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Behind Closed Doors: Should States Regulate Homeschooling?

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BEHIND CLOSED DOORS: SHOULD STATES REGULATE HOMESCHOOLING?

JUDITH G. McMULLEN*

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I. INTRODUCTION

Educating children at home was a common practice early in our nation's history. With the advent of compulsory education laws and public schools in the early twentieth century, homeschooling became a rarity. Beginning in the last quarter of the twentieth century, homeschooling again became popular. It has been estimated that as of 1999, 850,000 children were educated at home,¹ and experts believe that the number is growing at the rate of 11% a year.² Although this resurgence of interest in homeschooling was initially viewed with suspicion by many Americans, it appears that homeschooling has made it into the mainstream and is here to stay.

This Article examines the phenomenon of homeschooling as it exists in the early twenty-first century and discusses to what extent state regulation of homeschooling is appropriate. As the term is used in this article, "homeschooling" refers to the education of a school-age child, mainly in his home, by his parents.³ Part Two of the Article describes both the history and the present-day realities of homeschooling and the varied reasons parents turn to it. Part Three discusses the potential downsides to homeschooling. Part Four describes the current federal and state law applicable to homeschooling. Part Five discusses some of the shortcomings of current regulation of homeschooling and some difficulties intrinsic to any method of regulation. The Article concludes with some suggestions for modest regulation consistent with important state interests in having healthy and well-educated children. This Article also argues that, where regulation is deemed appropriate, a separate authority should be set up to evaluate whether homeschooling families adequately comply with state requirements and that the evaluation be conducted, insofar as possible, by using objective criteria. This avoids an inherent conflict of interest in allowing school boards and similar authorities to regulate homeschoolers.

II. DESCRIPTION AND HISTORY OF HOMESCHOOLING

From colonial times until well into the nineteenth century, it was common for children to receive at least part of their education at home.⁴ Even out-of-home instruction could be informal, as in the case of apprenticeships. "When

1. John Cloud & Jodie Morse, *Home Sweet School*, TIME, Aug. 27, 2001, at 47. The authors attribute this figure to "a new federal report" and add, "some experts believe the figure is actually twice that." *Id.* The "new federal report" is a reference to STACEY BIELICK ET AL., U.S. DEP'T OF EDUCATION, HOMESCHOOLING IN THE UNITED STATES: 1999 (2001).

2. Cloud & Morse, *supra* note 1, at 49.

3. As it is used here, the term "homeschooling" does not include children who are educated by private tutors hired for that purpose. It includes parents who follow a formal curriculum. The term also includes parents who engage in "unschooling," an unstructured approach which holds that children will learn naturally from engaging in ordinary, every-day activities.

4. WILLIAM M. GORDON ET AL., THE LAW OF HOME SCHOOLING 5 (1994).

laws regarding education existed in America's early history, they focused upon the responsibility of parents and 'masters' to teach children, but did not provide for schools or teachers."⁵ Schools that did exist were nothing like the public schools of today.

In the North American Colonies, education was almost without exception under private sponsorship and supervision, frequently under control of the dominant Protestant sects. . . . Education, as the framers knew it, was in the main confined to *private* school more often than not under strictly *Sectarian supervision*. Only gradually did control of education pass largely to public officials.⁶

Proponents of public education hoped it would bring about unity and equality for students. "Thomas Jefferson and the other early American crusaders for public education believed the schools would help sustain democracy by bringing everyone together to share values and learn a common history."⁷ Despite available private and public schools, however, many prominent persons were homeschooled. "Pres. Woodrow Wilson, inventor Thomas Edison, artist Andrew Wyeth, author Pearl Buck, and the Founding Fathers all were taught at home."⁸

Compulsory education laws, with their expectation of institutional (but not necessarily public) education, were not universally adopted until the early twentieth century.⁹ With the advent of compulsory education laws, homeschooling fell into temporary disfavor.

By the last quarter of the twentieth century, there was a renewed interest in homeschooling, partly brought about by disillusionment with the public school system. Poor student performance, overcrowded classrooms, and lack of discipline are oft-cited reasons for fleeing the public schools.¹⁰ Although the aforementioned concerns are current ones, the roots of the present homeschooling movement go further back.

5. Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1917 (1996).

6. CHRISTOPHER J. KLIKA, *THE RIGHT TO HOME SCHOOL* 29-30 (2d ed. 1998) (quoting *Sch. Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 238 & n.7 (1963)).

7. Cloud & Morse, *supra* note 1, at 48.

8. Isabel Lyman, *What's Behind the Growth in Homeschooling: Public School Problems Prompt Parents into Homeschooling*, USA TODAY MAG., at www.findarticles.com/cf_0/m1272/n2640_V127/2114547/print.jhtml (Sept. 1998).

9. Only one state, Oregon, ever passed legislation requiring universal attendance in a public school. This statute was struck down in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). See generally Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992) (arguing that the long-revered holding of *Pierce* helped to constitutionalize a vision of the child as private property and that such a vision has distorted family law and policy). See also discussion *infra* Part IV.A.

10. See *infra* text accompanying notes 24-38.

[T]he present-day home-schooling phenomenon dates back to the 1960s and '70s, when counterculture types—inspired by educational reformers like John Holt, the author of *How Children Fail* (1964) and *How Children Learn* (1967)—pulled their kids out of school for pedagogical, not ideological, reasons. These parents were frustrated with the rigid structure and conservative nature of school at the time and were convinced they could do a better job educating their children.¹¹

For various reasons, other parents have reached the same conclusion. Current-day motivations for homeschooling are several and varied.

One common reason for homeschooling is to provide a religious education that inculcates values and beliefs not taught in public schools. There are widely disparate estimates of how many parents homeschool primarily for religious reasons. In a recently released Department of Education study, *Homeschooling in the United States: 1999*, 38.4% of respondents indicated that they were homeschooling for religious reasons.¹²

However, in his book *The Right to Home School*, Christopher J. Klicka claims that religious beliefs are the impetus for homeschooling in approximately 85% of the cases.¹³ He cites a survey of over 2000 homeschooling families in which over 90% of the parents identified themselves as “born again” Christians.¹⁴ “These parents believe that God has given them the responsibility and the authority to educate their children,” writes Klicka.¹⁵ “Since they are called by God to be the primary teachers of their children and to apply God’s word to each and every subject, they believe it would be a sin for them to delegate this authority to another school system.”¹⁶

Religiously based motivations for homeschooling are complicated and have to do not only with the content of public education, but with the attitudes it engenders. Many conservative Christian families eschew a society that they see as materialistic and media-centered. In an attempt to return to values that are family-centered and God-centered, some of these families engage in practices such as homeschooling, which remove their children from what they perceive as threatening outside influences.

11. Carolyn Kleiner, *Home School Comes of Age*, U.S. NEWS & WORLD REP., Oct. 16, 2000, at 52.

12. Cloud & Morse, *supra* note 1, at 53 (citing BIELICK ET AL., *supra* note 1, at 10). Respondents were allowed to give more than one reason in response to the query about why they were homeschooling. *Id.*

13. KLICKA, *supra* note 6, at 2. “This conclusion has been drawn from the applications of over 50,000 home school families across the nation who have joined the Home School Legal Defense Association since 1985 and from conversations with state home school leaders.” *Id.* at 2 n.5.

14. *Id.* at 2.

15. *Id.*

16. *Id.* at 2-3.

In an article for *The New York Times Magazine* Margaret Talbot profiled one such family: Stephen and Megan Scheibner, who, at the time of the interview, were living with their seven children outside of Allentown, Pennsylvania.¹⁷ The Scheibners are fundamentalist Baptists who not only homeschool their children, but also shelter them from malls, television (selected videos are allowed), sports (team sports lead to behavior the parents do not consider “Christlike”), dating (it’s “practice for divorce”), and most peers.¹⁸ The Scheibners originally sent their oldest child to kindergarten at a private Christian school.¹⁹ “But what we noticed was that she got more interested in what her peers were doing than in what her family was doing! We felt like our family-centered little girl was being pulled away from us.”²⁰

While they do not believe that they isolate their family, the Schneibners “do feel like [they] are called to shelter them from evil until they are spiritually ready to stand firm.”²¹ This shelter is accomplished via homeschooling and other practices designed to severely limit contact with anyone outside of the family.

Family identity is extremely important to the Scheibners—they have their own sayings, code words, even a family song. The turning outward that most parents expect of their children and accept, with varying degrees of wistfulness, was to them an intolerable betrayal. “We didn’t want to lose our children to other people’s ideas and ideologies,” Megan will say, or, “We wanted our children’s hearts, and we really feel we have them.” Home-schooling afforded the prospect that the older kids would help with the younger ones and the younger ones would emulate the older ones instead of their peers.²²

After spending time with the Scheibners, talking with them, and watching their daily routine, Talbot observed: “One consequence of teaching your children at home—and of carefully customizing their media intake—is that you

17. Margaret Talbot, *A Mighty Fortress*, N.Y. TIMES MAG., Feb. 27, 2000, at 34.

18. *Id.* at 34, 36, 38. Rejection of dating is apparently shared by “a small but growing movement among conservative Christian youths who are rejecting the dominant culture’s approach to dating and romance.” Laurie Goodstein, *New Christian Take on the Old Dating Ritual*, N.Y. TIMES, Sept. 9, 2001, at A1. Goodstein describes a movement to what is called “courtship”: “The commitment to marriage comes first, before a couple is allowed to begin drawing emotionally close. In some cases, they are little more than acquaintances. Even then they are chaperoned and kept accountable by parents, pastors or responsible peers.” *Id.*

19. Talbot, *supra* note 17, at 37.

20. *Id.* (quoting Megan Scheibner).

