

Why Homeschooling Shouldn't Be Banned: The Resurgence of Home Education in the 21st Century

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INTRODUCTION

A good education is the backbone of a successful society.¹ Without a basic education in fundamental areas of life, individuals cannot effectively communicate or interact with others in meaningful ways.² While most Americans would likely agree with this general view of education, controversy ensues over how our youth should be educated.³ At the time of America's founding, homeschooling was the common form of education.⁴ In fact, many of our early presidents including George Washington, John Adams, and Thomas Jefferson were homeschooled.⁵ However, with the advent of the common school movement and the progressive reforms of advocates like Horace Mann in the 1800s, the public school model became the predominant system of education.⁶ Despite this societal shift, the historical tradition of homeschooling continues into the 21st century.⁷ Many well-known modern figures including Justin Bieber, Venus and Serena Williams, Emma Watson, and Tim Tebow were all

* J.D., New England Law | Boston (2022).

¹ See ECON. & SOC. RES. COUNS., *THE WELLBEING EFFECT OF EDUCATION* 1 (2014), <https://perma.cc/MH8L-RUEN>.

² See *id.*

³ See Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education and Protection*, 62 ARIZ. L. REV. 1, 3–4 (2020).

⁴ Paul T. Hill, *How Home Schooling Will Change Public Education*, BROOKINGS (June 1, 2000), <https://perma.cc/249K-7W26>.

⁵ Jessica Parnell, *Famous Homeschoolers*, BRIDGEWAY ACADEMY (Feb. 28, 2019), <https://perma.cc/9A2K-2PVK>.

⁶ Matthew Lynch, *Pass or Fail: Horace Mann—An American Public School Pioneer*, THE EDVOCATE (May 9, 2017), <https://perma.cc/2ZVS-HXVM>.

⁷ See Mack DeGeurin, *17 Famous People You Didn't Know Were Home-Schooled*, INSIDER (July 26, 2019, 4:10 PM), <https://perma.cc/9DS3-93TD>.

homeschooled.⁸ In fact, Justice Sandra Day O'Connor, the first woman to serve on the United States Supreme Court, was homeschooled while growing up on her family's ranch in Arizona.⁹

Today, an estimated four to five million American students (eight to nine percent of all school-age children) are homeschooled.¹⁰ This statistic is expected to continue growing at a rate of more than eight percent each year.¹¹ Interestingly, the growing population of homeschool families continues to become more demographically diverse as parents from different ethnicities, income levels, educational backgrounds, and ideologies have made the decision to homeschool—all for various reasons.¹² This growth, however, has raised the ire of critics and sparked concern from skeptics who view the modern resurgence of homeschooling as dangerous to the well-being of our children and the social fabric of our country.¹³ Harvard Law School professor Elizabeth Bartholet is a proponent of this view.¹⁴ Professor Bartholet made national headlines in early 2020 after publishing a law review article calling for a presumptive ban on homeschooling in the United States.¹⁵ Ironically, Professor Bartholet's article was published just before many countries, including the United States, declared national health emergencies surrounding the COVID-19 pandemic that forced many families, by default, to engage in some level of homeschooling or remote learning.¹⁶

This Note will argue that homeschooling should not be banned in the United States because banning interferes with the fundamental right of parents to direct the education of their children and is antithetical to America's long-standing history of protecting individual rights. Part I of this Note will explore the current legal framework for parental rights in the context of education by examining key United States Supreme Court cases. This section will also discuss notable actions taken by state legislatures since the 1980s that established clear protections and regulations for

⁸ *Id.*

⁹ *Id.*

¹⁰ Brian D. Ray, *Homeschooling: The Research*, NAT'L HOME EDUC. RES. INST. (Sept. 9, 2021), <https://perma.cc/55NB-SVQN> [hereinafter Ray, *Homeschooling*].

¹¹ *Id.*

¹² *Id.*

¹³ See Bartholet, *supra* note 3, at 13.

¹⁴ See Bartholet, *supra* note 3, at 13.

¹⁵ Mike McShane, *Harvard's Lazy Attack on Homeschooling*, FORBES (Apr. 21, 2020, 9:32 AM EDT), <https://perma.cc/88RY-8CXD>.

¹⁶ See Patrick J. Wolf, Matthew H. Lee & Angela R. Watson, *Harvard Law Professor's Attack on Homeschooling Is a Flawed Failure. And Terribly Timed, Too.*, EDUC. NEXT, <https://perma.cc/CUT3-PNJ8> (last updated May 5, 2020).

homeschooling in several states. Part II will explain why the right to homeschool is so critical in a post-COVID-19 world as many families consider home education as a way to address their unique opportunities and challenges, as well as prioritize their values. Part III of this Note will analyze and respond to the main arguments in favor of banning homeschooling. Part IV will propose several approaches to establishing the right to homeschool under current Supreme Court case law. And lastly, Part V will consider how other countries have addressed the issue of homeschooling much differently than the United States.

I. Background

Although homeschooling enjoys a long-standing tradition in American education, the United States Constitution provides no direct legal right for parents to homeschool their children.¹⁷ In fact, the late Justice Antonin Scalia went one step further by stating that the right of parents to direct the education of their children is among the unalienable rights in the Declaration of Independence, but that the federal Constitution does not explicitly recognize it as a right.¹⁸ Consequently, Justice Scalia would likely not have agreed with the outcomes of *Meyer v. Nebraska* or *Pierce v. Society of Sisters* and certainly not the Fourteenth Amendment substantive due process grounds they were decided on.¹⁹ As many legal scholars and homeschool advocates recognize, current federal constitutional protections for homeschooling are fragile at best and are made up of an amalgamation of cases which generally recognize parental rights to direct the education of their children but not to homeschool, specifically.²⁰

A. Federal Constitutional Framework for Parental Rights

In 1923, the Supreme Court decided *Meyer* which involved a school teacher, Robert Meyer, who was convicted for teaching German at a Lutheran school.²¹ The teacher did so in violation of a Nebraska law which prohibited grade school teachers from teaching any foreign languages.²² The

¹⁷ See *No Constitutional Right to Homeschool*, *Supreme Court Justice Says*, OFF THE GRID NEWS (Nov. 24, 2015), <https://perma.cc/AU5V-AGDC>.

¹⁸ Mark Walsh, *Justice Scalia: No Constitutional Right of Parents on Children's Education*, EDUC. WEEK (Nov. 17, 2015), <https://perma.cc/SJE9-VG2G>.

¹⁹ *Id.*

²⁰ Joe Wolverton, *Is There a "Constitutional Right" To Homeschool?*, TENTH AMENDMENT CTR. (Nov. 25, 2018), <https://perma.cc/X472-MWWD>.

²¹ *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923).

²² *Id.* at 397.

Court ruled that the Nebraska law violated the teacher's liberty interest protected by the due process clause of the Fourteenth Amendment.²³ In describing the scope of Mr. Meyer's liberty interest, the Court stated that his "right . . . to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the amendment."²⁴

Two years later, in 1925, the Court took up *Pierce* to determine the constitutionality of Oregon's Compulsory Education Act of 1922 which required parents to enroll their children between the ages of eight and sixteen in the local public school system, providing no exemptions for children who were enrolled in private or parochial schools.²⁵ The Society of Sisters, a Catholic organization that operated parochial schools, and Hill Military Academy, a secular private school, challenged the constitutionality of the Oregon statute.²⁶ In a unanimous decision, the Court struck down the law on Fourteenth Amendment grounds.²⁷ The Court held that "[t]he 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."²⁸ On the other hand, the Court did recognize "the power of the state reasonably to regulate all schools . . ."²⁹

In 1972, the Supreme Court took up yet another case challenging state compulsory education laws.³⁰ In *Wisconsin v. Yoder*, three Amish families were prosecuted for violating a Wisconsin statute that required all children under the age of sixteen to attend public schools.³¹ The Amish parents refused to send their children to the local public school after the eighth grade, arguing that the values and worldly influences promoted by secular education substantially interfered with their fundamental religious beliefs.³² Citing *Pierce*, the Court recognized "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."³³ But

²³ *Id.* at 400.

