benefited by a private or charitable trust, or opportunity to vote in public elections?

Id.; see also Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 902 (1975) (“[T]he reasonableness, not the existence, of state action is the issue in every case involving permissive actions.”); Henkin, *supra* note 199, at 490 (arguing that when the state enforces private conduct the enforcement is not subject to the exact same equal protection requirements as if the state was acting directly because the private liberty interests in some cases are strong enough to outweigh the state’s equal protection obligations); Herzog, *supra* note 176, at 45-46 (explaining that in apparently parallel cases the state does just the same sort of thing, but there is no constitutional violation in sight and noting, as an example that “[t]he constitutionality of the law of trespass goes one way when blacks ‘intrude’ in an amusement park, another when they intrude in a private home”).

201. *Shelley*, 334 U.S. at 10. Similarly, the Court emphasized:

We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.

Id. at 20-21.

202. See Carol Rose, *Property Stories: Shelley v. Kraemer*, in PROPERTY STORIES 169, 180-84 (Gerald Korngold & Andrew P. Morriss eds., 2004) (pointing out that both the horizontal privacy and touch and concern requirements were problematic in treating the covenants in *Shelley* as running with the land).

203. *Shelley*, 334 U.S. at 20 (“[I]n granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.”).

Some lower courts have adopted this view of *Shelley*. In *West Hill Baptist Church v. Abbate*,²⁰⁴ for example, the plaintiff church was prohibited by private covenants from constructing a house of worship. The church petitioned the court to declare the covenants unconstitutional and enjoin their enforcement. The court held that enforcement of the private covenants would violate West Hill Baptist's First Amendment rights.²⁰⁵ In finding enforcement unconstitutional, the court emphasized the importance of the interest at stake for the plaintiffs. According to the court, "While it is true, of course, that when the effect of such a covenant upon the exercise of one's freedom of religion is small and the public interest to be protected is substantial such freedom is to give way to the public interest, that situation does not here exist."²⁰⁶ Similarly in *Franklin v. White Egret Condominium*, a Florida state court refused to enforce a condominium covenant prohibiting children under age twelve from living on the premises.²⁰⁷ In holding that state enforcement of the covenant was unconstitutional, the court again emphasized the importance of the rights burdened by the covenant—in this case landowners' rights to marry and procreate.²⁰⁸

This conception of *Shelley* also helps make sense of the Court's holdings in the cases of *Palmer v. Thompson*²⁰⁹ and *Moose Lodge No. 107 v. Iris*²¹⁰ where the Court did not find state authorization of private, discriminatory conduct unconstitutional. In *Palmer*, the Supreme Court held that the City of Jackson, Mississippi's decision to close its public pools rather than desegregate them, and to permit private citizens to operate the pools on a racially segregated basis, did not violate the equal protection rights of black citizens.²¹¹ In *Moose Lodge*, the Court upheld against constitutional challenge the state's authorization of individuals to choose members of their own private clubs, even

204. *W. Hill Baptist Church v. Abbate*, 261 N.E.2d 196 (Ohio Ct. Com. Pl. 1969).

205. *Id.* at 202 ("[T]he enforcement of these covenants which would result in prohibiting the use by the plaintiff and the cross-petitioners of their property for the erection thereon of houses of worship, would constitute state action (through this Court) violative of the free exercise of religion provision of the First Amendment.").

206. *Id.* at 201-02.

207. *Franklin v. White Egret Condo., Inc.*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977).

208. *Id.* at 1088 ("This restriction is an unconstitutional violation of this defendant's rights to marry and procreate. Further, no compelling reason has been shown for refusing to allow children under twelve (12) to reside in the condominium.").

209. 403 U.S. 217 (1971).

210. 407 U.S. 163 (1972).

211. According to the Court:

[T]he issue here is whether black citizens in Jackson *are* being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of "the equal protection of the laws."

403 U.S. at 226.

if they did so in a racially discriminatory manner.²¹² In both cases, the Court focused on the trivial or limited nature of the third party interest at stake. In *Moose Lodge*, for example, the Court noted that "Moose Lodge is a private social club in a private building."²¹³ Explaining why he joined the Court's opinion in *Palmer*, Justice Blackmun emphasized: "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities."²¹⁴

Under this second view of *Shelley*, then, state authorization of private conduct does not violate the Equal Protection Clause in the full range of cases that more direct forms of state action do.²¹⁵ State authorization of private discriminatory conduct is only unconstitutional when that conduct implicates important third party interests in social or economic participation. The Equal Protection Clause becomes in effect embedded with a substantive minimum, and implicated only when state authorized private conduct hampers sufficiently important social and political interests of third parties.

Access to education is just such an important interest. Adequate education is essential to one's ability to participate in the political, economic and social life of the community. Yet education is not a binary good like the right to vote or the right to own property, which one either possesses or does not. Instead, education is a positional good. The amount of education one needs to participate meaningfully and effectively in society depends in significant part on how one's education compares with that of one's peers.²¹⁶

Some state supreme courts in interpreting their own education clauses have explicitly recognized the positional, rather than binary, nature of the right to education. In *Abbott v. Burke*, for example, the Supreme Court of New Jersey interpreted the state's constitutional provision requiring the state to provide a "thorough and efficient system of free public schools."²¹⁷ The court found that the state was not only required to provide all public school children with a basic minimum level of education, but was also required to provide

212. 407 U.S. at 177.

213. *Id.* at 175.

214. 403 U.S. at 229 (Blackmun, J., concurring).