21. *Id.*

22. *Id.*

almost never have the experience of hearing them say something you are surprised and sorry that they know.”²³

Another reason for homeschooling is dissatisfaction with the academic quality of the public schools. Nearly 49% of the parents in the Department of Education study indicated that they homeschool, at least partly, because they “[c]an give [the] child [a] better education at home.”²⁴

[P]ublic schools are turning out a poor product—illiterate and unprepared graduates. For example, American 13-year-olds have been documented as having math skills that rank below their counterparts in 14 other developed countries. One survey noted that just one-third of high school juniors could place the Civil War in the correct half-century.²⁵

Homeschooling gives parents the flexibility, lacking in public schools, of tailoring the curriculum to their child’s interests and abilities. Rachel Ahern, now 21 and a student at Harvard University, studied great authors in a curriculum designed by her mother and supplemented by online courses at the University of Nebraska.²⁶ “One of the many benefits of homeschooling is that each family can choose the approach that works best for the child and the family, and this approach can be adjusted as the child’s and family’s needs change.”²⁷

Some families adopt an extreme form of flexibility. “Unschoolers” do not use formal curricula at all, instead allowing their children to follow their interests at their own pace.²⁸

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. “Children have an innate love of learning new things,” explains Billy Greer, director of the Maryland-based Family Unschoolers Network, which has 3,000 member families. “We try to keep it fun rather than turning it into work, where it becomes something to avoid.”²⁹

23. *Id.* at 66.

24. BIELICK ET AL., *supra* note 1, at 11 (indicating that 48.9% of the respondents chose this as a reason).

25. Lyman, *supra* note 8, at 64.

26. Cloud & Morse, *supra* note 1, at 49.

27. *Homeschooling 101: Why We Do It (The Grant Family)*, Nat’l Pub. Radio, All Things Considered: The Changing Face of America (2001), at <http://www.npr.org/programs/atc/features/2001/feb/010226.cfoa.html> (last visited Sept. 10, 2001).

28. Peter T. Kilborn, *Learning at Home, Students Take the Lead*, N.Y. TIMES, May 24, 2000, at A1.

29. Kleiner, *supra* note 11, at 52.

Such individualized programs may mean that children will reach milestones at different times than they would in conventional schools. For example, one family reported that their unschooled son did not begin to read until he was ten.³⁰ His parents used various methods to encourage him, such as having him find all the Ks in a page of text or building words with Scrabble letters.³¹ “‘We made up games,’ [the boy’s mother] said. ‘But once it becomes tedious or counterproductive, you put it aside. Then all of a sudden,’ she said, ‘it all came together for him.’”³²

Sometimes unschooling means that the children learn by doing, rather than from books. Skeet Savage of Covert, Michigan “has practiced what she calls ‘relaxed home schooling,’ using real-life projects as teachable moments. At first, ‘I tried to bring the classroom into the home,’ she says, but she decided the family farm and business (publishing Christian home-schooling material) provided more opportunities to learn.”³³ This unstructured approach is apparently more extreme in some families than others. When asked by a reporter at a homeschooling gathering to describe his studies, one fifteen-year-old replied, “‘To be perfectly honest, I snowboard a lot.’”³⁴

A third motivation for homeschooling is a desire to remove children from perceived discipline problems, fears of violence, and other problems in the public schools. In *Homeschooling in the United States: 1999*, 25.6% of those surveyed reported that one of their reasons for homeschooling was a “[p]oor learning environment at school.”³⁵ An additional 11.5% cited “[o]ther problems with available schools,” and 9% cited “[s]tudent behavior problems at school” as a reason.³⁶ In one Florida survey, the number one reason given for homeschooling was “safety.”³⁷ Sometimes the concern with the safety and appropriateness of the learning environment merges with the desire to inculcate religious values, as this comment by homeschooling parents Marilyn and Kalon Watkins shows:

Even before we had children of our own, we were concerned about the negative influence of peer pressure. Thirty years ago, the evidence of this influence was “smoking in the rest room” and “skipping classes.” Today the stakes are much higher, as anyone knows who has read a newspaper. We wanted the first chance to teach our children that the “got to be bad to be cool” attitude is self-destructive and clearly

30. Kilborn, *supra* note 28.

31. *Id.*

32. *Id.* (quoting Mrs. O’Malley, the boy’s mother).

33. Cloud & Morse, *supra* note 1, at 50.

34. Kleiner, *supra* note 11, at 54.

35. BIELICK ET AL., *supra* note 1, at 11.

36. *Id.*

37. Barbara Kantrowitz & Pat Wingert, *Learning at Home: Does It Pass The Test?*, NEWSWEEK, Oct. 5, 1998, at 64, 66.

wrong. We wanted the “knowing right from wrong” attitude to dominate in our children’s lives and to be inseparably intertwined into their academics. God’s word is the scale that we wanted our children to use to help them weigh their decisions; not the whim of the kid sitting next to them.³⁸

While the aforementioned studies reflect concern with school violence, it appears that the events of September eleventh and the continuing threat of terrorist attacks may also motivate some parents to keep children home from school, maybe to the point of eventually homeschooling them. *The New York Times* reported that only 62% of New York City’s students showed up for class on October 31, 2001—an unusually high absentee rate even for Halloween.³⁹ A spokeswoman for the School’s Chancellor “attributed the poor attendance to the warnings from Washington of possible imminent terrorist attacks and increasing fear about biological attacks” immediately after the city’s first diagnosed case of inhalation anthrax.⁴⁰

Finally, parents of gifted children, special needs children, or children with behavioral problems may elect to homeschool if those special needs are not being adequately met in the public schools. *Homeschooling in the United States: 1999* states that, of the parents surveyed, 11.6% gave “[s]chool does not challenge child” and 8.2% gave “[c]hild has special needs/disability” as reasons for homeschooling.⁴¹ One family reported that the school, confused over how to handle their son, scheduled him for both remedial and gifted classes.⁴² A student at Marquette University Law School, reporting on her own homeschooling, said that her parents were concerned that her school was not meeting her academic needs. “I think the final straw came,” she writes, “when one of my teachers called my parents, and asked them to talk to me because I was asking too many questions in class.”⁴³ Faced with educational shortcomings like this, parents of special children of all kinds may well opt to take their chances at home, with occasional recourse to tutors for assistance.

III. POTENTIAL DOWNSIDES OF HOMESCHOOLING

The most glaring potential downside of homeschooling is that a negligent or ineffective parent can use it as a cover for truancy. However, opponents of homeschooling have raised serious concerns about its shortcomings, even in cases where parents are making good-faith efforts to effectively educate their

38. *Homeschooling 101: Why We Do It (The Watkins Family)*, Nat’l Pub. Radio, All Things Considered: The Changing Face of America (2001), at <http://www.npr.org/programs/atc/features/2001/feb/010226.cfoa.html> (last visited Sept. 10, 2001).

39. *A Bad Day for Attendance in City Schools*, N.Y. TIMES, Nov. 1, 2001, at D3.

40. *Id.*

41. BIELICK ET AL., *supra* note 1, at 11.

42. Cloud & Morse, *supra* note 1, at 50.

43. Julie Johnson (unpublished essay, on file with author).

children. Some such concerns are that homeschooled children do not receive the benefits of socialization that formal schooling provides, and that some homeschooled children will not receive a good enough education because their parents will omit important subjects from the curriculum. There is also concern that homeschooled children will not benefit from some of the child-protective functions of formal schooling, such as vaccination requirements and health screenings. Finally, the removal of children from a formal school reduces observations that could result in reports of suspected child maltreatment or those that simply make sure that children are accounted for and kept off the streets during school hours.