²⁴ *Id.*

²⁵ *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 530 (1925).

²⁶ *Id.* at 532.

²⁷ *Id.* at 534–35.

²⁸ *Id.* at 535.

²⁹ *Id.* at 534.

³⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

³¹ *Id.* at 207–08.

³² *Id.* at 210–11.

³³ *Id.* at 213.

the Court also acknowledged that even the state's responsibility in overseeing education must "yield to the right of parents to provide an equivalent education in a privately operated system."³⁴ The Court held that the free exercise clause of the First Amendment, which is applicable to states by incorporation via the Fourteenth Amendment, prevented Wisconsin from compelling the Amish defendants to enroll their children in the public schools.³⁵ The Court reasoned that the Amish community was a successful, self-sufficient social unit that was "capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief."³⁶ The Court further noted that the defendants had "convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of . . . Amish communities and . . . the hazards presented by the State's enforcement of a statute generally valid as to others."³⁷

In 1979, the Court decided *Parham v. J.R.*, which reinforced the presumption that parents act in the best interest of their children.³⁸ This was a class-action suit initiated by a group of minors who challenged Georgia's mental health laws that permitted parents to unilaterally admit their children into mental institutions.³⁹ They argued that Georgia's laws inappropriately allowed parents to use state mental hospitals as a "dumping ground" for their children.⁴⁰ The Court held that minors committed to mental institutions do not have a right to an adversarial hearing against their parents who voluntarily committed them.⁴¹ The Court reasoned that "parents . . . retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply."⁴² The Court rejected the "statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children," characterizing this view as "repugnant to American

³⁴ *Id.*

³⁵ *Id.* at 234.

³⁶ *Yoder*, 406 U.S. at 225.

³⁷ *Id.* at 235.

³⁸ *Parham v. J. R.*, 442 U.S. 584, 602–03 (1979).

³⁹ *Id.* at 584.

⁴⁰ *Id.* at 597.

⁴¹ *Id.* at 610.

⁴² *Id.* at 604.

tradition.”⁴³ The Court found that the existing procedures in place for initial and continued review of a child’s commitment to a mental hospital were sufficient to protect against erroneous admission.⁴⁴ The four Supreme Court cases described above provide a framework for understanding the scope of parental rights in the context of education; however, as some legal scholars and lower courts have noted, the cases do not explicitly establish a constitutionally-protected right to homeschool.⁴⁵

B. *State Protections for Homeschooling*

Although many states enacted compulsory education laws as early as 1642, it was not until 1852 that Massachusetts became the first state to enact a compulsory schooling statute mandating that children attend state-run public schools.⁴⁶ This change in law was prompted by mass immigration of poor Irish Catholics into Boston, who challenged the predominant Protestant culture in the United States.⁴⁷ While early compulsory education laws focused on compelling cities and towns to offer schooling to foster an educated citizenry, laws enacted in the 1800s forced parents to enroll their children in government-run public schools.⁴⁸ This change revealed a subtle, yet significant shift in legal authority and responsibility from parents to the state for the education of children.⁴⁹

By 1918, every state enacted compulsory schooling laws requiring mandatory attendance for school-age children aimed at keeping children of working-class families from working on farms, in factories, or causing trouble on the streets.⁵⁰ Enforcement was initiated through judicial truancy proceedings.⁵¹ The term truancy describes deliberate, unjustified absences of students from school in violation of compulsory attendance laws.⁵² Before homeschooling was exempt from compulsory attendance requirements, homeschool families in many states faced difficult legal challenges in

⁴³ *Id.* at 603.

⁴⁴ *Parham*, 442 U.S. at 607.

⁴⁵ E.g., Billy Gage Raley, *Safe at Home: Establishing A Fundamental Right to Homeschooling*, 2017 B.Y.U. EDUC. & L.J. 59, 62–63 (2017).

⁴⁶ Kerry McDonald, *Compulsory Schooling Laws Aren’t Progressive, They’re Inhumane*, FOUND. FOR ECON. EDUC. (Apr. 2, 2019), <https://perma.cc/X9YK-2SK8>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Dana Goldstein, *Inexcusable Absences*, THE NEW REPUBLIC (March 6, 2015), <https://perma.cc/D6QZ-J8LY>.

⁵¹ *Id.*

⁵² *Id.*

truancy proceedings.⁵³

In 1953, the Turners, a homeschool family in California, were prosecuted for truancy after failing to enroll their three children in a public or private school.⁵⁴ The Turners argued that they were operating a small private school; however, that view failed to convince the court.⁵⁵ Despite the *People v. Turner* ruling, homeschool families in California continued to characterize themselves as private schools in annual affidavits.⁵⁶ Because of the difficulty in prosecuting truancy and time intensive resources required for the process, California ultimately, yet grudgingly, accepted the reality of homeschooling.⁵⁷ Today, the California Department of Education states that parents may educate their children at home “through an existing private school . . . a public charter or independent study program, and in many instances by opening their own private home based school and filing a Private School Affidavit (PSA) with the California Department of Education (CDE).”⁵⁸

Although homeschooling is allowed in all fifty states, the legal protections and regulations differ from state to state.⁵⁹ For example, in Massachusetts, Mass. Gen. Laws ch. 76, § 1 exempts children from mandatory school attendance if they are “otherwise instructed in a manner approved in advance by the superintendent or the school committee.”⁶⁰ Massachusetts requires that parents teach state-mandated subjects, file an annual notice of intent with the school district of the proposed curriculum, and the superintendent may require periodic standardized testing with the mutual consent of parents.⁶¹

In Florida, Fla. Stat. §1002.01 defines home education as “the sequentially progressive instruction of a student directed by his or her parent in order to satisfy the attendance requirements”⁶² Florida requires

⁵³ See, e.g., *People v. Turner*, 263 P.2d 685, 686 (Cal. App. Dep't Super. Ct. 1953).

⁵⁴ *Id.*

⁵⁵ *Id.* at 688.

⁵⁶ James R. Mason, *A Look Back at the Great California Homeschool Case of 2008 (And What It Means for Today)*, HOMESCHOOL LEGAL DEF. ASS'N (May 5, 2020), <https://perma.cc/LG2C-XE5D>.

⁵⁷ *Id.*

⁵⁸ *Schooling at Home*, CAL. DEP'T EDUC. (last visited July 10, 2022), <https://perma.cc/HBU9-G883>.

⁵⁹ See *Homeschool Laws by State*, HOMESCHOOL LEGAL DEF. ASS'N, <https://perma.cc/E9EC-WBKV> (last visited July 10, 2022).

⁶⁰ MASS. GEN. LAWS ch. 76, § 1 (2014).

⁶¹ *How to Comply with Massachusetts' Homeschool Law*, HOMESCHOOL LEGAL DEF. ASS'N (June 18, 2020), <https://perma.cc/8K97-79C7>.