215. State action is direct when it is either "proprietary" or "mandatory." See Alexander, *supra* note 200, at 896. Conduct is proprietary when it is performed by state officials acting either in accordance with or in flagrant violation of state law. *Id.* Conduct is mandatory if it is required by state law. *Id.* An example of the former is the conduct of police officers carrying out an arrest. An example of the latter is the state law at issue in *Buchanan v. Warley*, 245 U.S. 60 (1917), prohibiting black people from occupying houses in predominantly white blocks and prohibiting whites from doing so in predominantly black blocks.

216. As Goodwin Liu has argued, educational adequacy "must entail a limit to inequality, a point at which the maldistribution of educational opportunity puts too much distance between the bottom and the rest of society. Adequacy is thus a function of the range and contours of the overall distribution. It is a principle of bounded inequality." Liu, *supra* note 68, at 347 (footnote omitted).

217. 575 A.2d 359 (N.J. 1990).

children in both rich and poor school districts with a sufficiently comparable education so as to enable all children to participate meaningfully and effectively in the economic life of the community.²¹⁸ The court then held that the disparity then existing “between education in these poorer urban districts and that in the affluent suburban districts . . . is severe and forms an independent basis for our finding of a lack of a thorough and efficient education in these poorer urban districts.”²¹⁹

As applied to the homeschooling context, this second narrower conception of *Shelley* suggests that state authorization of severe forms of sex-based educational inequality within homeschooling families violates the Equal Protection Clause.²²⁰ Severe forms of educational inequality deny those who are disadvantaged the ability to compete meaningfully and effectively against those who are more privileged. It effectively deprives the disadvantaged of their right to a basic adequate education, a right important enough to trigger constitutional protection regardless of whether the deprivation is carried out by the state directly or by state authorized private actors.

3. *Encouragement as State Action*

A third possible reading of *Shelley* focuses not on the state’s enforcement of discrete acts of private discrimination but on the state’s role in encouraging and promoting widespread social discrimination with respect to important social goods. Under this view, what is critical to finding an equal protection violation stemming from state authorization of private conduct is that the state has itself encouraged and enabled a more sweeping kind of private discrimination than would otherwise exist. There are in turn both broader and narrower versions of this interpretation of *Shelley*. The broader view focuses on state symbolic encouragement of discrimination. The narrower view focuses on

218. *Id.* at 363 n.1 (the New Jersey educational clause at issue provided: “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years.”).

219. *Id.* at 400. The students in the poorer school districts, the court emphasized, “simply cannot possibly enter the same market or the same society as their peers educated in wealthier districts.” *Id.*; see also *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) (holding that, “in mandating ‘efficiency,’ the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist. Instead, they stated clearly that the purpose of an efficient system was to provide for a ‘general diffusion of knowledge.’ The present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency.”).

220. The result is similar to but narrower than the equal protection obligation imposed upon white parents after the Supreme Court ordered the racial desegregation of public schools. White parents were effectively told that whatever level of education they wanted to provide for their own children they would have to provide for black children as well. This attempt at substantive educational equality was, of course, undermined significantly by white flight out of public schools and to private schools.

state material encouragement of discrimination.

a. Broader View: Symbolic Encouragement

Under a broad view of state action as encouragement, state authorization of private discriminatory conduct is unconstitutional when the state, by its actions, sends a message encouraging private discrimination that might not otherwise exist. The state may not encourage private discrimination, even through purely symbolic measures, and then use its power to enforce discrimination once it occurs.

Under this view, *Shelley* raised a Equal Protection claim not because the state was called upon to enforce private forms of discrimination that significantly impaired African Americans' social participation, but because the state had itself encouraged community-wide efforts of segregation. The state's willingness to enforce racially restrictive covenants served symbolically to condone and encourage such discrimination. The state could not, then, consistent with the Fourteenth Amendment, enforce the private discrimination it had encouraged.

This symbolic encouragement conception of *Shelley* also explains why the Supreme Court, in *Reitman v. Mulkey*, held that state authorization of private race-based discrimination in residential property sales was unconstitutional.²²¹ In *Reitman*, California voters passed a constitutional amendment permitting property owners to make sale and lease decisions based on any factors they wanted—thereby voiding the state's preexisting statutes prohibiting race-based housing discrimination.²²² The amendment signaled the state's approval of race-based housing discrimination, and this approval served as a form of encouragement for race discrimination. The amendment changed the status quo, the California Supreme Court noted, from one in which race-based housing discrimination was prohibited "to one wherein it is encouraged."²²³ Such encouragement, even if only symbolic, was unconstitutional. As the court explained, "a prohibited state involvement could be found 'even where the state can be charged with only encouraging,' rather than commanding discrimination."²²⁴ The United States Supreme Court agreed with both the California Supreme Court's characterization of the amendment and its conclusion regarding the amendment's unconstitutionality.²²⁵ According to the

221. 387 U.S. 369 (1967).

222. The California constitutional amendment challenged in *Reitman* provided: Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id. at 371.

223. *Id.* at 375 (quoting *Mulkey*, 413 P.2d at 834).

224. *Id.* (quoting *Mulkey*, 413 P.2d at 832).