A. Concern About Socialization of Children

Some critics of homeschooling worry that learning while sheltered at home, without the ups and downs of peer pressure and group dynamics, deprives children of an essential chance to learn lifelong coping skills. “They say it discourages social interaction and development of the skills of teamwork and collaboration.”⁴⁴

“‘Kids need to be successful in three overlapping spheres—at home, at school and with peers,’ says Phoenix pediatrician Daniel Kessler, a member of the American Academy of Pediatrics developmental-behavior group. ‘Home schooling compresses all that into a single setting that can be very difficult for kids.’”⁴⁵ One twenty-year-old college student, who was homeschooled from fourth grade through high school, reported that, if he could change anything about his experience, he would have wanted more social interactions with peers during his teen years.⁴⁶ “‘I don’t date, and that’s something I attribute to home schooling,’ he [said].”⁴⁷ Richard Shaw, dean of undergraduate admissions at Yale, puts it this way: “‘Homeschoolers are often very astute. But they often have to learn to live with others.’”⁴⁸

Homeschooling parents counter that they make sure to provide their children with many opportunities for socialization. Many homeschooled children participate in extracurricular activities, such as sports, dance and choir.⁴⁹ Other families join homeschooling support groups.⁵⁰ In addition, according to the U.S. Department of Education report cited above, 18% of the

44. Kilborn, *supra* note 28.

45. Kantrowitz & Wingert, *supra* note 37, at 67.

46. Cloud & Morse, *supra* note 1, at 52.

47. *Id.*

48. *Id.*

49. *Id.* at 51.

50. See Kilborn, *supra* note 28 (describing how Dean Palmiter meets with other 12-year-old boys he met through his parents’ homeschooling support group); see also Cloud & Morse, *supra* note 1, at 48 (explaining why homeschooling mother, Judi Thomas, started a homeschooling support group for minority families).

children surveyed were enrolled in school part-time.⁵¹ School districts may honor requests for part-time admission, despite the fact that they are probably not legally obligated to do so.⁵²

B. Concern with Curriculum Content

Homeschooling philosophies of curriculum content run the gamut from structured lessons conducted in home classrooms to letting kids learn what they want to learn when they want to learn it. Families profiled in a *Time* magazine article illustrate the range of approaches: The Deckers, a Texas family with five children, include traditional subjects such as spelling and high-level math courses in their homeschooling.⁵³ On the other hand, Skeet Savage, a Michigan mother of six, engages in “what she calls ‘natural home schooling,’ using real-life projects as teaching opportunities: caring for animals on the family farm, building an addition on the house, [and] designing graphics for the family company (which publishes Christian home-schooling material).”⁵⁴ Some families let the children, rather than the parents, determine the course of study:

“I make pretty much all the decisions about what to study,” says Maren McKee, 15, of Naperville, Ill., who left public school after third grade. “I wasn’t interested in math or composition, so I didn’t really do it. I liked to dance.” But now McKee, who is dyslexic, realizes she will need more than dance steps to get into college. “My mom and I are going to spend this whole year on math and learning to write,” she says, perhaps not fully appreciating that both of those skills can take much longer than a year to learn.⁵⁵

However, critics contend that catching the interest of a student is not the only role a broad curriculum is meant to play.

The basic function of a liberal education is to expose people to fields they normally wouldn’t investigate. Whether you believe the purpose of education is to shape one’s character in a democracy or to prepare Johnny for his job, neither is accomplished when kids get to study only what they want.⁵⁶

51. BIELICK ET AL., *supra* note 1, at 4.

52. Lukasik, *supra* note 5, at 1955-71.

53. Cloud & Morse, *supra* note 1, at 47, 53.

54. *Id.* at 53.

55. *Id.* at 52.

56. *Id.*

“‘Education should be more flexible and more engaging for kids, but learning needs some structure.’ . . . ‘If you have no sense of what you want kids to know or at least be able to do . . . then you really take a chance of their growing up in a fairly ignorant state.’”⁵⁷

When presented with concerns about curriculum content or the adequacy of education, homeschooling advocates tend to point to high profile success stories, such as students accepted into excellent colleges.⁵⁸ In 2000, the average SAT score for home schoolers was 1100, eighty-one points higher than the general population average of 1019.⁵⁹ One study showed that home schoolers averaged in the 75th percentile on the Iowa Test of Basic Skills.⁶⁰

“But not all home schoolers take standardized tests, and one suspects the better students are the ones volunteering to do so.”⁶¹ Moreover, if participants in less structured “unschooling” programs choose not to take tests, their lack of knowledge may go unnoticed. This is despite the fact that the very unstructured nature of their education may place them at higher risk for gaps in their knowledge base.

Finally, an individually tailored curriculum, taught in an atmosphere that insulates children from others, leads to a concern beyond the worry of whether children will be exposed to a wide enough array of subjects. Some critics fear that homeschooled children could be encouraged to be racist or otherwise prejudiced.⁶² One concerned teacher puts it this way: “In a home school, a parent can really insulate a child from the vibrant, pluralistic, democratic world.”⁶³

In extreme cases, the consequences can be tragic. In June 2001, six siblings in rural Idaho engaged in a standoff with sheriff’s deputies after their father died and their mother was arrested on child neglect charges.⁶⁴ “Living without electric power, heat or a source of clean water, and apparently schooled at home in name only, the children [had] been essentially confined to the property for years,” according to neighbors.⁶⁵ The mother, who had been exhibiting

57. Kleiner, *supra* note 11, at 54 (quoting Paul Houston, executive director of the American Association of School Administrators).

58. See, e.g., Cloud & Morse, *supra* note 1, at 49 (citing the example of Rachel Ahern, age 21, who “did not set foot in a classroom until she was 18 and left her home in Grand Junction, Colo., for Harvard University, where she is a senior majoring in classics”). The authors also note that “[t]oday Harvard admissions officers attend home schooling conferences looking for applicants, and Rice and Stanford admit home schoolers at rates equal to or higher than those for public schoolers.” *Id.* at 51.

59. *Id.* at 51.

60. *Id.* (citing a study by Lawrence Rudner of the University of Maryland).

61. *Id.*

62. Kilborn, *supra* note 28.

63. Cloud & Morse, *supra* note 1, at 50 (quoting Rob Reich, political science teacher at Stanford).

64. Sam Howe Verhovek, *6 Siblings Make a Lonely Stand, Minus Mother, Father and Power*, N.Y. TIMES, June 1, 2001, at A1.

65. *Id.*

paranoid symptoms, had taught the children to distrust outsiders.⁶⁶ While this family is presumably highly unusual, their lifestyle made aid to the children nearly impossible, and the lifestyle is not unique to them. “The family’s rugged and autonomous existence was not all that unusual in the Idaho Panhandle, where scores of families live ‘off the grid’—unconnected to schools, churches, telephones, television and most everything else in conventional society.”⁶⁷

C. Child-protective Functions of Compulsory Schooling

Traditionally, schools perform a safety-net function in a variety of areas concerned with child protection. Compliance with compulsory state immunization laws is typically monitored through the schools; children are required to have age-appropriate vaccinations completed prior to school admission. Failure to comply may result in exclusion from school.⁶⁸ Compulsory school attendance, where a child’s failure to attend school is truancy and the parent may be held accountable for it, represents a valuable incentive. However, where the parent claims homeschooling, no truancy threat remains, especially since in most states there is no longer a method of checking whether or not a particular child has been immunized.

A second child-protection service typically provided by schools is the reporting of suspected cases of child abuse and neglect. Teachers and other school employees are mandatory reporters of suspected maltreatment under the reporting statutes that have been adopted in almost every state.⁶⁹ Since children attend school on a nearly daily basis during most of the year, school employees are in a unique position to detect patterns of bruising, other injuries, or unusual patterns of behavior, which may signal a problem. The accessibility of teachers, school nurses, and counselors also makes them likely recipients of the confidence of an endangered child. All these possibilities are lost when children are permanently removed from the school environment.

Finally, schools provide a mechanism for ensuring that children are not just “out on the street” during school hours. Parents are notified when their children are not in attendance and are expected to provide explanations for absences. While conscientious homeschooling parents undoubtedly know their children’s location, less diligent parents may not know or may have lost control. The risks inherent in having unoccupied, unattended minors left to their own devices

66. *Id.*

67. *Id.*

68. See, e.g., WIS. STAT. ANN. § 252.04 (West 1999) (“A school, day care center or nursery school may exclude from the school, day care center or nursery school any student who fails to satisfy the [immunization] requirements . . .”).

69. Douglas Besharov, “*Doing Something*” About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POL’Y. 539, 545 (1985), quoted in ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE 444 (4th ed. 2000). For an overview of child maltreatment reporting laws, see generally MNOOKIN & WEISBURG, *supra* at 407-31.

during the day have long been thought to result in higher rates of problem behavior.⁷⁰

IV. HOMESCHOOLING LAW

A. Current State Laws

Although all fifty states and the District of Columbia have compulsory education laws,⁷¹ homeschooling is currently legal in all fifty states.⁷² State regulation of homeschooling varies widely, from states that have few restrictions to states that have many. Homeschooling laws have been characterized as falling into three separate categories: “private school laws, equivalency laws, and home education laws.”⁷³

The first category, “private school laws,” refers to states that treat a home school as a private school.⁷⁴ For example, in Alabama the statute allows home schools to qualify as church schools if they “are operated as a ministry of a local church, group of churches, denomination, and/or association of churches.”⁷⁵ Once this rather broad definition is met, there are no subjects required by state law, no minimum attendance requirements, no teacher certification requirements, nor any testing requirements. The homeschooling parent need only file a notice with the local school superintendent and maintain an attendance register.⁷⁶ Similarly, children in Illinois who are attending a private school, where instruction is in English and “where children are taught the branches of education taught to children of corresponding age and grade in the public schools,” meet the requirements of the compulsory attendance law.⁷⁷ As early as 1950, the Illinois Supreme Court established that a home school could be a private school.⁷⁸

70. See, e.g., SUSAN CHIRA, *A MOTHER'S PLACE* 103-06 (1998) (discussing risks of problem behaviors resulting from lack of parental supervision after school).