⁶² FLA. STAT. § 1002.01(1) (2007).

that parents send a written notice of intent to the school district superintendent, maintain a portfolio of educational records, and provide an annual evaluation of the student's educational progress.⁶³

Pennsylvania's compulsory school attendance law states that "instruction to children of compulsory school age provided in a home education program . . . shall be considered as complying with the provisions of this section . . ." ⁶⁴ Pennsylvania requires that to qualify to teach, a parent must have at least a high school diploma and must file annual affidavits with the local superintendent.⁶⁵ Children must be taught certain state-mandated subjects, undergo periodic standardized testing, and obtain annual evaluations from qualified evaluators.⁶⁶

Texas law states that "[a] child is exempt from the requirements of compulsory school attendance if the child . . . attends a private or parochial school."⁶⁷ In *Texas Educ. Agency v. Leeper* the Court held that homeschooling can be considered a private school within the meaning of Texas' statutory exemption to the compulsory attendance law.⁶⁸ To qualify as a private school, however, homeschool parents must teach their children in a "bona fide manner" a "curriculum designed to meet basic education goals of reading, spelling, grammar, mathematics and a study of good citizenship."⁶⁹

II. Importance/Relevance

As explained above, homeschooling is not a new phenomenon, but new technology, societal developments, and a growing diversity in the demographics of homeschooling has underscored the importance of freedom of choice in education.⁷⁰ Many critics wrongly believe that the homeschool community is a homogeneous group of religious conservatives.⁷¹ Director of National Research at EdChoice, Mike McShane, Ph.D., states that the "stereotype of the insular conservative homeschooler

⁶³ FLA. STAT. § 1002.41(1) (2021).

⁶⁴ 24 PA. CONS. STAT. § 13-1327(d) (2019).

⁶⁵ *How to Comply with Pennsylvania's Homeschool Law*, HOMESCHOOL LEGAL DEF. ASS'N (June 15, 2020), <https://perma.cc/39XK-7EF8>.

⁶⁶ *Id.*

⁶⁷ TEX. EDUC. CODE ANN. § 25.086 (West 2019).

⁶⁸ 893 S.W.2d at 443–44.

⁶⁹ *Id.* at 439.

⁷⁰ See *Educational Freedom: An Introduction*, CATO INST., perma.cc/MC5K-KFDV (last visited July 10, 2022).

⁷¹ Jaweed Kaleem, *Homeschooling Without God*, THE ATL. (Mar. 30, 2016), <https://perma.cc/BJ92-CB7B>.

has never been an accurate picture of homeschooling in America” and, in fact, is not even one of the top two reasons that parents homeschool.⁷² A 2016 study conducted by the National Center for Education Statistics revealed that the top reasons parents decide to homeschool are: (1) “concern about school environment, such as safety, drugs, or negative peer pressure (34 percent)”;

(2) “a dissatisfaction with the academic instruction . . . (17 percent)”;

and (3) “a desire to provide religious instruction (16 percent).”⁷³ Other reasons parents decide to homeschool their children include special needs, bullying at school, school shootings, racism, travel sports, etc.⁷⁴ Other parents cite concerns over class sizes that are too large and lack school resources.⁷⁵ Charter schools, private schools, and homeschooling are the most popular alternatives to the public school system for families that have the resources.⁷⁶ Homeschooling, however, provides a unique flexibility and autonomy for parents to tailor a learning experience that best meets the needs of their children.⁷⁷

In addition to the challenges that many parents and children already wrestle with in a “one-size-fits-all” public education model, the COVID-19 pandemic has added yet another dimension of complexity as schools throughout the world shut down in early 2020, causing over fifty million children to engage in remote learning.⁷⁸ While some parents are concerned about the health risks associated with sending their children back to school full-time or via hybrid models, other parents have concluded—after watching their children struggle before the pandemic and now with remote classes—that the traditional model of public education may not be the best option for everyone.⁷⁹ The pandemic has increased the awareness that homeschooling is a viable option for many families who were already

⁷² McShane, *supra* note 15.

⁷³ *School Choice in the United States: 2019*, NAT'L CTR. FOR EDUC. STAT., <https://perma.cc/2DBH-T3ER> (last visited July 10, 2022).

⁷⁴ See Chris Weller, *Homeschooling Could Be the Smartest Way to Teach Kids in the 21st Century — Here Are 5 Reasons Why*, BUS. INSIDER (Jan. 21, 2018, 10:30 AM), <https://perma.cc/JA8X-TP74>.

⁷⁵ Nancy Bailey, *Why Some Parents Turn Their Backs on Public Schools, And What Can Be Done About It*, NANCY BAILEY'S EDUC. WEBSITE (July 30, 2018), <https://perma.cc/LS6B-JW4K>.

⁷⁶ See generally Robin Martin, *An Introduction to Educational Alternatives*, ALT. EDUC. RES. ORG. (Nov. 2000), <https://perma.cc/W7PT-BYYR> (describing different types of educational alternatives).

⁷⁷ See Weller, *supra* note 74.

⁷⁸ Kerry McDonald, *Homeschooling in the Time of COVID-19*, FOUND. FOR ECON. EDUC. (Oct. 20, 2020), <https://perma.cc/QJ2J-G774>.

⁷⁹ Emma Green, *The Pandemic Has Parents Fleeing from School — Maybe Forever*, THE ATL. (Sept. 13, 2020), <https://perma.cc/M78P-YDAX>.

contemplating alternative forms of education for their children.⁸⁰ While homeschooling's attractiveness might be a short-lived fad among some who are simply frustrated with the temporary challenges they face with remote learning, it is estimated that before the pandemic the number of homeschoolers was already growing between two and eight percent annually.⁸¹ Estimates indicate that between four and five million school-age children are currently homeschooled in the United States, with projections of accelerated growth reaching ten percent annually throughout the pandemic.⁸²

ANALYSIS

This section of the Note will analyze homeschooling through several perspectives. Part III will explore some of the primary criticisms levied against the homeschool community and will offer several responses and counter-arguments against the proposal for a presumptive ban on homeschooling. Part IV will analyze the Supreme Court's jurisprudence on education and parental rights and discuss how that provides a legal foundation for the federal protection of homeschooling. Lastly, Part V will compare how the current legal and regulatory structures for homeschooling in other countries drastically differ from the United States.

I. Criticisms Against Homeschooling

A. Religious Homeschoolers

In her article advocating a presumptive ban on homeschooling, Professor Bartholet presents several reasons why she believes parents should not be permitted to educate their children at home.⁸³ One main criticism is that the majority of families (Professor Bartholet estimates between fifty and ninety percent) homeschool for religious reasons and are thus "ideologically committed to isolating their children from the majority culture and indoctrinating them in views and values that are in serious conflict with that culture."⁸⁴ She fears that allowing religious parents to homeschool will result in children that "replicate [their] parents' views and

⁸⁰ *See id.*

⁸¹ Brian D. Ray, *Big Growth in Homeschooling Indicated This "School Year"* NAT'L HOME EDUC. RESEARCH INST. (Aug. 21, 2020), <https://perma.cc/X74R-542P> [hereinafter Ray, *Big Growth*].

⁸² Ray, *Homeschooling*, *supra* note 10; Ray, *Big Growth*, *supra* note 81.

⁸³ Bartholet, *supra* note 3, at 1.

⁸⁴ Bartholet, *supra* note 3, at 5.

lifestyle choices.”⁸⁵ Professor Bartholet states that “[t]hese parents are committed to homeschooling largely because they reject mainstream, democratic culture and values and want to ensure that their children adopt their own particular religious and social views.”⁸⁶ On the other hand, Paul Hill, founder of the Center on Reinventing Public Education, states “[t]here is nothing un-American about home schooling. Home-schooling families are, however, breaking a pattern established since colonial times—education has been becoming increasingly institutionalized, formal, and removed from the family.”⁸⁷ While it may be true that the majority of homeschoolers were once primarily motivated by religion, modern data suggests that many families are homeschooling for a variety of reasons today.⁸⁸ Banning homeschooling because some families are religious is dangerous for at least two reasons: it infringes on parental rights and presents troublesome First Amendment issues.⁸⁹

First, religiously-motivated banning of homeschooling is dangerous because it presumes that the state, rather than responsible parents, should maintain control over the education of their children.⁹⁰ In *Troxel v. Granville*, the United States Supreme Court unequivocally “recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”⁹¹ Although parents do not have absolute control over their children, the Court in *Pierce* specifically upheld the parental right to direct the education of their children.⁹²

Second, banning homeschooling on the basis of religion raises a First Amendment concern.⁹³ Banning homeschooling solely because it is a form of education that religious families engage in is facially discriminatory and triggers strict scrutiny that can only be overcome by a compelling government interest.⁹⁴ To ban homeschooling by singling out an entire class of people based on religious affiliation does not serve any compelling government interest and thus violates the First Amendment’s guarantee of

⁸⁵ Bartholet, *supra* note 3, at 4.