225. *Id.* at 376 ("There is no sound reason for rejecting this judgment" of the state supreme

Court:

Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.²²⁶

Under this symbolic encouragement conception of *Shelley* state permissiveness toward extreme forms of sexist homeschooling is again problematic. By explicitly exempting homeschools from many of the requirements of public and private schools, states encourage homeschooling parents to think of homeschooling as distinct and different from these formal, regulated forms of schooling. The creation of different rules just for homeschools may send a message that homeschooling is for those who want to separate themselves out not only from the standard secular, heavily regulated public schools but even from the more lightly regulated and often religious private schools. The effect may be to encourage those who homeschool to adopt more distinctly antisecular and illiberal stances toward education than they would otherwise. The very process of deregulating homeschooling—like the process of deregulating property decisions in *Reitman*—may encourage a greater degree of illiberal homeschooling than would otherwise exist. To the extent that states' lack of oversight of homeschooling actually encourages more extreme forms of discriminatory homeschooling, state permissiveness toward such homeschooling is unconstitutional.

b. Narrower View: Material Encouragement

There is, however, a narrower version of the encouragement as unconstitutional state action conception of *Shelley*. This version focuses on the state's functional and material facilitation of discrimination rather than its

court regarding the amendment's unconstitutional encouragement of discrimination.). The Court approvingly described the ruling of the California Supreme Court as follows:

[The California Supreme Court] did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations. . . . [I]t held the intent of § 26 was to authorize private racial discriminations in the housing market, to repeal [existing antidiscrimination statutes] and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. Hence, the court dealt with § 26 as though it expressly authorized and constitutionalized the private right to discriminate. Third, the court assessed the ultimate impact of § 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.

Id.

226. *Id.* at 381.

symbolic encouragement of discrimination. Under this view, what made state authorization and enforcement of private discrimination unconstitutional in *Shelley* was that the state had taken concrete steps to overcome the organizational problems which would otherwise have made the discriminatory agreements in the case ineffective. At its core, the right to contract entails the power to exchange promises and, at a higher level of state involvement, the right to call upon the state to enforce such promises against participants. State enforcement of contracts by and against successor owners who are not part of the original exchange involves a far greater degree of state involvement in private contracts, and a move beyond core contract rights. It is this extension of traditional contract rights that made racially restrictive covenants so powerful. Without allowing third-party enforcement of private agreements against successor owners it is unlikely that individuals would have been able to overcome the free rider problems that plague most attempts at group organization. Individual homeowners would be likely to violate racially restrictive covenants when faced with sufficiently high offer prices. Third-party enforcement of racially restrictive covenants against successor landowners was critical to their power and impact. By enforcing restrictive covenants, the state in effect chose to use its power to overcome the problems of private organization. In doing so, the state facilitated a pattern of racial discrimination that could not have emerged with such depth and sustainability otherwise.²²⁷

Under this narrow reading of *Shelley* the case provides no useful precedent for the homeschooling context. States' deregulation of homeschooling may encourage a kind of sexist homeschooling that would be less likely to exist otherwise, but it does not modify contract principles or correct contract problems so as to make sexist homeschooling more possible

227. What is important here is that the state is acting in such a way as to facilitate intentional private discrimination. It does not matter whether the state itself intended to facilitate and encourage such discrimination. There is a similarly narrow version of *Reitman* that focuses on the state taking concrete steps to facilitate racial housing discrimination by making it impossible for state or local lawmakers to prohibit such discrimination in the future through normal legislative means. As Justice White writing for the Court, explained:

Private discriminations in housing were now not only free from [existing antidiscrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Reitman, 387 U.S. at 377; see also Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 75 (1967) (contending that what the amendment in *Reitman* does "is to lay a sweeping prohibition on all agencies and subdivisions of government within the state, and *not* merely on the state legislature, saying that none of them may do anything to place any limitation on the absolute discretion of owners to decline to deal with chosen objects of discrimination among would-be buyers and tenants of residential property").

and durable.

This most narrow conception of *Shelley*, one which effectively limits the Court's holding regarding unconstitutional authorization of private conduct to state enforcement of racially restrictive housing covenants, is, however, inadequate. As discussed previously, while the precise contours of *Shelley* are certainly fuzzy, it is clear that the case's core holding regarding the unconstitutionality of state authorization of certain private conduct extends well beyond that narrow range of cases involving enforcement of racially restrictive covenants.²²⁸

In sum, under any but the narrowest interpretation of *Shelley*, state authorized sex inequality within homeschooling families raises equal protection problems. Under the broadest interpretation of *Shelley*, virtually any kind of sex-based educational inequality between daughters and sons would be prohibited. Under the narrower, and more plausible, interpretations of *Shelley*, only more severe forms of sex-based educational inequality within families would necessarily be prohibited.

B. Refining and Defending the Equal Protection Mandate for Homeschoolers

As I have hinted at already, the nature and scope of the equal protection entitlement that flows from *Shelley* is both limited and odd in the homeschooling context. It is worth being more explicit about how, before defending the clause's usefulness.

First, the Equal Protection Clause limits only intra-family rather than inter-family sex-based educational disparities. To see why this is so, consider how the Equal Protection Clause works in the context of public schools. A public school may not discriminate internally between black and white students by placing white students in advanced placement calculus classes while restricting black students to algebra classes. Yet the fact that a predominantly black inner-city school may offer only algebra to its students while a predominantly white suburban school also offers calculus does not raise an equal protection problem. The differences, the Supreme Court has held, are the result of class, not race, and do not violate equal protection.²²⁹ Therefore, even if homeschools were bound by the very same constitutional obligations as public schools—rather than more limited constitutional obligations as I have argued—the Equal Protection Clause can, at most, prevent a single family from providing its daughters with educations that are inferior to those provided to its sons. It can do nothing, however, about inter-family differences. A girl in a family with low educational interests and resources does not have a right to be

228. See *supra* text accompanying notes 186–190.

229. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (“[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”).

taught calculus simply because a different family, with different resources and values, chooses to teach its sons calculus.

This intra-family limitation leads to odd results. Girls' educational rights are tied to the benefits received by particular boys—their brothers. Girls in families without sons receive no potential educational boost from the Equal Protection Clause. Likewise, girls in low education families, where neither they nor their brothers receive educations above the bare minimum, receive no benefit simply because boys (and girls) in other families are receiving much more.