71. Scott Woodruff, *Compulsory Threats to Education, Freedom*, WASH. TIMES, Apr. 17, 2001, <http://www.hslda.org/docs/news/washingtontime/200104170.asp>.

72. Lukasik, *supra* note 5, at 1952.

73. LINDA DOBSON, *THE HOMESCHOOLING BOOK OF ANSWERS* 7 (1998) (quoting Doris Hohensee, a homeschooler of her six children, and a political activist against regulation of homeschooling).

74. *Id.*

75. ALA. CODE § 16-28-1(2) (2001), *quoted in* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Alabama)*, Home School Legal Defense Ass'n, at <http://www.hslda.org/laws/analysis/AL.asp> (last updated Aug. 2002).

76. ALA. CODE §§ 16-28-7 to -8 (2001), *quoted in* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Alabama)*, Home School Legal Defense Ass'n, at <http://www.hslda.org/laws/analysis/AL.asp> (last updated Aug. 2002).

77. 105 ILL. COMP. STAT. ANN. § 5/26-1(1) (1998), *quoted in* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Illinois)*, Home School Legal Defense Ass'n, at <http://www.hslda.org/laws/analysis/IL.asp> (last updated Aug. 2002).

78. *People v. Levisen*, 90 N.E.2d 213, 215 (Ill. 1950).

Texas also treats home schools as private schools. In Texas, “home schools do not have to initiate contact with a school district, submit to home visits, have curriculum approved or have any specific teacher certification. Home schools need only have a written curriculum, conduct it in a bona fide manner and teach math, reading, spelling, grammar, and good citizenship.”⁷⁹

Still another approach is illustrated by Michigan, where parents have the option, but not the requirement, of notifying the state that they are homeschooling, “which earns them status as a nonpublic school. They must keep detailed records detailing enrollment and course of study, and furnish them at the request of the Michigan Department of Education.”⁸⁰ Since the only benefit of notification is that a record is created in case of future questions, few Michigan homeschoolers avail themselves of this option.⁸¹ Parents who do not elect this option may educate their children at home anyway under the homeschool statute, which has no notice, approval, testing, or teacher certification requirements.⁸² There are certain curricular requirements, but in the absence of notice or approval requirements, it is hard to see how these could be enforced.

States having equivalency laws “exempt children from compulsory attendance laws if they are receiving ‘equivalent instruction’ elsewhere. While these laws may vary somewhat from state to state, it’s difficult to define ‘equivalent,’ and the burden of proof is on the state.”⁸³ However, “equivalency states” may require more extensive paperwork by the parents. For example, Connecticut allows a parent to homeschool if that parent “is able to show that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools.”⁸⁴ Connecticut State Department of Education procedures require parents to file a “Notice of Intent” form with the local school

79. Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Texas)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/TX.asp> (last updated Aug. 2001) (citing *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 435 (Tex. 1994)).

80. Lori Higgins, *Homeschooling, Second of Three Parts: Michigan Asks Little of Teaching Parents*, DETROIT FREE PRESS, Feb. 19, 2002, available at http://www.freep.com/news/education/hlaws19_20020219.htm.

81. *Id.*

In fact, the number of people registered with the state has declined sharply since the Legislature amended the compulsory attendance law. In the 1995-96 school year, 1,645 families registered as homeschoolers, compared with the latest count of 884, done Dec. 12. The legal defense group estimates there are 70,000 homeschoolers in Michigan.

Id.

82. See MICH. COMP. LAWS ANN. § 380-1561(3) (West 1997), quoted in Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Michigan)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/MI.asp> (last updated Aug. 2002).

83. DOBSON, *supra* note 73, at 7-8 (quoting Doris Hohensee).

84. CONN. GEN. STAT. ANN. § 10-184 (West 2002), quoted in Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Connecticut)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/CT.asp> (last updated Aug. 2002).

superintendent.⁸⁵ Required information includes “name of the teacher, subjects taught, days of instruction, and the teacher’s method of assessment.”⁸⁶ Although standardized tests are not required, “an annual portfolio review will be held with the parents and school officials to determine if instruction in the required courses has been given.”⁸⁷ Connecticut recently considered legislation to impose more restrictions on homeschooling parents. These proposed changes were vigorously opposed by homeschooling advocates.⁸⁸ And after homeschoolers reached an agreement with the Committee Co-Chair who supported the bill, the bill was allowed to die in committee.⁸⁹

Massachusetts provides another example of an “equivalency state,” because it allows parents to exempt themselves from compulsory attendance requirements by demonstrating that they are providing an equivalent education for their children. Massachusetts parents must obtain advance approval to operate a home school⁹⁰ and must provide instruction in reading, writing, English, geography, arithmetic, drawing, music, United States history and constitution, citizenship, health, physical education, and good behavior.⁹¹ However, the local school authority may “not dictate the manner in which the subjects will be taught.”⁹² Periodic testing, progress reports submitted by the parents, or home visits (if approved by the parents) may be used to evaluate the progress of homeschooled children.⁹³

Home education law states have specific regulations that apply to home schools. These vary greatly from state to state and may include requirements for home teacher certification, curriculum, and other restrictions. As a practical matter, requirements may be similar to those imposed by states in the previous categories: the difference is that these states have a specific homeschooling statute.

85. Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Connecticut)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/CT.asp> (last updated Aug. 2001).

86. *Id.*

87. *Id.*

88. Matt Pyeatt, *Connecticut Home Schoolers Fight Stricter Rules*, CNSNEWS.COM, Mar. 11, 2002, at <http://www.cnsnews.com/nation/archive/200203/NAT20020311a.html>.

89. *Raised House Bill 5535: New Restrictive Home Schooling Requirements*, Homeschool Legal Defense Ass’n, Apr. 5, 2002, available at <http://www.hslda.org/legislation/state/ct/2002/CTHB5535/default.asp>.

90. MASS. GEN. LAWS ANN. ch. 76, § 1 (West 2002), quoted in Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Massachusetts)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/MA.asp> (last updated Aug. 2001).

91. MASS. GEN. LAWS ANN. ch. 71, § 1 (West 2002), quoted in Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Massachusetts)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/MA.asp> (last updated Aug. 2001).

92. *Care and Protection of Charles*, 504 N.E.2d 592, 602 (Mass. 1987), quoted by Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Massachusetts)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/MA.asp> (last updated Aug. 2001).

93. *Id.* at 601-02.

For example, Ohio has a homeschool statute that exempts children from compulsory school attendance as long as the requirements of the statute are met.⁹⁴ These statutory requirements include educational requirements for the parent who is doing the teaching (she must have a high school diploma, GED, test scores that demonstrate high school equivalence, or must work under the supervision of a person holding a baccalaureate degree until the children's test scores reach a reasonable level);⁹⁵ required courses (e.g., math, language arts, science);⁹⁶ and testing requirements for gauging the children's progress.⁹⁷

Another approach is demonstrated by the South Carolina homeschool statute, which offers three options to homeschoolers. The first option allows homeschooling if the school district board of trustees approves the instruction.⁹⁸ However, the board must approve the instruction if the parents meet statutory requirements for parental qualifications (high school diploma, GED or baccalaureate degree), minimum days of instruction and hours per day, records, testing, curriculum, and library access.⁹⁹ Options two and three exempt parents who are members of the South Carolina Association of Independent Home Schools or another bona fide homeschool organization authorized by the statute from some of the Option one requirements, most notably testing.¹⁰⁰

In contrast, Wisconsin's homeschooling law requires that a "statement of enrollment" be submitted annually to the department of education but does not impose minimum teacher qualifications and does not require standardized tests or other annual evaluation of student progress.¹⁰¹ Still another approach is

94. OHIO REV. CODE ANN. § 3321.04 (A)(2), *quoted by* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Ohio)*, Home School Legal Defense Ass'n, at <http://www.hslda.org/laws/analysis/OH.asp> (last updated Aug. 2002).

95. OHIO ADMIN. CODE § 3301-34-03(9) (2002), *cited in* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Ohio)*, Home School Legal Defense Ass'n, at <http://www.hslda.org/laws/analysis/OH.asp> (last updated Aug. 2002).

96. *Id.* § 3301-34-03(5).

97. *Id.* OHIO ADMIN. CODE § 3301-34-04 (2002) gives parents three options for annual assessment of their children's progress: standardized test scores, a written narrative prepared by a certified teacher or other person agreed to by the School Superintendent, or a mutually agreed upon alternative assessment. *Id.*

98. S.C. CODE ANN. § 59-65-40(A) (Law. Co-op. 1976), *quoted in* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (South Carolina)*, Home School Legal Defense Ass'n, at <http://www.hslda.org/laws/analysis/SC.asp> (last updated Aug. 2001).