⁸⁶ Bartholet, *supra* note 3, at 10.

⁸⁷ Hill, *supra* note 4.

⁸⁸ See *School Choice in the United States: 2019*, *supra* note 73.

⁸⁹ See *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

⁹⁰ See *Troxel*, 530 U.S. at 65–66.

⁹¹ *Id.* at 66.

⁹² *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925).

⁹³ See, e.g., *Yoder*, 406 U.S. at 219.

⁹⁴ *Id.* at 220 (“A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion.”).

religious freedom.⁹⁵ Professor Bartholet cites the example of Derek Black, a young leader in the white nationalist movement, whose parents homeschooled him in order to avoid interaction with minority students in West Palm Beach's school system and indoctrinated him in the culture of white supremacy.⁹⁶ While it is repulsive that parents would teach their children blatant racism in the name of homeschooling, it is likewise true that some parents who send their children to public school teach them equally harmful ideology, including racism.⁹⁷ Banning an entire method of education because of isolated examples of bigotry by a few parents, who are not representative of the homeschool community at-large, ultimately punishes responsible parents and infringes on their constitutional rights.⁹⁸ A presumptive ban on homeschooling is diametrically opposed to the essence of the First Amendment's protection of religious freedom and constitutional case law on parental rights.⁹⁹

B. *Child Abuse and Neglect*

Another frequent criticism levied against homeschooling is the issue of child abuse and neglect.¹⁰⁰ Professor Bartholet claims that "[c]hild abuse and neglect characterize a significant subset of homeschooling families."¹⁰¹ She explains that many families choose homeschooling because it allows them to escape the accountability of school personnel who are required to report suspected child abuse or neglect to child protective services.¹⁰² In 2018, it was revealed that a California couple, David and Louise Turpin, who claimed to be homeschooling their children, engaged in decades worth of child abuse.¹⁰³ The couple punished their children by beating and choking them, tying them to beds, depriving them of food, and engaging in other acts of torture.¹⁰⁴

⁹⁵ *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

⁹⁶ Bartholet, *supra* note 3, at 13.

⁹⁷ See Daniel Beasley, *Don't Ban Homeschooling Based on Stereotypes*, HOMESCHOOL LEGAL DEF. ASS'N. (June 8, 2020), <https://perma.cc/75BK-HSCL>.

⁹⁸ *Id.*

⁹⁹ See U.S. CONST. amend. I; see also *Yoder*, 406 U.S. at 220–21.

¹⁰⁰ Bartholet, *supra* note 3, at 14.

¹⁰¹ Bartholet, *supra* note 3, at 14.

¹⁰² Bartholet, *supra* note 3, at 14.

¹⁰³ Paloma Esquivel, *Captive Children Suffered Years of Abuse, Starvation, and Cruelty by Parents*, *Authorities Say*, L.A. TIMES (Jan. 19, 2018), <https://perma.cc/GZA2-KRL6>.

¹⁰⁴ *Id.*

Critics of homeschooling cite horrific cases of abuse, such as the Turpins, as support for banning homeschooling.¹⁰⁵ While there is no doubt that some parents neglect and abuse their children and use homeschooling as a way to avoid detection from law enforcement and government agencies, this argument fails to characterize the majority of families who undertake homeschooling for the benefit of their children.¹⁰⁶ In fact, one of the main reasons many parents decide to homeschool is because they are so attentive to their children's education and well-being—a much greater sacrifice than sending them off to public school.¹⁰⁷ The claim that children of homeschool families are more likely to be abused than other children is unsupported by the evidence.¹⁰⁸ There are no large-scale studies comparing abuse among homeschool families with public or private school families.¹⁰⁹ In 2018, the Centers for Disease Control and Prevention reported that one in every seven children in the United States had experienced child abuse or neglect and 1,840 children died from such abuse or neglect.¹¹⁰ The report, however, does not provide any further distinction between children of homeschool families and public school families.¹¹¹ A 2017 report prepared for the Department of Justice reveals that ten percent of all students will experience sexual misconduct from a school employee by the time they graduate high school, but provides no statistics for homeschool students.¹¹² The argument that banning homeschooling will help solve the issue of child abuse and neglect is flawed since there is no evidence that home education corresponds with higher rates of abuse compared to public education.¹¹³ While this fact does not diminish the heinous nature of abuse by parents purporting to homeschool, it does highlight the absurdity that homeschooling is the only form of education that poses risks of child neglect or does so at

¹⁰⁵ Brian D. Ray, *Child Abuse of Public School, Private School, and Homeschool Students: Evidence, Philosophy, and Reason*, NAT'L HOME EDUC. RES. INST. (Jan. 23, 2018), <https://perma.cc/VG4K-4EJY> [hereinafter Ray, *Child Abuse*].

¹⁰⁶ See Naomi Schaefer Riley, *Harvard Professor's "Absurd" Claim that Homeschooling Is Child Abuse*, EDUC. NEXT, <https://perma.cc/A4D4-DMFV> (last updated May 5, 2020).

¹⁰⁷ Kerry McDonald, *There's a Due Process Problem with Homeschool Regulations*, FOUND. FOR ECON. EDUC. (Dec. 18, 2017), <https://perma.cc/QQ4Y-QP7U>.

¹⁰⁸ Riley, *supra* note 106.

¹⁰⁹ Riley, *supra* note 106.

¹¹⁰ CDC, PREVENTING CHILD ABUSE & NEGLECT 1 (2022), <https://perma.cc/SPW3-X4Q3>.

¹¹¹ *See id.*

¹¹² BILLIE-JO GRANT ET AL., A CASE STUDY OF K-12 SCHOOL EMPLOYEE SEXUAL MISCONDUCT: LESSONS LEARNED FROM TITLE IX POLICY IMPLEMENTATION 2 (2017), <https://perma.cc/LEQ9-N36Y>.

¹¹³ Ray, *Child Abuse*, *supra* note 105.

proportionally higher levels than traditional forms of education.¹¹⁴

The United States Supreme Court addressed the issue of child abuse and neglect in *Parham*.¹¹⁵ In that case, parents were accused of abuse and neglect by committing their children to mental institutions.¹¹⁶ The Court reaffirmed the traditional legal presumption that parents act in the best interests of their children and held that the risk of abuse or neglect by some parents does not justify governmental authority being considered superior to parental authority.¹¹⁷ The Court reasoned that “[t]he law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”¹¹⁸

A high percentage of claims regarding child abuse and neglect are cases of repeat abuse; therefore, many offending parents are already known by child protective services.¹¹⁹ As some have suggested, one solution to curb abuse is to impose stricter measures on parents who want to homeschool but have been the subject of prior substantiated abuse claims.¹²⁰ This would address the need for state and local governments to manage the safety and well-being of school children while allowing responsible parents to exercise their right to direct their children’s education.¹²¹

C. Regulation for Homeschooling

Critics also argue that the United States should ban homeschooling because their communities have successfully thwarted attempts to add restrictions or, alternatively, implement uniform federal regulations.¹²² Moreover, critics argue that while all states currently have regulations on the books, they are meaningless since they are rarely enforced.¹²³ While it is true that states vary in terms of their enforcement of homeschool regulations, many critics fail to consider the practical effects of current regulations and fail to ask whether more regulations upon families will actually improve the

¹¹⁴ Ray, *Child Abuse*, *supra* note 105.