Moreover, this intra-family limitation means that the Equal Protection Clause does not create the kind of group right that it does in other contexts. Normally, the Equal Protection Clause elevates the status of an entire group by tying its entitlements to those of another group that the state has treated better. For example, even though no one has a substantive due process right to police protection or welfare, the Equal Protection Clause demands that if the state provides such benefits to whites, then blacks get a right to them as well.²³⁰ Blacks as a group are entitled to a particular level of protection or welfare measured by that which the state has chosen to provide to whites. The clause overcomes group-based disparities by providing entitlements to all members of the disadvantaged group. In the homeschooling context, however, the Equal Protection Clause does not improve the educational entitlement of all girls. It bestows constitutionally protected educational rights beyond the bare minimum only on those girls whose brothers are receiving the most advanced educations. Girls as a group get no educational benefit.

Nonetheless, despite this oddity and limitation, equal protection demands are still worth recognizing and asserting. First, these demands may get some girls something. They impose limits on educational inequalities within those families that value education highly, but only for boys. Girls in such families would certainly benefit from a greater share of the family pie. Perhaps more importantly, however, equal protection demands target and eliminate the most extreme and transparent forms of sex-based inequality. Inequality is most obvious and egregious when the people treated differently are most similarly situated; such is the case with homeschooled siblings. By prohibiting at least these most glaring forms of sex-based inequality, the state sends an important symbolic message about its commitment to, protection of, and expectations for girls.

230. For example, in *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that the state did not have a due process obligation to provide protective services to its citizens. 489 U.S. 189, 196-97 (1989). "[O]f course," the Court emphasized, "[t]he State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Id.* at 197 n.3. Cf. Currie, *supra* note 169, at 881-82 (noting that the practical effect of the Equal Protection Clause "may often be the same" as if there were an absolute right to a particular good or service).

III ENFORCEMENT OBLIGATIONS

I have argued thus far that states cannot permit homeschooling parents to engage overtly in certain extreme forms of illiberal education. Yet the fact that states must prohibit overt miseducation does not say anything about what states must do to ensure that homeschooled children actually receive the educations to which they have a formal right. Most educational deprivation will not be overt, but covert in the sense that parents will not flaunt their failure to comply with state education requirements. This Part considers the extent to which the educational rights that I have asserted on behalf of homeschooled children impose enforcement and monitoring obligations on states. It determines the scope of these obligations by looking at those associated with state enforcement of other affirmative rights.

It is a common trope that the federal Constitution guarantees negative rather than positive rights.²³¹ The Constitution protects individuals from state intrusions into their liberties but does not entitle them to the state action necessary to make such rights real or meaningful. As Judge Richard Posner explained in *Jackson v. City of Joliet*:

The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.²³²

The Supreme Court has been explicit about the negative rather than positive nature of the federal Due Process Clause. In *DeShaney v. Winnebago County Department of Social Services*, for example, the Supreme Court held that individuals did not have an affirmative right to police protection from third-party violence.²³³ The case involved four-year-old Joshua DeShaney who was beaten so severely by his father that he was left with permanent brain damage and confined to an institution for the profoundly retarded.²³⁴ Prior to this incident, state authorities had temporarily taken Joshua from his father's home because of signs of abuse. The state returned Joshua to his father but continued to receive indications that Joshua was being abused. After the final beating, Joshua's mother sued the county Department of Social Services on Joshua's behalf alleging that it had violated Joshua's Fourteenth Amendment due process rights "by failing to intervene to protect him against a risk of

231. See, e.g., Currie, *supra* note 169, at 866 ("[T]he due process clauses confer rights of protection *from* rather than *by* the government.").

232. 715 F.2d 1200, 1203 (7th Cir. 1983).

233. 489 U.S. at 195.

234. *Id.* at 193.

violence at his father's hands of which they knew or should have known."²³⁵ The Supreme Court affirmed the lower court's summary judgment for the county holding that while the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' . . . its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."²³⁶

John Goldberg has argued that while the federal Due Process Clause does require states to enact a body of tort law prohibiting certain types of private harms, it does not require them to make such protections real.²³⁷ Goldberg distinguished between the right to law and the right to a benefit, stating that the Due Process Clause guarantees the former but not the latter.²³⁸ The Due Process Clause, Goldberg argued, entitles individuals to "a body of law, including the institutions necessary to administer it," prohibiting private torts, but does not entitle individuals to the affirmative benefit of state protection from harm.²³⁹

Yet the federal Due Process Clause is not the basis for the educational rights I assert in this paper, and it is a mistake to assume that negative rights define the scope of either federal or state constitutional law. The right to a basic minimum level of education that I assert in Part I flows primarily from state constitution education clauses. It is because of federal state action doctrine that homeschooling parents are subject to constitutional obligations, but it is the state education clauses that establish the specific nature of the state's educational obligations.

Unlike the federal Due Process Clause which provides, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law,"²⁴⁰ these state education clauses do establish positive as opposed to merely

235. *Id.* at 193.

236. *Id.* at 195; *see also* *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that plaintiff had no "property interest in police enforcement of the restraining order" when police failed to respond to her notification that her husband had taken their children resulting in their murder). Although this interpretation of the Due Process Clause is quite settled by the Court, it is not without criticism. Steven Heyman, for example, argues that the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause is inaccurate and that the clause does in fact impose upon states a positive obligation of protection from third party harms. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546 (1991) ("A central purpose of the Fourteenth Amendment and Reconstruction legislation was to establish the right to protection as a part of the federal Constitution and laws").

237. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 594 (2005).