99. *Id.*

100. S.C. CODE ANN. §§ 59-65-45, -47 (Law. Co-op. Supp. 2001), *quoted in* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (South Carolina)*, Home School Legal Defense Ass'n, at <http://www.hslda.org/laws/analysis/SC.asp> (last updated Aug. 2002). South Carolina recently had pending legislation which would have, among other things, created a \$500 tax credit for each homeschooled child. However, the bill died at the end of the legislative session on June 6, 2002. *House Bill 4874: State Aid for Home School Programs*, Home School Legal Defense Ass'n, June 25, 2002, *available at* <http://www.hslda.org/legislation/state/sc/SCHB4874/default.asp>.

101. WIS. STAT. ANN. § 115.30(3) (West 1999); *see id.* §§ 118.15, 118.165, *cited in* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (Wisconsin)*, Home School Legal Defense Ass'n, at <http://www.hslda.org/laws/analysis/WI.asp> (last updated Aug.

illustrated by the North Carolina homeschooling statute, which requires teachers to have a high school diploma or GED,¹⁰² requires annual standardized testing of the children,¹⁰³ and requires attendance and disease immunization records.¹⁰⁴ These four states illustrate that there is no uniformity of requirements, even among states with specific homeschooling statutes.

B. U.S. Supreme Court Cases

Are the above state statutes and others like them within the constitutional limits imposed on state restrictions of the parent-child relationship? It turns out that there are only a handful of U.S. Supreme Court cases that address the authority of parents over the education of their minor children, and some of these cases address that authority only indirectly.

*Meyer v. Nebraska*¹⁰⁵ is the earliest of the relevant cases. In *Meyer* the Court reversed the conviction of an elementary school teacher who had violated a state statute prohibiting the teaching of a foreign language to anyone who had not completed the eighth grade.¹⁰⁶ The Court struck down the statute as applied as “arbitrary and without reasonable relation to any end within the competency of the State.”¹⁰⁷ The decision noted:

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State’s power to prescribe a curriculum for institutions which it supports.¹⁰⁸

Nonetheless, the Court held that the right of the teacher to teach German as part of his occupation, and the right of parents to hire him to do so, were within the liberty protected by the Fourteenth Amendment.¹⁰⁹

Because *Meyer* upheld the right of parents to direct the education of their children, it is among the cases cited by homeschooling advocates as supportive of their cause.¹¹⁰ However, the opinion itself does not seem to contemplate a homeschooling situation. “Practically,” the Court says, “education of the young

2001).

102. N.C. GEN. STAT. § 39-115C-564 (2001), cited in Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (North Carolina)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/NC.asp> (last updated Aug. 29, 2001).

103. *Id.* §§ 39-115C-549, -557.

104. *Id.* §§ 39-115C-548, -556.

105. 262 U.S. 390 (1923).

106. *Id.* at 396-97, 403.

107. *Id.* at 403.

108. *Id.* at 402.

109. *Id.* at 400.

110. See KLICKA, *supra* note 6, at 34-35.

is only possible in schools conducted by especially qualified persons who devote themselves thereto.”¹¹¹

Two years later, in *Pierce v. Society of Sisters*,¹¹² the Court struck down an Oregon statute that required all school-aged children to attend public school. The Court held that the act unreasonably interfered with the liberty of parents “to direct the upbringing and education of children under their control.”¹¹³ As in *Meyer*, the Court emphasized that the State does have some rights to influence the education of children.¹¹⁴ These rights of the State include the rights

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.¹¹⁵

Nonetheless, the Court, in the perhaps most oft-cited language from the opinion, emphasized:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹¹⁶

Traditional analysis suggests that the statutes in *Meyer* and *Pierce* were the products of bigoted anti-German and anti-Catholic attitudes.¹¹⁷ However, as Barbara Bennett Woodhouse suggested in her article “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, the reality may be more

111. *Meyer*, 262 U.S. at 400.

112. 268 U.S. 510 (1925).

113. *Id.* at 533-35.

114. *Id.* at 534.

115. *Id.* at 534.

116. *Id.* at 535.

117. *E.g.*, MNOOKIN & WEISBERG, *supra* note 69, at 74 (“The legislation at issue in both *Meyer* and *Pierce* grows out of xenophobic fears. No state other than Oregon has ever adopted a requirement that children attend only *public* schools. The Oregon provision, no doubt reflecting anti-Catholic sentiment, was adopted after a referendum campaign promoted by the Ku Klux Klan and the Scottish Rite Masons, who claimed to want to Americanize the schools, with the support of public school teachers who feared a negative vote would hurt public education.”).

complicated.¹¹⁸ In fact, the contested statutes were supported by a strange assortment of liberals and conservatives.¹¹⁹ Much of the debate centered on the best way to assimilate the large immigrant populations that had arrived in the United States.¹²⁰

Apparently, many groups that favored legislation such as that seen in *Meyer* and *Pierce* had altruistic motives of assuring that the children of immigrant populations would have the full opportunity to live a happy life, free from poverty and ignorance.¹²¹ Many viewed universal education as the key to the achievement of that goal.¹²² The intent was not only to insure that the children of the poor, the disadvantaged, and the immigrants would attend public schools, but that the children of the privileged and wealthy would also attend. "Voters rallied behind such slogans as 'Free Public Schools—Open to All, Good enough for All, Attended by All. All for the Public School and the Public School for All. One Flag, One School, One Language.'"¹²³

As with *Meyer*, homeschooling advocates are quick to claim *Pierce* as supporting homeschooling. In *The Right to Homeschool*, author Christopher J. Klicka argues that, "[i]n addition to upholding the right of parents to direct or control the education of their children, *Pierce* also asserts the parents' fundamental right to keep their children free from government standardization."¹²⁴ However, Klicka ignores the specific language in *Pierce* that reaffirms the right of the state to require each child to attend some school.¹²⁵ While it could be argued that a homeschooling situation is "some school," the statement in *Pierce* was made in the context of relatively new compulsory education laws and in the political context of a quest for equalization of educational opportunities for rich and poor alike. Clearly, the decision did not envision the home tutoring of previous times. Thus, one cannot reasonably read *Pierce*'s defense of parental prerogatives in a child's education to discredit compulsory education laws, nor did later Supreme Court cases treat it that way.

The next in this line of cases, *Prince v. Massachusetts*,¹²⁶ upheld some limits on a parent's right to freely raise a child. *Prince* involved an appeal by a guardian who had been convicted under a state statute that prohibited children from selling publications or other merchandise in a street or public

118. Woodhouse, *supra* note 9, at 998-99.

119. *Id.*

120. *Id.* at 1009-10.

121. *Id.* at 1006.

122. *Id.* at 1020-21.

123. *Id.* at 1018. Woodhouse goes on to argue that the results in *Meyer* and *Pierce* are the result of a philosophy that treats children as the property of their parents. *Id.* at 1036-37.

124. KLICKA, *supra* note 6, at 35.

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

126. 321 U.S. 158 (1944).

place.¹²⁷ The guardian had taken her ward out to distribute Jehovah's Witnesses literature on the streets of Brockton, Massachusetts.¹²⁸

The Court affirmed the convictions and upheld the validity of the child labor statute against claims that it violated free exercise of religion and infringed upon a parent's constitutional right to raise a child as she sees fit.¹²⁹ The Court stated:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty.¹³⁰

Like *Meyer* and *Pierce*, *Prince* listed examples of permissible state restriction of parental control. The examples included requiring school attendance, regulating or prohibiting child labor, and compulsory vaccination.¹³¹ "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection."¹³²

Prince can be read both to support unrestricted homeschooling and homeschooling regulation. Homeschooling advocates tend to zero in on the language that places in parents the primary right and obligation to care for the child and to prepare him for life in society.¹³³ However, those hoping to impose restrictions on homeschooling find support in *Prince*'s seeming recognition that the state has a legitimate interest in protecting children from dangers that their parents have not adequately protected against. If the state has an interest in an educated citizenry, then protection against ignorance would be a legitimate exercise of state power under *Prince*, even in the face of parental disagreement.

*Wisconsin v. Yoder*¹³⁴ is the only Supreme Court case to date that specifically addressed a situation involving a form of homeschooling. *Yoder* held that the convictions of three Amish parents for violating a state compulsory school-attendance law were invalid under the Free Exercise Clause

127. *Id.* at 159-61.

128. *Id.* at 161-62.

129. *Id.* at 171.

130. *Id.* at 166 (citations omitted).

131. *Id.* at 166-67.

132. *Prince*, 321 U.S. at 168.

133. See KLICKA, *supra* note 6, at 36.

134. 406 U.S. 205 (1972).

of the First Amendment.¹³⁵ The respondents had refused to send their children to public or private school after completion of the eighth grade, despite the existence of a Wisconsin law that required school attendance until age sixteen.¹³⁶ The Court found, based on the record, that forcing Amish teens to attend secondary school would threaten the very existence of the Amish community and its religious practice.¹³⁷

The record in *Yoder* demonstrated that the Amish, who were members of a self-contained and productive society unto itself, believed that their life should take place “in a church community separate and apart from the world and worldly influence.”¹³⁸ As the court noted, the refusal to enroll children in education past the eighth grade is an integral part of this belief system:

[The Amish] object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a “worldly” influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of “goodness,” rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the

135. *Id.* at 234 & n.22.