¹¹⁵ *Parham v. J. R.*, 442 U.S. 584, 603 (1979).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 602.

¹¹⁹ Riley, *supra* note 106.

¹²⁰ Riley, *supra* note 106.

¹²¹ See Riley, *supra* note 106.

¹²² See Bartholet, *supra* note 3, at 37.

¹²³ Bartholet, *supra* note 3, at 40.

academic quality of homeschooling.¹²⁴ Additionally, the United States Constitution does not provide explicit authority for the federal government to regulate education; therefore, according to the Tenth Amendment, this power is left to the states.¹²⁵ As a threshold issue, several states recognize homeschooling as a legitimate form of education that satisfies compulsory education laws.¹²⁶ And as with many other police powers of the state in a system of federalism, creating and enforcing homeschool regulations is best left to local governing bodies who can best address the needs of children and families in their communities.¹²⁷ States should balance accommodating parents' wishes with state interests by allowing parents to determine how their children will be educated while ensuring that children receive, at a minimum, a basic education.¹²⁸

A 2015 report by the Education Commission of the States on homeschool regulation found that forty states require parents to notify school districts of their intent to homeschool, twenty-nine states mandate that students learn certain subjects, and twenty states require some form of academic assessment.¹²⁹ Alaska, Idaho, and Michigan are among the least restrictive states, while Washington, New York, and Pennsylvania impose the strictest regulations on homeschooling.¹³⁰ Generally speaking, one might expect that more homeschool regulations on parents produce better results.¹³¹ Empirical evidence, however, does not bear out this theory.¹³² After conducting a study comparing low, medium, and high homeschool regulation states, Dr. Brian Ray concluded that there is no significant statistical relationship between the

¹²⁴ See Daniel James Devine, *Opposing Views on Homeschool Regulation*, WORLD NEWS GRP. (Aug. 26, 2014), <https://perma.cc/26XB-3YCM>.

¹²⁵ See U.S. CONST. amend. X.

¹²⁶ See, e.g., FLA. STAT. § 1002.01 (2007); MASS. GEN. LAWS ch. 76, § 1 (2014); 24 PA. CONS. STAT. § 13-1327(d) (2019).

¹²⁷ See Williamson Evers, *How the Common Core Suppresses Competitive Federalism*, EDUC. NEXT, <https://perma.cc/E829-ECL2> (last updated Sept. 8, 2014).

¹²⁸ Courtenay E. Moran, Note, *How to Regulate Homeschooling: Why History Supports the Theory of Parental Choice*, 2011 U. ILL. L. REV. 1061, 1062–63 (2011).

¹²⁹ Arianna Prothero, *Homeschooling: Requirements, Research, and Who Does It*, EDUC. WEEK (Jan. 10, 2018), <https://perma.cc/7H8M-AJ5K>.

¹³⁰ *Id.*

¹³¹ See Brian Ray & Bruce Eagleson, *State Regulation of Homeschooling and Homeschoolers' SAT Scores*, 6 ACAD. LEADERSHIP: THE ONLINE J., Summer 2008, at 1–2, <https://perma.cc/WK3X-BXM9>.

¹³² See *id.* at 17 (finding that homeschool children succeed academically regardless of state regulation).

degree of homeschool regulation and performance outcomes on the SAT.¹³³ While Dr. Ray carefully described the limitations and methodologies used in his study, he also conceded that part of one's assessment of the study's findings is heavily influenced by preconceived biases either for or against homeschool regulation.¹³⁴

While reasonable regulations for homeschooling sound sensible, there are several reasons why stricter regulations are ill-advised and may lead to unintended consequences.¹³⁵ One concern is the risk of criminal charges for technical oversights.¹³⁶ Many law-abiding, responsible, loving parents are afraid they will be mislabeled as offenders of child neglect or abuse based on technical errors.¹³⁷ In 2015, Valerie Bradley was criminally charged by the state of Ohio under a truancy statute for inadvertently failing to send a requested form to the school district indicating her intent to continue homeschooling her son for the next school year by the August 1 deadline.¹³⁸ The state argued that since Bradley had sent her form on September 28 and did not receive approval until October 21, her son had technically been truant for forty-six days (from August 19, the beginning of the school year, until October 21).¹³⁹ The trial court ruled against Bradley, but the appeals court overturned the conviction noting that "Bradley's son received instruction and his test scores reflect[ed] high achievement" and that the criminal charge stemmed only from a technical paperwork error, since Bradley was homeschooling her son throughout the time the state claimed he was truant.¹⁴⁰

The second issue of concern is false allegations.¹⁴¹ In 2016, Tanya Acevedo, a single mother in New York City, decided to homeschool her son after facing repeated bullying at his local public school.¹⁴² In accordance with New York state law, Acevedo filed the required notice of intent with the local school district on the same day she removed her son from public school.¹⁴³

¹³³ *Id.* at 15–16.

¹³⁴ *Id.* at 16.

¹³⁵ Scott Woodruff, *Here's Why Good People Oppose "Reasonable" Homeschool Regulation*, HOMESCHOOL LEGAL DEF. ASS'N. (Aug. 4, 2020), <https://perma.cc/KWK4-X7FX>.

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ *State v. Bradley*, No. CA2016-11-094, 2017 Ohio App. LEXIS 3238, at *1–2 (Aug. 7, 2017).

¹³⁹ *Id.* at *3.

¹⁴⁰ *Id.* at *7.

¹⁴¹ Woodruff, *supra* note 135.

¹⁴² Susan Edelman, *Over 10K NYC Kids Are Now Being Homeschooled, New DOE Figures Show*, N.Y. POST (Nov. 14, 2020, 3:31 PM), <https://perma.cc/X3SB-6MWY>.

¹⁴³ Woodruff, *supra* note 135.

Due to the failure of New York City's Central Office of Homeschooling to update Acevedo's homeschool status within ten days after her letter was received, Child Protective Services launched an investigation into educational neglect pursuant to its policy regarding truancy.¹⁴⁴ As a part of the investigation, representatives from Child Services knocked on Acevedo's apartment door, questioned her about her parental habits, and questioned her older daughter at school.¹⁴⁵ Acevedo retained an attorney and ultimately settled a lawsuit against New York City requiring it to stop unwarranted educational neglect investigations against homeschool families caused by its own incompetence or otherwise face legal sanctions.¹⁴⁶ Unfortunately, Acevedo's incident was not an isolated one.¹⁴⁷ Other homeschool families in New York City and other school districts throughout the country have faced similar false allegations of neglect because of administrative backlogs.¹⁴⁸ Attorney Scott Woodruff warns that "[e]very additional rule—even a 'reasonable' one—is a new landmine on which . . . a loving parent can be mislabeled as an abuser or neglecter."¹⁴⁹

As described above, studies have revealed that there is no significant difference between states with strict versus loose regulations for homeschooling when compared to academic achievement and standardized testing results.¹⁵⁰ For example, New Jersey only requires parents to provide an education comparable to that of a public school, whereas New York requires parents to file annual notices of intent to homeschool, annual lists of curriculum to be used, quarterly progress reports, daily attendance records, and year-end assessments, but is no better off for it.¹⁵¹ Considering the highly bureaucratic processes in many states that parents must navigate, the risk of criminal charges for harmless errors, and false allegations of child neglect (which are highly prejudicial to parents), states and local government agencies should bear the burden of proving that additional regulations will lead to significantly improved educational experiences and

¹⁴⁴ Edelman, *supra* note 142.

¹⁴⁵ Edelman, *supra* note 142.

¹⁴⁶ *See* Edelman, *supra* note 142.

¹⁴⁷ *See* Woodruff, *supra* note 135.

¹⁴⁸ *See* Woodruff, *supra* note 135.