238. *Id.*

239. *Id.*

240. U.S. CONST. amend. XIV, § 1.

negative rights.²⁴¹ Although, as stated previously, these state clauses can be distinguished based on the strength of the educational obligation they create, the clauses all share the same affirmative form directing that states “shall” provide their children with certain educational opportunities, rather than that they “shall not” deprive them.²⁴² Indeed, while state courts differ in how they define the minimum adequate education that states must provide,²⁴³ the success of the third wave of school financing cases has been in getting state courts to recognize and enforce the positive obligations that these clauses impose.²⁴⁴ As discussed in Part I, the obligation that states have to provide children with a

241. See Cochran, *supra* note 52, at 430-31 (“[M]any state constitutions use positive phrasing to describe core rights and government services. This affirmative language creates a much stronger textual basis for arguing that state governments have a duty to provide support for needy citizens, public education, and other basic services and even that constitutional requirements apply to private actors.”).

242. See, e.g., CAL. CONST. art. IX, § 5 (“The Legislature shall provide for a system of common schools.”); TEX. CONST. art. VII, § 1 (“[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”).

243. State courts have used three different approaches, sometimes in combination, to define the minimally adequate education required by their constitutions’ education clauses. First, courts have looked at children’s performance on the state’s own tests. Satisfactory performance on the state’s proficiency tests would suggest that the state’s minimal requirements for a basic and adequate education are being met. See *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 383 (N.C. 2004) (stating that in determining whether children were receiving the basic education they were entitled to it was relevant to look at their scores on subject matter tests); *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) (instructing trial court to look to state adopted standards to determine whether children are being denied their right to a basic education). Second, courts have outlined a substantive list of the skills and capabilities that were deemed necessary for effective civic and economic participation. Courts then looked to see how successful the state schools were in ensuring that children possessed these necessary capabilities. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (describing the seven capacities that children must possess in order to have a constitutionally adequate education); see also *Opinion of the Justices No. 338*, 624 So. 2d 107, 166 (Ala. 1993) (holding that legislature was required to comply with a circuit court order to provide children with an adequate education, including nine enumerated capabilities necessary for an adequate education); *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993) (noting that the *Rose* “guidelines accord with our Constitution’s emphasis on educating our children to become free citizens on whom the Commonwealth may rely to meet its needs and to further its interests”). Finally, courts have taken a comparative approach defining a basic and adequate education for the state’s poorest children in terms of its comparability to that received by the state’s wealthier children. Under this approach, the courts defined a basic and adequate education in relative terms by ensuring that poor children were not severely handicapped or disadvantaged as compared to their wealthier peers. See *Abbott v. Burke*, 575 A.2d 359, 400 (N.J. 1990) (describing educational disparities between rich and poor districts as denying children in poor districts a thorough and efficient education); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) (holding that educational inequalities resulting from school district disparities are “contrary to the constitutional vision of efficiency”).

244. See James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 533 (1999) (“[T]he key to understanding the broader possibilities of school finance litigation is to recognize that the right to an adequate or equal education is an affirmative right, which creates a corresponding obligation on the part of the state.”). For an overview of cases challenging state financing plans as in violation of state education clauses, see *id.* at 533 n.15.

basic minimum level of education holds regardless of whether it is the state or homeschooling parents doing the actual educating.

In order to get a better sense of what states' affirmative obligations might entail, it is useful to look then not to states' obligations under the Due Process Clause, but to states' obligations to protect other kinds of affirmative constitutional rights. Consider for, example, state obligations to protect the right to vote and the right to an abortion.

The right to vote is protected by the Fourteenth, Fifteenth, Nineteenth and Twenty-Fourth Amendments.²⁴⁵ Although the earliest interpretations of the Fifteenth Amendment's prohibition on race discrimination in voting construed the right to vote as only a negative right to be free from state interference,²⁴⁶ the right to vote has gradually taken on a more affirmative cast.

In *United States v. Cruikshank*²⁴⁷ and the *Ku-Klux Cases*,²⁴⁸ decided just years after the Amendment's passage, the Supreme Court held that the Fifteenth Amendment protected individuals not only from racially motivated state interference with the right to vote but from racially motivated forms of private interference as well. In *Cruikshank* the Court considered criminal indictments against private defendants who were charged with conspiring to prevent two African Americans from exercising their right to vote in violation of Section 6 of the Enforcement Act, which was passed shortly after and pursuant to the Fifteenth Amendment.²⁴⁹ Although the Court threw out the indictments, it did so not because the Fifteenth Amendment did not protect against such private action, but because it had not been averred in that case that the defendants had been motivated by race.²⁵⁰ The Supreme Court made the Amendment's scope of coverage more explicit in the *Ku-Klux Cases* in which it affirmed the convictions under section 6 of the Enforcement Act of several white men for conspiring to deprive a black man of his right to vote by beating him.²⁵¹ In doing so, the Supreme Court made clear that the scope of the Fifteenth Amendment's right to vote protected individuals from private as well

245. See U.S. CONST. amends. XIV, XV, XIX, XXIV. Perhaps most important in ensuring an affirmative right to vote is the Fifteenth Amendment. The Fifteenth Amendment provides: Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV, §§ 1-2. Pursuant to Section 2 of the Fifteenth Amendment, Congress passed the Enforcement Act the same year. Civil Rights (Enforcement) Act of 1870, ch. 114, 16 Stat. 140, amended by Act of Feb. 28, 1871, ch. 99, 16 Stat. 433.

246. See *United States v. Reese*, 92 U.S. 214, 217 (1875) ("[T]he Fifteenth Amendment does not confer the right of suffrage upon anyone;" it just creates a right to be free from race-based discrimination in voting.).

247. 92 U.S. 542 (1876).

248. *Ex parte Yarbrough*, 110 U.S. 651 (1884).

249. 92 U.S. at 544-45.

250. *Id.* at 556.