136. *Id.* at 207.

137. *Id.* at 218.

138. *Id.* at 210.

category of those best learned through example and “doing” rather than in a classroom. . . . Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.¹³⁹

The State asserted that its interest in compulsory education was compelling and that the Amish should be required to comply with the attendance requirements. The State had two arguments to support its claim. First, it argued that “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”¹⁴⁰ Secondly, the State argued that “education prepares individuals to be self-reliant and self-sufficient participants in society.”¹⁴¹

The Court accepted the validity of those statements about the importance of education, but found that the Amish had achieved those goals through other means.¹⁴² The Court noted:

Respondents’ experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separate agrarian community that is the keystone of the Amish faith.

. . . Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional “mainstream.”¹⁴³

However, the Court was careful to distinguish between a religious belief and a mere philosophy or way of life, noting that a person who, like Thoreau at Walden Pond, elected to break with majority practices simply as a matter of personal philosophy would not be entitled to the same level of constitutional protection as would a person who was motivated by religious convictions.¹⁴⁴ In the secular case, the State need only prove the reasonableness of its

139. *Id.* at 210-12.

140. *Yoder*, 406 U.S. at 221.

141. *Id.*

142. *Id.* at 221-22.

143. *Id.* at 222 (citations omitted).

144. *Id.* at 235.

regulations in the furtherance of a legitimate state interest. In the case of action based upon religious conviction, the State must show a compelling interest, and that it has used the least burdensome means to achieve that interest.¹⁴⁵

As indicated by the foregoing distinction, it appears that *Yoder* would easily support regulation of homeschoolers who were not motivated primarily by religious belief but would impose a much higher burden on the state in justifying regulation of homeschooling undertaken for religious purposes. Possibly because of the administrative burden of separating religious motivations from non-religious motivations—not to mention the near impossibility of distinguishing between sincere and insincere religious belief—most states have adopted a fairly loose system of regulation, applied to all homeschoolers, regardless of the motivation for homeschooling.

The most recent Supreme Court case dealing with state interference in parental rights, *Troxel v. Granville*,¹⁴⁶ does not address education at all but examines state interference in parental decisions having to do with custody and visitation. Nonetheless, *Troxel* gives valuable insight into the question of when it is appropriate for the State to interfere in parental decision-making with respect to a child's upbringing.

The case involved a petition by Jenifer and Gary Troxel for increased visitation with their two granddaughters.¹⁴⁷ The father of the children (the Troxels' son) had committed suicide, and the mother, Tommie Granville, had reduced the Troxels' visitation with the girls.¹⁴⁸ The State of Washington had a statute that permitted "'any person' to petition a superior court for visitation rights 'at any time,' and authorizes that court to grant such visitation rights whenever 'visitation may serve the best interests of the child.'"¹⁴⁹ The superior court sided with the grandparents and ordered increased visitation over the mother's objections, reasoning that it was in the children's best interests.¹⁵⁰ The Washington Court of Appeals reversed, and the Washington Supreme Court affirmed that result, although on different grounds.¹⁵¹ The U.S. Supreme Court affirmed, holding that the state interference with Tommie Granville's parental decision violated her constitutional rights.¹⁵²

The Supreme Court emphasized that there is normally a presumption that a fit parent acts in his child's best interests.¹⁵³ However, the majority opinion characterized language in the superior court judge's oral ruling as suggesting "that he presumed the grandparents' request should be granted unless the

145. *Id.* at 214-16.

146. 530 U.S. 57 (2000).

147. *Id.* at 61.

148. *Id.* at 60-61.

149. *Id.* at 60.

150. *Id.* at 61-62.

151. *Id.* at 62-63.

152. *Troxel*, 530 U.S. at 75.

153. *Id.* at 68-69.

children would be ‘impacted adversely.’¹⁵⁴ In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interests of her daughters.”¹⁵⁵ The Court further found that the Washington Superior Court “failed to accord the determination of Granville, a fit custodial parent, any material weight.”¹⁵⁶ The Court concluded that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a ‘better’ decision could be made”¹⁵⁷ and found that the sweeping provisions of the Washington nonparental visitation statute were unconstitutional.¹⁵⁸

How does this unique case support regulation of homeschooling? Enforced third-party visitation does not have the long history of recognition that compulsory schooling has. Thus, the right of the state to insist upon third-party visitation over the objections of a parent would seem to be weaker than the right of the state to insist upon formal education of a child over the objections of a parent. State interests in education and health of children are more compelling than the state interests in *Troxel*.

However, even in the face of this presumably weaker state authority, *Troxel* does not preclude the award of visitation over the objection of parents; it simply requires that appropriate weight be given to parental decisions. Likewise, the decision to homeschool could be given a presumption of validity, subject to rebuttal by evidence that the child is not receiving an adequate education.

Considered as a group, the foregoing U.S. Supreme Court cases consistently support state compulsory education laws, while equally consistently upholding the right of parents to raise and educate their children as the parents see fit. The only real recognition of homeschooling as a valid option is seen in *Yoder*, a case which rests largely on the strength and credibility of Amish religious beliefs. Therefore, it is reasonable to conclude that homeschooling regulation is constitutionally permissible. However, as was demonstrated in Part IV.A, all states have accepted homeschooling as an option, and many states have less regulation than is probably constitutionally permissible.

V. REGULATING HOMESCHOOLING

State law approaches to homeschooling represent a curious state of affairs. On the one hand, all states retain compulsory education laws. On the other hand, all states permit some kind of homeschooling that, as a practical matter,

154. *Id.* at 69.

155. *Id.*

156. *Id.* at 72.

157. *Id.* at 72-73.

158. *Troxel*, 530 U.S. at 73.

makes uniform enforcement of compulsory education laws difficult, if not impossible. The various statutes addressing homeschooling represent attempts to impose some kind of educational equality, or at least reaffirm the state's interest in assuring some kind of education for its children, by reserving the right of the state to intervene in cases where children are receiving no education at all. Yet the regulations vary greatly in their likely effectiveness in even identifying students who are not really receiving an education, much less remedying the situation.

There are at least three problems with the current approach to regulation of homeschooling. First, the vagueness of many of the standards, and the lack of resources with which to enforce them, means there is no guarantee that children who are allegedly homeschooled receive a meaningful education. Second, the persons responsible for overseeing compliance with homeschooling regulations are usually employees of the local school district. Because formal schools have conflicts of interest with homeschoolers, this is like letting the proverbial fox guard the hen house. Finally, there are no health and safety safeguards in place in many states to replace safeguards existing in formal school environments.

Even if these problems are solved, there are other bars to homeschooling regulation. First, homeschoolers are fiercely protective of their hard-won gains in homeschooling rights and have historically been fiercely resistant to new regulation. Second, there is a substantial risk that the cure will be worse than the disease; in at least some school districts, a forced return to school would likely result in more overcrowding and higher failure rates than already exist. Even more regulation could have the unintended effect of forcing parents to spend time fulfilling bureaucratic requirements. Such time could be better spent in educating their children. Third, it is possible that the state could accomplish some of its goals, especially in the child-protection area, by enforcement of existing statutes rather than by further regulation of homeschooling. Therefore, additional regulation might be a waste of scarce resources. Finally, the variety of state regulation may well reflect the lack of consensus in our society about what children need to learn after having mastered basic reading and math. This lack of consensus is a by-product of an increasingly diverse society, and it is unlikely to be satisfactorily resolved by more regulation of homeschooling.

A. Problems with the Current Approach to Regulation of Homeschooling

1. Lack of Meaningful Quality Safeguards

It is well established that the state has a legitimate interest in children being sufficiently educated so that they will grow up to be informed citizens, able to support themselves and to participate in our democracy. However, many states regulate homeschooling in a way that will not necessarily advance that interest. For example, states that require proof that children not enrolled

in a formal school are receiving an “equivalent” education elsewhere¹⁵⁹ do not typically provide an objective definition of that term. Instead, it is left to the subjective assessment of authorities, assuming that they have the sufficient resources to even delve into the question. States that require the teaching of a certain list of subjects¹⁶⁰ may not clearly define the scope of those subjects. In short, the standards that purport to insure a minimum education for a state’s children are so vague that they risk being flaunted by defiant parents on the one hand or being used as instruments of harassment by overzealous enforcers on the other.

Vagueness or alleged nonexistence of educational standards has been a source of controversy in school and homeschool situations alike. In the public school setting, concerns with whether children in all schools are emerging with minimum skills and knowledge have led to proposals for universal testing, with penalties for schools having an excessive failure rate. But testing has its own set of problems and controversies.