¹⁴⁹ Woodruff, *supra* note 135.

¹⁵⁰ Ray & Eagleson, *supra* note 131.

¹⁵¹ Homeschool Legal Defense Ass'n, *How to Comply With New York's Homeschool Law*, HSLDA (June 15, 2020), <https://perma.cc/69RW-FJMN>; Homeschool Legal Defense Ass'n, *How to Comply With New Jersey's Homeschool Law*, HSLDA (Aug. 15, 2020), <https://perma.cc/E3H4-WFRN>.

outcomes for children.¹⁵²

Another concern of increased regulation is the financial conflict of interest that arises for state and local governments.¹⁵³ While federal and state funding formulas for public education can be rather complex, the basic premise behind most formulas is that the funds public schools receive are directly proportional to the number of students enrolled in the school district.¹⁵⁴ Because of this, school districts could potentially be incentivized to increase homeschool regulations if it means less families would qualify or take the time to comply with such regulations, thus increasing public school enrollment and, in turn, increasing funding for local schools.¹⁵⁵ On the flip side, an increase in homeschooling results in a decrease in public school enrollment and consequently less funding.¹⁵⁶ Throughout the Covid-19 pandemic, declining enrollment in public schools, especially in large urban school districts where many families have pursued alternative forms of education, has presented funding concerns as federal and state funding formulas are highly dependent on enrollment numbers.¹⁵⁷ At the end of the day, this dilemma that many state and local governments face regarding incentives for increasing public school enrollment fails to acknowledge that other forms of education may best suit the needs of some children.¹⁵⁸ This is ultimately a question of who should wield control over a child's education—the parent or the state?¹⁵⁹

II. Deriving a Right to Homeschool from Federal Case Law

Currently, the U.S. Constitution provides no direct protections for homeschooling.¹⁶⁰ Some argue that the gap should be filled, while others argue that a correct understanding of the Tenth Amendment precludes the federal government from making laws regarding homeschooling, since that power has been delegated to the states.¹⁶¹ Federal case law, however,

¹⁵² See Woodruff, *supra* note 135.

¹⁵³ See Woodruff, *supra* note 135.

¹⁵⁴ See Hill, *supra* note 4.

¹⁵⁵ See Hill, *supra* note 4.

¹⁵⁶ See Hill, *supra* note 4.

¹⁵⁷ Victoria Lee, Emily Gutierrez & Kristin Blagg, *Declining School Enrollment Spells Trouble for Education Funding*, URB. INST. (Oct. 6, 2020), <https://perma.cc/83MC-9J69>.

¹⁵⁸ See Matthew Lynch, *3 Reasons America Needs School Choice*, THE ADVOCATE (June 7, 2016), <https://perma.cc/83RZ-ZC6E>.

¹⁵⁹ See Nick Hankoff, *Education Must Put Parents and Children First, Not Government Control*, THE ADVOCATES (last visited Mar. 10, 2022), <https://perma.cc/MU5N-QK7K>.

¹⁶⁰ Wolverton, *supra* note 20.

¹⁶¹ See Wolverton, *supra* note 20.

provides a strong foundation for extending a parent's right to direct their child's education not only as to public or private schools, but also to alternative forms of education such as homeschooling under, at least, two doctrinal grounds.¹⁶²

A. *Substantive Due Process*

In addition to the procedural protections (e.g. hearings, trials, etc.) guaranteed by the Fourteenth Amendment, the U.S. Supreme Court has come to recognize certain rights under the theory of substantive due process.¹⁶³ Over the years, the Court has constructed the framework for substantive due process and has developed it through a series of cases.¹⁶⁴ The rationale underpinning substantive due process is that some rights are so fundamental that regardless of the fairness of any procedural protections, those rights cannot be violated.¹⁶⁵ As discussed above, *Meyer* and *Pierce* together stand for the proposition that parents have the right to direct the education of their children.¹⁶⁶ The Court recognized this right as fundamental under the doctrine of substantive due process.¹⁶⁷

In the 1944 case of *Prince v. Massachusetts*, involving the conviction of a woman for the violation of child labor laws, the U.S. Supreme Court famously held 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.”¹⁶⁸ In a concurring opinion more than five decades later in *Washington v. Glucksberg*, Justice Souter declared that *Meyer* and *Pierce* are two “durable precursors of modern substantive due process.”¹⁶⁹ Just a few years later, Justice O'Connor, in her plurality opinion in *Troxel*, dealing with the scope of parental rights when at odds with visitation rights under state law, noted that “the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this court.”¹⁷⁰

¹⁶² Wolverton, *supra* note 20.

¹⁶³ See Timothy Sandefur, *Why Substantive Due Process Makes Sense*, CATO UNBOUND (Feb. 6, 2012), <https://perma.cc/3PK6-77UQ>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Erik M. Zimmerman, *Defending the Parental Right to Direct Education: Meyer and Pierce as Bulwarks Against State Indoctrination*, 17 REGENT U. L. REV. 311, 311 (2005).

¹⁶⁷ *Id.* at 313.

¹⁶⁸ 321 U.S. 158, 166 (1944).

¹⁶⁹ 521 U.S. 702, 761 (1997).

¹⁷⁰ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Justice O'Connor went on to explain that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."¹⁷¹

In light of these cases, it appears that denying parents the ability to homeschool their children would, in principle, be inconsistent with the broad deference the Supreme Court has granted to parents to direct the upbringing of their children.¹⁷² Moreover, denying the right to homeschool would appear to fundamentally undermine the established right of parents to direct the education of their children under the rubric of substantive due process.¹⁷³ Considering the long-standing history of homeschooling in America and the strong state protections that parents have come to rely on for several decades, it is unlikely that the Supreme Court could deny this right without casting serious doubt on several decades worth of jurisprudence and the resulting recognition of fundamental rights under substantive due process that might otherwise not receive any protection under federal law.¹⁷⁴ For these reasons, substantive due process provides a strong constitutional basis for recognizing a parent's right to homeschool.¹⁷⁵

B. *First Amendment: Freedom of Speech*

While some believe that *Yoder* provides a First Amendment right to homeschool under freedom of religion, many courts refuse to extend the holding of *Yoder* beyond the facts and circumstances of the Amish community.¹⁷⁶ While one could certainly attempt to use *Yoder* and the guarantee of the free exercise clause to argue for a federal right to homeschool, the free speech clause of the First Amendment provides a broader basis for protection.¹⁷⁷ Arguing for the right to homeschool as a religious matter under the free exercise clause, while a legitimate constitutional argument, is much too narrow to provide protection for families that choose to homeschool for non-religious reasons.¹⁷⁸ In 1993, the Supreme Court of Michigan decided two cases, each involving parents who

¹⁷¹ *Id.* at 66.

¹⁷² See Zimmerman, *supra* note 166, at 352.

¹⁷³ See Zimmerman, *supra* note 166, at 352.

¹⁷⁴ See Zimmerman, *supra* note 166, at 352.

¹⁷⁵ See Zimmerman, *supra* note 166, at 352.

¹⁷⁶ Raley, *supra* note 45, at 66.

¹⁷⁷ Jennifer Karinen, *Finding a Free Speech Right to Homeschool: An Emersonian Approach*, 105 GEO. L.J. 191, 193–94 (2016).