251. 110 U.S. at 655-56.

as state interference.²⁵² Likewise, in the white-primary cases, the Supreme Court held that the Fifteenth Amendment guaranteed protection not only from direct state efforts to block blacks from voting but from ostensibly private conduct with the same effect.²⁵³ Finally, in the apportionment cases of the 1960s the Supreme Court made clear that citizens had not only the right to vote without interference, but also the right to cast an effective vote.²⁵⁴ In *Reynolds v. Sims*,²⁵⁵ and *Wesberry v. Sanders*,²⁵⁶ the Supreme Court required states to draw voting districts of substantially equal populations in order to ensure all citizens votes of roughly equal weight.

Consider also the right to abortion. In *Roe v. Wade*, the Supreme Court noted that “[t]he Constitution does not explicitly mention any right of privacy.”²⁵⁷ Nonetheless, the Court concluded that such a right to personal privacy did exist under the Constitution and that it encompassed a woman’s right to terminate her pregnancy.²⁵⁸

In addition to barring states from prohibiting outright or unduly burdening a woman’s access to abortion,²⁵⁹ this right also entitles women to state

252. *Id.* at 666-67. The Court explained the necessity of this protection as follows:

In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. . . . If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.

Id.

253. See, e.g., *Terry v. Adams*, 345 US 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

254. See Katharine Inglis Butler, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, 57 S.C. L. REV. 749, 761 (2006) (“The reapportionment cases of the early 1960s invalidated any scheme that assigned legislative representatives without regard to population of the represented unit and prescribed strict population equality requirements for districts.”); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883 (1995) (“[N]egative liberties do not alone define a free and equal right to vote. From the first steps taken in the reapportionment revolution of the 1960s, the Supreme Court recognized the further right of individuals to not simply cast a ballot, but to cast an effective one.”).

255. 377 U.S. 533 (1964) (requiring substantially equal populations in state and local election districts).

256. 376 U.S. 1 (1964) (requiring substantially equal populations in congressional districts).

257. 410 U.S. 113, 152 (1973).

258. *Id.* at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

259. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (“Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an

protection from at least some forms of private conduct aimed at interfering with access to abortion. In *Operation Rescue v. Women's Health Center, Inc.* for example, the Supreme Court of Florida upheld against First Amendment challenge a trial court injunction barring anti-abortion protesters from picketing and demonstrating in a buffer zone outside a Florida abortion clinic.²⁶⁰ In doing so, the court emphasized that the injunction served to protect women's constitutional right to abortion. The court explained:

Our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida's citizens, including its women. A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our state and federal constitutions.²⁶¹

In *Madsen v. Women's Health Center, Inc.*, the Supreme Court affirmed that part of the injunction that created a buffer zone around clinic entrances and driveways, emphasizing that it "burden[ed] no more speech than necessary to accomplish the governmental interest at stake."²⁶² Similarly, in *Pro-Choice Network of Western New York v. Project Rescue Western New York*, the district court issued a preliminary injunction which among other things prohibited anti-abortion protestors from entering a fifteen foot buffer zone around clinic doorways and driveways.²⁶³ It did so, the court explained, because the case "involve[d] a significant federal interest in balancing what are in essence, conflicting rights guaranteed by the United States Constitution—the First Amendment right of free speech, and the Fourteenth Amendment right to an abortion."²⁶⁴ In *Schenck v. Pro-Choice Network of Western New York*, the Supreme Court affirmed part of an injunction that created a "fixed" fifteen foot buffer zone around clinic doorways and driveways.²⁶⁵ The Court relied on its prior holding in *Madsen* to conclude that the government interests underlying the injunction—"ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services"—were "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics."²⁶⁶

undue burden."); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (striking down a state law requiring spousal consent before a woman could obtain an abortion and striking down a parental consent requirement for minors which did not involve a judicial bypass procedure).

260. 626 So. 2d 664 (Fla. 1993).

261. *Id.* at 672.

262. 512 U.S. 753, 770 (1994) (affirming in part and reversing in part the state court's injunction).

263. 799 F. Supp. 1417, 1440-41 (W.D.N.Y. 1992) (issuing the preliminary injunction), *motion to vacate injunction denied*, 828 F. Supp. 1018, 1032 (W.D.N.Y. 1993).

264. 828 F. Supp. at 1031.

265. 519 U.S. 357 (1997).

266. *Id.* at 376.

The Supreme Court has rejected, however, any notion that the right to abortion entails a right to state funding for abortions in order to make the right meaningful and effective for poor women. In *Harris v. McRae*, for example, the court held that the right to abortion did not include the right to state funding for even medically necessary abortions.²⁶⁷ The Court explained:

[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in [*Roe v. Wade*], it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.²⁶⁸

Given their explicit enumeration in state constitutions, state obligations to ensure a basic minimum level of education should bear some resemblance to the obligations states have to protect the right to vote and to abortion.²⁶⁹ Certainly states may not themselves take steps that block children's access to education. Yet the voting and abortion contexts suggests that states must also, at a minimum, take steps to prevent private interference with children's right to obtain an education, and may also be required to take affirmative steps to ensure that the right to a minimum education for children translates in educational reality.

In the homeschooling context, private interference is most likely to come from parents. States might protect children from parental interference in a number of ways. States might permit third party complaints on behalf of underage children whose education is being interfered with by their parents. States might establish judicial procedures, like in the abortion context, to allow children themselves to challenge the adequacy of their parents' homeschooling.²⁷⁰ Additionally, states might impose a long statute of limitations on claims against the state for denial of the right to education in

267. 448 U.S. 297 (1980).

268. *Id.* at 316. The Court explained that the Hyde Amendment's refusal to provide funding for almost all abortions while providing funding for medical services related to childbirth violated no constitutionally protected rights recognized in *Roe v. Wade*. According to the Court: "The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315; see also *Maier v. Roe*, 432 U.S. 464 (1977) (holding that the right to abortion did not include the right to state funding for non medically necessary abortions even when the state provided funding for services incident to childbirth).