After discouraging reports in the 1980s about how American students were performing compared to students in other industrialized countries, just about every state adopted reforms that incorporated statewide standards.¹⁶¹ Still, low student performance remains a concern throughout the United States. In December 2001, Congress passed President Bush’s standards-based education bill.

The new federal law is designed to compel each state to develop its own coherent system of standards-based reform. The states have five years to devise standards and tests. They will be expected to raise all students to “proficiency” levels over the next 12 years, and they will have to administer the N.A.E.P. test every other year in order to provide and external check to their internal measures. But a combination of liberals worried about tests and conservatives worried about federal power blunted the law’s bite. Nothing prevents states from designing wishy-washy standards and tests and from defining “proficiency” so modestly that everybody succeeds—though Rod Paige, Bush’s secretary of education, argues that the law’s highly detailed reporting requirement will shame lagging states into cleaning up their acts.¹⁶²

159. See *supra* text accompanying notes 84-93.

160. See *supra* text accompanying note 79.

161. James Traub, *The Test Mess*, N.Y. TIMES MAG., Apr. 7, 2002, at 46, 48.

162. *Id.* at 50. N.A.E.P. refers to the National Assessment of Education Progress, “a widely regarded test of basic skills.” *Id.*

Importing the testing requirements into the homeschool setting may seem like a good idea for insuring educational equality. However, standards reform has its opponents, who raise legitimate points about its limitations.

[M]any educators and academics view the standards movement as a catastrophic mistake and as a cynical ploy designed to detract attention from “real” reform. Progressive educators believe that neither children nor schools will or even should respond to externally imposed standards and reel in horror at the data-driven, goal-oriented pedagogy induced by the new testing regime. And civil rights advocates argue that it is both unjust and unrealistic to expect disadvantaged students to achieve higher standards until we spend more money on inner-city schools.¹⁶³

As mentioned above, concerns about the low academic quality of some public schools are what prompt some families to begin homeschooling in the first place.¹⁶⁴ Yet requiring homeschooled children to take the same test that public school students are required to take does not seem to be a reasonable solution. Even professional educators cannot agree on the value of specific subject testing, which many believe runs the risk of necessitating *teaching to the test*,¹⁶⁵ an educational practice of dubious value. “[A]dvocates of standards-based reform insist that the best test preparation is a rich curriculum . . . but [that is] not the reality. . . . [T]est prep—at least good test prep—works.”¹⁶⁶ It works, that is, if your goal is to raise the test scores at a given school. “In Mount Vernon, where scores were low, it is all test prep all the time.”¹⁶⁷ However, in schools with high-achieving students, teachers, students, and parents resent the tests:

Schools that already consider themselves excellent bridle at the idea of being held to standards imposed by state education authorities, not only because it is a nuisance but because it seems pointless. The folks in Scarsdale rebelled only when the state added science and social studies tests in the eighth grade, thus forcing many teachers to miss well over a week of class time in order to prepare for, administer and grade the tests, and to curtail such beloved interdisciplinary, multi-week projects as “the hurricane unit” and “the Colonial fair.” . . . The parents in Scarsdale have

163. *Id.*

164. *See supra* text accompanying notes 24-27.

165. *See* Traub, *supra* note 161, at 49.

166. *Id.* at 49-50.

167. *See id.* at 51.

trouble understanding how they can benefit from standards lower than the ones they apply to themselves.¹⁶⁸

Tests of debatable value in the public schools seem unlikely to solve the quality control concerns about homeschooled students, yet some sort of action does seem necessary.

2. *Conflicts of Interest on the Part of Regulators*

The second problem with homeschooling regulation is that someone associated with the school district usually performs oversight duties. While professional educators certainly have in common with homeschooling parents the goal of insuring that the children are well educated, they also have competing goals of protecting the school system itself. Often the institutional goals will represent a conflict of interest when determining whether a homeschooled individual's educational needs are being met.

To see how home schooling threatens public schools, look at Maricopa County, Ariz. The county has approximately 7,000 home-schooled students. That's only 1.4% of school-age kids, but it means \$35 million less for the county in per-pupil funding. The state of Florida has 41,128 children (1.7%) learning at home this year . . . those kids represent a loss of nearly \$130 million from school budgets in that state. Of course, the schools have fewer children to teach, so it makes sense that they wouldn't get as much money, but the districts lose more than cash. "Home schooling is a social threat to public education," says Chris Lubienski, who teaches at Iowa State University's college of education. "It is taking some of the most affluent and articulate parents out of the system. These are the parents who know how to get things done with administrators."

. . . [A]s the most committed parents leave, the schools may falter more, giving the larger community yet another reason to fret over their condition. "A third of our support for schools comes from property taxes," says Ray Simon, director of the Arkansas department of education. "If a large number of a community's parents do not fully believe in the school system, it gets more difficult to pass those property taxes. And that directly impacts the schools' ability to operate." Says Kellar Noggle, executive director of the Arkansas Association of Educational administrators: "We still have 440,000 kids in public schools, and some 12,000 [in

168. *Id.* at 50-51.

home schooling] is a small number. But those 12,000 have parents and grandparents. Sure, it erodes public support.”¹⁶⁹

Thus, professional educators, who may by training be naturally suspicious of homeschooling, could have an institutional financial incentive to make sure that as many homeschooled children return to formal schooling as possible. Allowing people in these positions to determine whether homeschooling is working in a particular case is a clear conflict of interest.

Moreover, even lesser decisions, such as whether a homeschooled child needs tutoring or should participate in formal instruction in a particular subject, could be subject to this same conflict of interest. Some school districts allow homeschooled children to sign up for individual courses or organized sports. “This cooperation is largely motivated by self-interest—many schools can regain at least a percentage of their per-pupil funding by counting homeschoolers, who get more options without being fully part of the system.”¹⁷⁰ While such choices are beneficial to many homeschooled students, the power to require them should not be in the hands of an educator whose employer might benefit from the decision.

3. *Absence of Health and Safety Safeguards*

When a child is homeschooled, the state misses an important opportunity to ascertain whether the child’s health is being adequately protected. Compulsory vaccinations have been routinely monitored through the schools, and schools have often provided vision and hearing tests as well. Yet only a few of the homeschooling statutes directly address this issue.¹⁷¹ While it can be argued that children who are not subject to the crowded classrooms that characterize much of public education are less susceptible to contagious diseases, the state still has a significant interest in insuring that children are protected from serious childhood diseases, such as measles and whooping cough. However, without the incentive of complying with school vaccination deadlines, some parents may neglect vaccinations, leaving no organized way of monitoring compliance with requirements.

169. Cloud & Morse, *supra* note 1, at 48-49.

170. *Id.* at 53.

171. North Carolina is one example of a state that requires disease immunization records for homeschooled children. N.C. GEN. STAT. §§ 39-115C-548, -556 (2001), *cited in* Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (North Carolina)*, Home School Legal Defense Ass’n, at <http://www.hsllda.org/laws/analysis/NC.asp> (last updated Aug. 28, 2001).

B. Other Problems with Regulating Homeschooling

1. Parental Opposition

Homeschooling parents are known to be a well-organized, fiercely self-protective group. Their general pattern has been to resist any regulation of homeschooling. One example is the Home School Legal Defense Association's opposition to the adoption of stricter homeschooling regulations in Connecticut.¹⁷² Another example is the experience of Rep. Michael Switalski, a state representative in Michigan, who introduced legislation that would require all homeschoolers to register and to take a particular standardized test that is used, but not required, in Michigan public schools.¹⁷³

"I'm not asking to regulate them," he said. "I'm just trying to get a handle on how many are out there. What is the trend? Is it growing?"

....

Switalski's legislation prompted an outcry from the homeschool community in Michigan and beyond. He received more than 100 calls a day, and his cosponsors quickly withdrew their support. The bills died in the House Education Committee.

"The homeschoolers are so organized and vocal that I'll never get a hearing," Switalski said."¹⁷⁴

While resistance to regulation by the persons to be regulated is not a valid reason for not regulating, such resistance is a potential roadblock to successful regulation. Faced with resistance, state authorities need to make a careful cost-benefit analysis of any proposed rule changes.

2. Cure Potentially Worse Than the Disease

Would-be regulators of homeschooling should carefully evaluate possible alternatives. Homeschoolers who are found to be less successful than a state requires could be ordered to send their children back to school or could be urged to use tutoring or other supplemental services. But if the main motivation to homeschool is a failing school system or overcrowded schools, such measures could cause more problems than they solve. A sudden influx of formerly homeschooled students could overburden a school system. These students may not even attain an acceptable level of education in the public schools because many public schools do not meet minimum standards either.

172. Pyeatt, *supra* note 88.

173. Higgins, *supra* note 80.

174. *Id.*

And as the previous discussion of testing indicates, there is not even agreement among professional educators about how best to address educational underperformance.¹⁷⁵

3. *Possibility of Attainment of State Goals Without Greater Regulation*

Many state goals that are usually attained through formal schools could be enforced in homeschooling situations without the introduction of new legislation. For example, concerns that a minority of parents may be keeping their children out of school without actually providing them with an education could be addressed through state truancy statutes, and in some states, child neglect statutes might be invoked as well. Concerns that compulsory education laws keep children off the street and safer from potential exploitation in the labor market could be addressed through enforcement of truancy, delinquency, and child labor laws. Concerns about child vaccination laws could be addressed through those statutes or through child neglect statutes. None of these approaches would necessitate regulation of homeschooling itself.