¹⁷⁸ *Id.* at 192–93.

challenged Michigan's strict homeschool requirement that parents obtain a teaching certification—one family won, and the other lost.¹⁷⁹ Ultimately, the DeJonges, a religious family, won their case because the court held that the state failed to show that requiring the parents to be certified to teach was the least restrictive means of achieving the state's interest in regulating homeschooling, thus violating the free exercise clause of the First Amendment.¹⁸⁰ In contrast, the Bennetts, a non-religious family, were not granted the same protection.¹⁸¹ The court held that they could not establish a fundamental right to homeschool on secular grounds (which would have triggered strict scrutiny), thus they failed to prove Michigan's certification requirement was unreasonable under the rational basis standard of review.¹⁸²

The free speech clause of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."¹⁸³ While the free exercise clause provides protection for religious families, much like in *Bennett*, it fails to provide a much broader protection for the growing demographic of non-religious homeschool families.¹⁸⁴ Thus, the free speech clause potentially provides a broader approach to establishing a constitutional right to homeschool.¹⁸⁵ It could be argued that homeschooling is expressive in nature through teaching, creating lesson plans, etc.¹⁸⁶ While this doctrinal approach has never been argued before the Supreme Court, it would allow homeschooling to be viewed through the lens of free speech, thus achieving First Amendment protection.¹⁸⁷ As such, homeschooling would be subject to strict scrutiny for content-based regulation or intermediate scrutiny for content-neutral regulation.¹⁸⁸

C. Federal Versus State Protections

Recognizing that current federal protections for homeschooling are not strong and require extending the logic behind a series of cases decided by the Supreme Court, some proponents have advocated amending the U.S.

¹⁷⁹ *Id.* at 192.

¹⁸⁰ *People v. DeJonge*, 501 N.W.2d 127, 140–41 (Mich. 1993).

¹⁸¹ *Karinen*, *supra* note 177, at 192.

¹⁸² *People v. Bennett*, 501 N.W.2d 106, 111–12 (Mich. 1993).

¹⁸³ U.S. CONST. amend. I.

¹⁸⁴ *See* 501 N.W.2d at 111.

¹⁸⁵ *See Karinen*, *supra* note 177, at 200.

¹⁸⁶ *Karinen*, *supra* note 177, at 200.

¹⁸⁷ *Karinen*, *supra* note 177, at 213.

¹⁸⁸ *Karinen*, *supra* note 177, at 213.

Constitution to guarantee parents the right to homeschool.¹⁸⁹ Since the United States is the only eligible country that has not yet ratified the United Nations' Convention on the Rights of the Child, some fear that, if ratified, the treaty could transfer control over the parent-child relationship from state to federal to international control, thereby preempting state homeschooling laws.¹⁹⁰ In light of this risk, homeschool proponents advocate a constitutional amendment that calls for the establishment of defined parental rights which guarantee the liberty of parents to direct the upbringing, education, and care of their children, thus codifying the federal right of parents to choose private schools, religious schools, or home education for their children.¹⁹¹ Procedurally, a constitutional amendment requires the approval of two-thirds of the House of Representatives, two-thirds of the Senate, and three-quarters of state legislatures.¹⁹² While such an amendment would undoubtedly resolve the constitutional ambiguity of homeschooling, the political bipartisanship and willpower needed to approve such a proposal simply does not exist at this point in time.¹⁹³

While some support a constitutional amendment, others recognize homeschooling as an important form of education but support it only on policy grounds, refusing to infer a right to homeschool citing Tenth Amendment concerns.¹⁹⁴ Although some in the legal community fundamentally disagree with recognizing a federal right to homeschool, state courts such as the Court of Appeals in Georgia have attempted to establish homeschooling as a parental right.¹⁹⁵ In 2018, the Georgia Court of Appeals took up an appeal of a divorced mother contesting a contempt order pursuant to a parenting plan.¹⁹⁶ The trial court had ordered the mother to enroll her youngest child in private school which was in direct conflict with her desire to homeschool the child.¹⁹⁷ The appeals court held that the lower

¹⁸⁹ E.g., Jennifer L. Sabourin, Note, *Parental Rights Amendments: Will a Statutory Right to Parent Force Children to "Shed Their Constitutional Rights" at the Schoolhouse Door?*, 44 WAYNE L. REV. 1899, 1899-1900 (1999).

¹⁹⁰ Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, THE ATL. (May 2, 2017), <https://perma.cc/YEL8-FZJQ>.

¹⁹¹ Sabourin, *supra* note 189, at 1899.

¹⁹² Brenda Erickson, *Amending the U.S. Constitution*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 2017), <https://perma.cc/JHX6-AX7N>.

¹⁹³ See Jesse Rikfin, *Proposed Constitutional Amendment Would Enshrine Parental Rights in the Constitution*, GOVTRACK INSIDER (Feb. 4, 2019), <https://perma.cc/W94N-XMSU>.

¹⁹⁴ E.g., Wolverton, *supra* note 20.

¹⁹⁵ Wolverton, *supra* note 20.

¹⁹⁶ *Borgers v. Borgers*, 820 S.E.2d 474, 476 (Ga. Ct. App. 2018).

¹⁹⁷ *Id.* at 474.

court exceeded its authority by overriding the mother's decision to homeschool her child.¹⁹⁸ In a passionate concurrence, Judge Dillard, the chief judge of the Georgia Court of Appeals, argued that a parent's right to the care, custody, and control of their child encompasses the right to make decisions about a child's education, including the choice to homeschool.¹⁹⁹ Judge Dillard declared "[t]here is little question . . . that parents have a fundamental right under the United States and Georgia Constitutions to homeschool their children."²⁰⁰ While Judge Dillard represents a minority position, his concurrence in *Borgers* nevertheless supports a simple, logical contention: if the parents have the right to direct the education of their children, then they should naturally have the right to choose what type of education their children will receive.²⁰¹

D. Positive Rights Theory

While it is important to understand how various constitutional doctrines could be applied to protect homeschooling as a parental right, it is also important to understand how potential changes in related areas of the law could create unintended consequences that undermine freedom of choice in education.²⁰² One example is the theory of positive rights.²⁰³ The Fourteenth Amendment forbids states from depriving "any person of life, liberty, or property, without due process of law."²⁰⁴ Historically, many scholars characterized the Fourteenth Amendment as a provision of negative rights, which in the educational context, prevents the government from infringing on or interfering with a parent's right to direct the education of his or her child.²⁰⁵ Others, however, believe that the Fourteenth Amendment's language should also grant positive rights, such as providing the right to a basic education.²⁰⁶ While this theory has not been successfully argued before the United States Supreme Court, in 2020, the Sixth Circuit Court of Appeals

¹⁹⁸ *Id.* at 478.

¹⁹⁹ *Id.* at 479.

²⁰⁰ *Id.* at 481.

²⁰¹ *See id.* at 480–81.

²⁰² *See generally, e.g.,* Alexis Piazza, *The Right to Education After Obergefell*, 43 N.Y.U. REV. L. & SOC. CHANGE 62, 78 (2019).

²⁰³ *Id.*

²⁰⁴ U.S. CONST. amend. XIV.

²⁰⁵ *See Piazza, supra* note 202, at 78.

²⁰⁶ James Mason, *Sixth Circuit "Right-to-Public-Education" Appeal Dismissed*, HOMESCHOOL LEGAL DEF. ASS'N (June 16, 2020), <https://perma.cc/W8PG-4MUV>.

took up this issue in *Gary B. v. Whitmer*.²⁰⁷ The plaintiffs, students from several of Detroit's worst performing public schools, claimed that the poor condition of the schools, including missing and unqualified teachers, physically dangerous facilities, and inadequate books and materials, violated their constitutional right to be provided a basic minimum education under the Fourteenth Amendment.²⁰⁸ As a matter of first impression, the Sixth Circuit initially held that the Fourteenth Amendment provided students with a fundamental right to a basic education, but in a later en banc hearing, the court vacated that decision.²⁰⁹

While at first glance the original Sixth Circuit decision to recognize a fundamental right to a minimum education for inner city students in terribly-run public schools seems reasonable, the positive rights theory advanced by the plaintiffs would have created significant legal threats to homeschooling.²¹⁰ This is because, under the theory of positive rights, some scholars argue that the United States should recognize basic rights for children as many other countries have done, thus imposing a mandate for the federal government to provide each child with a basic minimum education.²¹¹ Homeschool proponents, however, are concerned that recognizing the positive rights theory would fundamentally restructure the responsibilities of government and parents to children and their education.²¹² As a result, the government would have the legal responsibility for providing children with an education, thus the government's duty to educate could be in conflict with and ultimately extinguish a parent's right to homeschool.²¹³

III. Homeschooling Internationally

While on the whole, the United States maintains a favorable disposition towards homeschooling, Professor Bartholet points out that many other countries have either highly restricted homeschooling or banned it altogether.²¹⁴ Germany enforces a strict ban on homeschooling (outside of a few narrow exceptions) which has been upheld by federal courts.²¹⁵ The

²⁰⁷ 957 F.3d 616, 621 (6th Cir. 2020).