269. The obligations imposed to ensure a basic minimum level of education should perhaps be less than those imposed to protect voting rights, given the explicit and repeated assertion of voting rights in the federal constitution, but more than those imposed to protect abortion rights, given that the right to abortion was found in the penumbras of the federal constitution while the right to a basic minimum level of education is provided for directly in the state constitutions.

270. See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (holding that state abortion law requiring parental consent for minors must include a judicial bypass procedure in order to protect girls from parental interference with their constitutional right to abortion).

order to allow minor children to grow up and sue the state on their own behalf.²⁷¹

There are also many ways in which states could satisfy an affirmative obligation to ensure that homeschooled students receive a basic education. States could require attendance at state regulated schools, either public or private, until basic skill mastery is shown;²⁷² states could require and provide tutoring for homeschooled students; or states could monitor homeschoolers through periodic home visits.²⁷³ All of these options, however, are highly costly to states and highly invasive to homeschooling families. The requirement for school attendance, moreover, would deny all children the real and substantial benefits of homeschooling in order to ensure that an endangered few are not denied basic competency. Such tradeoffs seem unjustified when competency may be guaranteed in other ways.

Probably the most efficient and least invasive way for a state to ensure a basic education is through some form of required testing. Young students might be required to take annual tests to ensure they are making progress toward the required skill level. Certainly many students will achieve such mastery well before majority, perhaps by the eighth or ninth grade, other students will not show adequate progress. As children become older, the urgency of their educational predicament increases, and more interventionist state policies—such as tutoring or mandatory school attendance—may become justified and necessary.

I have argued that in addition to a basic minimum level of education, some students may have a constitutionally protected right, stemming from the Equal Protection Clause, to an education above the basic minimum. I have argued, more specifically, and in gendered terms, that the Equal Protection Clause prohibits state authorization of extreme inequality in the educations provided to homeschooled girls and boys within the same family.

To the extent that the Equal Protection Clause prohibits extreme forms of sex-based educational disparity within homeschool families, this requirement too imposes affirmative duties on states in some circumstances. Just as this duty to remedy disparity creates affirmative obligations on states to oversee and monitor the distribution of educational resources within public schools, so too

271. There is a similarly motivated trend among states to extend or abolish statute of limitations on child abuse. See Pamela D. Bridgewater, *Ain't I A Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 139 n.261 (2005) (listing examples).

272. Most states do impose curriculum requirements on private schools. See Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU Educ. & L.J. 363, 393 (noting that thirty-eight of forty-seven states that responded to a survey said they imposed curriculum requirements on private schools though some states also allowed for certain exemptions).

273. At least one state, however, has held mandatory home visits to be illegal. See *Brunelle v. Lynn Pub. Sch.*, 702 N.E.2d 1182 (Mass. 1998) (holding that parents' right to homeschool could not be conditioned on evaluative home visits by school officials).

does it create obligations to monitor and remedy severe sex-based disparities within homeschools.

Even if the educational rights I assert in this paper exist and impose affirmative obligations on states with respect to homeschooled children, there remains the question of who in the homeschooling context is in a position to enforce these rights if states fall short. Generally, children's rights are protected and enforced by their parents, who bring lawsuits on their behalf. Homeschooling parents would be extremely unlikely, however, to bring actions designed to limit their own authority over their children.²⁷⁴ Parents who do not believe that their children should be educated would certainly not seek out state action requiring them to do so. Young children are unlikely to be able to initiate lawsuits on their own behalf, and older children might be unwilling or unable to express educational preferences that conflict with those of their parents, even if states established judicial procedures on their behalf.

In some cases in which children's rights are at stake, courts appoint a "next friend" or guardian *ad litem* to bring an action on behalf of a minor in federal court.²⁷⁵ This approach seems appropriate theoretically, but infeasible practically. It is precisely those states that are not satisfying their affirmative obligations to ensure homeschooled children's education that will be least motivated to self police through the appointment of guardians *ad litem*. They will also be least knowledgeable about which homeschooled children are most in need of such protection. In other words, those states in which enforcement of children's rights is most necessary are the ones in which enforcement is likely to be most difficult and ineffectual.

Enforcement measures may, however, be brought by adults who were homeschooled as children in a way that violated their state or federal constitutional rights.²⁷⁶ For example, individuals who reach adulthood deprived of basic skills as a result of decisions made by their parents and condoned by the state would be able to challenge the state's delegation of educational authority and would be in a realistic position to bring such claims. Assuming the statute of limitations permitted, such individuals would be able to sue the state for violating their right to education guaranteed by their state's constitution. Although such enforcement actions may effectively be too late to

274. James Dwyer raises similar enforcement problems with respect to his argument that religious exemptions from state child welfare and education laws violate children's Fourteenth Amendment right to equal protection. See Dwyer, *supra* note 44, at 1465. Dwyer notes that, "an obvious procedural difficulty [in raising such a claim] arises from the fact that this would be a suit that enjoyed the support of none of the affected parties." *Id.*

275. See *id.* at 1467 (finding a presumption that "such appointment will occur whenever a minor is not sufficiently mature to act on her own behalf and the minor's general guardians—typically, her parents—have a conflict of interest with the minor in connection with the litigation").

276. The importance of this avenue of enforcement reinforces the need for long state statutes of limitations for such claims.

change the lives of the adult plaintiffs who were denied education as children, the threat of enforcement alone may be enough to prompt a higher level of state oversight.