4. *No Social Consensus About Educational Content*

Perhaps the greatest difficulty in regulating homeschooling is one that is rarely discussed in the literature. In our increasingly diverse society, there is not a consensus about what children should learn in school. Parental and societal concerns today are not the same as those of early twentieth century reformers who wanted universal public schools to ensure equality of opportunity for immigrants' children. Today, parents are more concerned with preserving their own cultural and religious heritage than they are with blending in and succeeding in the larger society.

As recently as the 1970's, when the Court decided *Yoder*, the argument made sense that children need to attend formal schools to prepare them to participate in society and support themselves in the economy. The Amish were an exception because they had their own method of preparing their children for a life apart from the rest of society. However, as the family profiled by Margaret Talbot demonstrates,¹⁷⁶ it isn't just the Amish anymore. "Fundamentalist families like the Scheibners are no longer fighting against the mainstream—they're 'dropping out' and creating their own private America."¹⁷⁷ Although she acknowledges that "[m]any of them lead lives that are far less sequestered and culturally abstemious than the Scheibners," Talbot notes that "[t]here are about 20 million evangelical Christians in the U.S. today; together with fundamentalists, who tend to be more withdrawn from

175. See *supra* Part V.A.1.

176. See *supra* text accompanying notes 17-23.

177. Talbot, *supra* note 17, at cover.

public life and more theologically conservative, they make up about 25 percent of the American population.”¹⁷⁸ Although as of the February 2000 article “[o]nly 6 percent of conservative Christians educate their children at home . . . though the numbers are growing,”¹⁷⁹ it is clear that a large segment of the American population has a predilection for setting itself apart from some of the mainstream society, including some of its educational practices. Debates about whether to teach evolution or creationism are one example of this split. Another example is the case of the Harry Potter books—hailed as excellent literature by some and objectionable black magic by others.¹⁸⁰

Because there is no one lifestyle for which we are preparing our nation’s children, it is hard to argue that home schools should be constrained by curricular requirements or that home teachers should have a particular educational background. When and if society reaches a consensus, it may be sensible to impose more requirements, but it makes no sense now.

C. Some Proposals For Future Regulation

Homeschooling should be regulated to some degree, but such regulation should be fairly minimal and aimed less at intrusive oversight and more at identifying the small minority of homeschooling parents who are not in fact providing their children with an education. First, I would require registration of school-age children and an application for homeschooling status from parents planning to homeschool. Homeschooling status would be automatically granted to any parent who provides the student’s name, address, and proof of compliance with state vaccination requirements, assuming that parent had not been previously convicted of child abuse or neglect. Second, I propose that state laws require age-appropriate competence testing in reading and math in order for a parent to retain homeschooling status. Families not in compliance could be pursued under that state’s truancy regulations. Moreover, the compliance should be monitored by an independent homeschooling agency. As discussed above, the current practice of allowing school superintendents or other public school authorities to oversee compliance introduces an unacceptable conflict of interest and heightens the perception of an adversarial nature to the monitoring. Although an independent evaluative agency is not current practice, many states already require registration of students, periodic standardized testing, and proof of compliance with state immunization requirements.¹⁸¹ The current evidence about homeschooling does not justify further regulation, and regardless, it is not unreasonable to expect beleaguered

178. *Id.* at 36.

179. *Id.*

180. *See, e.g.,* Paul Anast, *Bishops Attack Potter Books*, DAILY TELEGRAPH (London), June 10, 2002, at 12 (reporting that Greek bishops launched a campaign against “the Harry Potter cult”).

181. *See supra* Part IV.A.

states to improve homeschooling before they have rescued their own public schools from chronic underperformance.

1. *Registration of Homeschoolers*

Homeschoolers sometimes resist the concept of registration,¹⁸² perhaps because it has “Big Brother” connotations. However, I favor registration only for limited purposes: mainly to assess whether state immunization requirements have been fulfilled and to track the children’s educational progress long enough to ensure that they learn to read, write and do basic mathematics. However, in circumstances where parents have already been convicted of abuse or neglect of a child, I would require a further investigation to ascertain whether the home had stabilized before granting homeschooling status to the parents.

As has been discussed in this Article, one of the disadvantages of widespread homeschooling from a societal perspective is that we lose the check that schools provide on children’s health and well-being. However, simply requiring physicals and proof of vaccination before awarding homeschooling status could easily restore much of this protective function. North Carolina is one state that already has a requirement that homeschooled children provide proof of immunization.¹⁸³

2. *Periodic Testing in Reading and Math Competence*

To address concerns about whether homeschooled children are being provided with a real education, the most straightforward solution is to require that students take an age-appropriate standardized test at regular intervals. Students scoring in the lowest quartile would be required to do some follow-up testing or consulting with the regulating authority.

Given the lack of national consensus on what should be taught and how it should be taught, the state-required testing should be limited to basic skills such as math, reading, reading comprehension, and vocabulary. The Iowa Basic Skills Test is an example of a well-regarded, widely-used general skills test that would serve nicely in the homeschool setting. Because this test does not test knowledge of specific subjects, there is little pressure to teach to the test. However, the test would do a good job of identifying children whose reading and math skills are significantly below par for their age group. Children who cannot read are not likely to learn more advanced subjects, while children who

182. See, e.g., Higgins, *supra* note 80 (detailing the experience of would-be regulator, Michigan State Rep. Michael Switalski).

183. N.C. GEN. STAT. §§ 39-115C-548, -556 (2002), cited by Christopher J. Klicka, *Homeschooling in the United States: A Legal Analysis (North Carolina)*, Home School Legal Defense Ass’n, at <http://www.hslda.org/laws/analysis/NC.asp> (last updated Aug. 28, 2001).

can read will have endless opportunities to learn, whether in a formal or a homeschooling setting.

Follow-up to the testing need not necessarily lead to re-enrollment in a formal school, but should lead to an examination of options such as tutoring. Not every student should be required to be above-average, and it is important to keep in mind that some parents began homeschooling their children because of learning or other disabilities that might independently put those students behind their peers at certain stages. Nor should the tests measure specific subject matter knowledge, because such interests would require homeschooling parents to follow a specific curriculum, a restriction that may not be warranted and may unfairly infringe upon the parents' rights to direct their children's education. Nonetheless, tests of reading, writing, math, and reasoning skills are a legitimate exercise of the state's power to ensure that children are properly educated. "'After all, if home schooling fails, . . . we pay the freight' when a person ends up on public assistance or in jail."¹⁸⁴

3. *Independent Regulation*

Finally, I suggest that regulation of homeschooling compliance should be in the hands of an independent agency. As is discussed above, officials connected to schools or school districts have a financial interest in bringing children into the school system.¹⁸⁵ Allowing them to decide whether homeschooled children are receiving an adequate education is a conflict of interests. Instead, I suggest using independent investigators from a range of backgrounds, such as law, psychology, or education. These independent investigators could evaluate test scores, interview parents and children, and recommend remedies for inadequate performance. Failure to comply could result in penalties, such as those imposed under a state truancy statute. If homeschooling is as successful for kids as its supporters claim, the penalties would rarely be necessary but could be crucial in rescuing a child from a truly neglectful parent.

The relevant Supreme Court cases support regulation of homeschooling such as that proposed above. Any regulation should, of course, be tailored to advance the state's interest in the health and education of children in the least intrusive manner possible. Parents' rights to make decisions about upbringing and education have always been limited by the state's interest in the safety and adequate education of children. None of the constitutional cases dealing with education casts doubt on the power of the state to have compulsory education requirements. The right to have compulsory education requirements implies the

184. Kantrowitz & Wingert, *supra* note 37, at 67 (quoting Ronald Areglado of the National Association of Elementary School Principals). The article further noted that "Areglado has good reason for his concern; as a principal, he saw a home-schooled kid who got no instruction at all from his parents." *Id.*

185. See *supra* Part V.A.2.

right to see that they are fulfilled. The state has other legitimate concerns including child safety and health, and again, the state can act to protect these interests. Protecting these interests will be more difficult in a homeschooling situation, but not impossible.

VI. CONCLUSION

After a long period of disfavor, homeschooling has once again emerged as a viable education option for thousands of children in the United States. The diversity of our society and the recognition of severe problems with public schools make it likely that homeschooling is here to stay. States have passed legislation allowing homeschooling as long as certain requirements are met. However, these state requirements do not always advance the education of the children they are meant to protect, and they are not always administered fairly. I suggest that states adopt a more modest, but consistent, approach. Requiring immunizations, limiting testing to basic skills, and establishing oversight by a neutral body would go a long way in achieving the educational and child safety goals of the states, while protecting the parental prerogative to educate each child as that parent sees fit.