²⁰⁸ *Id.* at 620–21.

²⁰⁹ See Mason, *supra* note 206.

²¹⁰ Mason, *supra* note 206.

²¹¹ Bartholet, *supra* note 3, at 62.

²¹² See Mason, *supra* note 206.

²¹³ See Mason, *supra* note 206.

²¹⁴ Bartholet, *supra* note 3, at 63.

²¹⁵ Bartholet, *supra* note 3, at 63.

German government justifies its ban on homeschooling by arguing that it has an interest in avoiding parallel societies based on diverse philosophical values and encouraging integration of minorities into German society.²¹⁶ In 2013, the Wunderlich family's four children were seized from their home in Darmstadt, Germany by government officials after the parents refused to send the children to public or private school, instead opting to homeschool them.²¹⁷ The head of the region's youth services department stated that the children were taken into care in order to guarantee their right to education.²¹⁸ The parents brought their case before the European Court of Human Rights arguing that their right to respect for private and family life under Article 8 of the European Convention on Human Rights had been breached.²¹⁹ The court ruled against the Wunderlichs, declaring that the actions by the government were reasonable because officials were justified in assuming that the parents had endangered the children since homeschooling caused them to be isolated.²²⁰ The Wunderlichs attempted to appeal their case to the Grand Chamber of the European Court of Human Rights (the highest court of law), but it declined to hear the case.²²¹

Currently in France, homeschooling is allowed but strict regulations require parents to register as home educators in their local school districts and must undergo inspections to evaluate the curriculum they are teaching.²²² Under French law, parents are permitted to homeschool for religious or social reasons.²²³ In response to several recent incidents of Islamic radicalism, however, France is attempting to root out separatism in its society by proposing new regulations that would eliminate the religious right to homeschool and require parents to enroll their children over the age of three in public schools.²²⁴

²¹⁶ Bartholet, *supra* note 3, at 63.

²¹⁷ BBC News, *Home Education: Court Rules Against German Christian Family*, (Jan. 10, 2019), <https://perma.cc/TCH4-VMYT>; see also BBC News, *German Home-schooled Children Taken into Care*, (Sept. 3, 2013), <https://perma.cc/CY9D-EGPU>.

²¹⁸ *German Home-schooled Children Taken Into Care*, *supra* note 217.

²¹⁹ *Home Education: Court Rules Against German Christian Family*, *supra* note 217.

²²⁰ See *Home Education: Court Rules Against German Christian Family*, *supra* note 217.

²²¹ David Rising, *European Court Rejects German Couple's Home-schooling Appeal*, ABC NEWS (Jan 10, 2019), <https://perma.cc/U6FZ-XH85>; Int'l Justice Resource Center, *European Court of Human Rights*, <https://perma.cc/Q3VZ-59DJ> (last visited July 10, 2022).

²²² Jane Hanks, *France Home-school Ban: Conditions May Be Relaxed*, THE CONNEXION (Dec. 9, 2020), <https://perma.cc/XQK9-G9RT>.

²²³ *Id.*

²²⁴ Elaine Ganley, *France Bans Homeschooling in Sweeping Anti-Islamist Reforms*, THE SYDNEY MORNING HERALD (Dec. 10, 2020, 6:50 AM AEST), <https://perma.cc/J4SN-UD52>.

Although some claim that the United States should follow in suit with other European countries in recognizing that children have a right to a government-provided education, the position countries like Germany have taken and France is now taking to ban homeschooling is adverse to the values enshrined in the United States Constitution guaranteeing individual rights.²²⁵ Moreover, American case law has rejected positive rights theory in favor of encouraging and protecting the individual rights of Americans to direct their own lives.²²⁶ The Declaration of Independence guarantees Americans the right to life, liberty and the pursuit of happiness.²²⁷ Embracing a new positive rights theory in the context of education will lead to a uniform, inflexible system of education managed by the federal government, representing a shift away from the freedom that parents in America have long enjoyed to determine the best form of education for their own children.²²⁸ In his concurring opinion in *Borgers*, Judge Dillard, in describing the parent-child relationship, argued that “[t]he constitutional right of familial relations is not provided by government; it preexists government. Indeed, this ‘cherished and sacrosanct right is not a gift from the sovereign; it is our natural birthright. Fixed. Innate. Unalienable.’”²²⁹

CONCLUSION

Education is arguably one of the most important pillars of a well-functioning society, yet the topic engenders much controversy.²³⁰ Among the various methods of education, homeschooling remains one of the most controversial.²³¹ Today, the number of children who are being homeschooled in America is rapidly growing and has risen to the forefront of public discussion in the wake of the COVID-19 pandemic.²³² While all fifty states recognize homeschooling as a legitimate form of education that satisfies compulsory state schooling laws, the United States Constitution grants no

²²⁵ See Michael Donnelly, *Professor Bartholet Wrong on International Law*, HOMESCHOOL LEGAL DEF. ASS’N. (June 19, 2020), <https://perma.cc/G33P-N7Z4>.

²²⁶ See Tibor R. Machan, *The Perils of Positive Rights*, FOUND. FOR ECON. EDUC. (Apr. 1, 2001), <https://perma.cc/ZYF7-3LVB>.

²²⁷ Donnelly, *supra* note 225.

²²⁸ See Donnelly, *supra* note 225.

²²⁹ *Borgers v. Borgers*, 820 S.E.2d 474, 482 (Ga. Ct. App. 2018).

²³⁰ See Hill, *supra* note 4.

²³¹ See Erin O’Donnell, *The Risks of Homeschooling*, HARVARD MAGAZINE (May-June 2020), <https://perma.cc/XSR8-3S6R>.

²³² Valerie Bauerlein, *Covid-19 Pandemic Pushes More Parents to Go All-In for Home Schooling*, WALL ST. J. (Jan. 31, 2021), <https://perma.cc/2DXE-725V>.

explicit parental right to homeschool.²³³ The Supreme Court, however, has established a bedrock of case law and doctrinal approaches to support such a right under the First and Fourteenth Amendments.²³⁴ In light of this legal history, banning homeschooling is inconsistent with the values set forth in the United States Constitution and many years of established case law.²³⁵ A presumptive ban presents significant legal and practical challenges for those parents who are most interested in providing the best education for their children, but will be handicapped from doing so.²³⁶ Ultimately, preserving freedom of choice for families to homeschool is about protecting the rights of responsible parents who are in the best position to make decisions regarding the educational needs of their children.²³⁷

²³³ David Wagner, *Homeschooling as a Constitutional Right: A Close Look at Meyer and Pierce and the Lochner-Based Assumptions They Made About State Regulatory Power*, 39 OKLA. CITY U. L. REV. 385, 385–87 (2014).

²³⁴ See Raley, *supra* note 45, at 6–63.

²³⁵ Erin Hawley, *Why Banning Homeschooling is an Idiotic and Unconstitutional Idea*, THE FEDERALIST (April 24, 2020), <https://perma.cc/5ZUH-TRNU>.

²³⁶ See Weller, *supra* note 74.

²³⁷ *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”).