CONCLUSION

It is clear and uncontroversial that states can regulate homeschooling.²⁷⁷ I have argued in this article that they must do so. Federal state action doctrine combined with state and federal constitutional guarantees require states to ensure that homeschooled children receive a basic minimum level of education and are not severely disadvantaged in their educational opportunities because of sex.

Certainly this is an infringement of parental autonomy. Yet despite the legal presumption of parental control over children, there are in fact a multitude of ways in which such control is limited. As the Supreme Court explained in *Prince v. Massachusetts*, “[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”²⁷⁸

The extent to which a basic minimum level of education actually infringes on parental autonomy depends to some degree, of course, on how states interpret their own required minima. If states conceive of the basic minimum as requiring only those skills necessary for the barest conception of citizenship—namely the ability to vote—then the minimum probably requires no more than basic literacy. Conceived in this way, the minimum would impose truly negligible limitations on parental autonomy. Parents would be required to teach

277. In considering an Oregon state law requiring attendance at public schools, Justice McReynolds held that the law went too far but found it uncontroverted that the state could regulate schooling:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925). Cf. Dwyer, *supra* note 44, at 1350 (“[C]ourts have consistently held that parents, other than the Amish and similar groups, have no constitutional right to home school.”).

278. 321 U.S. 158, 170 (1944). Sarah Prince was convicted of violating Massachusetts’ child labor laws by allowing her nine year old niece to sell religious magazines with her on the street. *Id.* at 159-60. The Court upheld the conviction noting that, “the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.” *Id.* at 166 (citations omitted); see also *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (“To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens”).

their children to read, but beyond this they would be free to educate, miseducate and indoctrinate their children as they saw fit.

The more likely scenario, however, is one in which states interpret their education clauses as requiring not only that children learn to read but that they acquire both a set of skills and base of knowledge necessary for effective participation in the market and substantive participation in the democratic process.²⁷⁹ This scenario is both more interesting and complicated in terms of its implications for illiberal parents. It may be that the basic minimum level of education is not in fact compatible with any and all sorts of fact or value teaching. Some kinds of teaching may not just supplement the basic minimum level of education, but may in a sense depress it. The basic minimum may, for example, simply preclude the teaching of certain counterfactual claims such as the natural superiority and inferiority of the races or the danger of intellectual development to women's health. In addition, the basic minimum may limit the extent to which parents may teach their children idiosyncratic and illiberal beliefs and values without labeling or framing them as such. In other words, the minimum may require that if parents want to teach against the enlightenment they have to label what they are doing as such.

Illiberal homeschoolers may, then, be correct in their contention that even minimal education requirements impair their ability to effectively direct their children's education and socialization. This contention, however, seems to do no more than reveal the lie of liberalism generally. A liberal society cannot in fact be wholly neutral toward competing conceptions of the good. Liberalism

279. This scenario is more likely in light of the range of interpretations states have given thus far of their education clauses. See *supra* note 243. In *Rose v. Council for Better Education, Inc.*, for example, the Supreme Court of Kentucky held that a constitutionally efficient system of education had to have as its goal provision of at least the following seven capacities:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

790 S.W.2d 186, 212 (Ky. 1989) (footnote omitted); see also Opinion of the Justices No. 338, 624 So. 2d 107, 166 (Ala. 1993) (holding that legislature was required to comply with circuit court order to provide children with an adequate education and which listed nine capabilities necessary for such education including oral and written communication skills, math and science skills, knowledge of economic, social and political systems, self-knowledge and self-worth); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (explaining that the *Rose* "guidelines accord with our Constitution's emphasis on educating our children to become free citizens on whom the Commonwealth may rely to meet its needs and to further its interests").

does involve at least minimal commitments to rationality and autonomy.²⁸⁰ It is not surprising then that both federal and state constitutions are themselves not wholly neutral with respect to competing conceptions of the good, particularly when it comes to children.²⁸¹

Yet this criticism from the right suggests an opposing criticism from the left—namely, that the requirement of a basic minimum level of education does not do nearly enough to ensure that children being raised in illiberal families or communities have meaningful access to and opportunities in the outside world. Even acknowledging that the minimum has a greater impact on parental autonomy than might be first assumed, this argument has teeth. Certainly states would have to provide homeschooled children, and children generally, with far more than the basic minimum in order to assure them something approaching fair equality of opportunity. Nonetheless, the basic minimum is an important starting point. Not only does it establish the required baseline, but it also highlights for legislators the discretionary zone above the basic minimum where more far reaching educational reforms are possible.

Indeed, despite the positive law focus of this paper, it seems very possible that the legal arguments I have made will have their greatest impact in a political rather than traditionally legal forum. States have a social and economic interest in ensuring that all children receive an adequate education. Their political health and economic prosperity depend on it. The primary importance of the legal arguments I have offered may then lie not in their ability to coerce states with threatened judicial sanctions into doing something they do not want to do, but in their ability to support and reinforce states' efforts to do that which they already want to do. Arguments about constitutional mandates bolster states' ability to withstand pressure from an increasingly powerful homeschool lobby seeking to gain parents unfettered control over their children's education.²⁸² While a great deal remains open for debate about appropriate limitations on parental control over children's education, the arguments I have made here may help ensure that the most extreme forms of illiberal homeschooling are simply and appropriately taken off the table and out of the political debate.

280. See Yuracko, *supra* note 36.

281. For a discussion of the values infused in and promoted by state treatment of families and children, see Linda C. McClain, *Family Constitutions and the (New) Constitution of the Family*, 75 *FORDHAM L. REV.* 833, 871 (2006).

282. In some sense my goal is similar to that of Goodwin Liu who aimed to describe the duties the Fourteenth Amendment imposed on "conscientious legislator[s]" without regard to the threat of external judicial enforcement. See Liu, *supra* note 68, at 339–40.