

# Parent, Child, and State: Regulation in a New Era of Homeschooling

Lawson B. Hamilton\*

## ABSTRACT

With the explosive growth of homeschooling in the wake of the COVID-19 pandemic and cultural debates over school curriculum, greater public scrutiny of the practice is coming. What it will reveal is a fundamental divide not only over the law and efficacy of homeschooling but also the nature of parental rights. The academic debate over homeschooling, however, is not new. Critics of home education have long called for more stringent regulation of the practice and recently for its presumptive ban while advocates argue homeschooling should be recognized as a parent's fundamental right.

This Article adopts a novel approach by arguing that the question of how homeschooling should be regulated ultimately depends on the bounds of parental versus state rights over children. The philosophical foundations of *Troxel v. Granville*, the Court's most recent parental rights case, suggest an answer: states should recognize the weighty interests of parents in their children's education by affirming the pre-political status of parental rights. Under that standard, states should adopt a presumption of legitimate homeschooling while addressing the reasonable concerns of homeschooling's critics by increasing parents' accountability for their children's education.

---

\* Lead Articles Editor, Texas Tech Law Review, Vol. 55; J.D. Candidate, May 2023, Texas Tech University School of Law; M.A., Philosophy, 2020, Texas Tech University; B.S., Political Science, 2017, Texas A&M University. Special thanks to Dean Jack Wade Nowlin and Professor DeLeith Gossett for their comments, guidance, and support. Thanks also to Professor Jamie Baker and the staff of the Texas Tech Law Review—especially Ashley Wilde, Rebecca Brogan, and Xenna Davis. I am also very grateful to Dean S. Ernie Walton of Regent University School of Law, Tim Lambert and Jeremy Newman of the Texas Homeschool Coalition, and Professor Justin Tosi for their encouragement and willingness to discuss these issues with me. Finally, thank you to Lucchese Hamilton to whom I owe so much.

## TABLE OF CONTENTS

|                                                                                                                            |    |
|----------------------------------------------------------------------------------------------------------------------------|----|
| INTRODUCTION                                                                                                               | 47 |
| I. CONTOURS OF THE HOMESCHOOLING DEBATE                                                                                    | 50 |
| A. Why Homeschooling is Controversial                                                                                      | 51 |
| B. The Factual Debate                                                                                                      | 52 |
| C. The Legal Debate                                                                                                        | 54 |
| 1. <i>Supreme Court Precedent</i>                                                                                          | 55 |
| 2. <i>State Regulation</i>                                                                                                 | 57 |
| II. WHY HOMESCHOOLING SHOULD NOT BE BANNED: THE FACTS AND THE LAW                                                          | 61 |
| A. Addressing the Factual Debate: The Evidence Does Not Warrant a Ban                                                      | 61 |
| B. Addressing the Legal Debate: Homeschooling Warrants at Least Intermediate Scrutiny                                      | 63 |
| III. WHY HOMESCHOOLING SHOULD NOT BE BANNED: THE PHILOSOPHICAL FOUNDATIONS OF <i>TROXEL V. GRANVILLE</i>                   | 66 |
| A. Parental Rights are Pre-Political                                                                                       | 66 |
| B. Principles for Regulation: Basic Needs vs. Best Interests                                                               | 70 |
| IV. A PRESUMPTION OF LEGITIMATE HOMESCHOOLING BEST CONFORMS WITH THE CONSTITUTIONAL STANDING AND NATURE OF PARENTAL RIGHTS | 73 |
| A. The Presumption of Legitimate Homeschooling                                                                             | 73 |
| B. The Presumption of Legitimate Homeschooling Satisfies Intermediate Scrutiny                                             | 76 |
| V. LEGISLATIVE PROPOSALS: STATES SHOULD ADDRESS THE REASONABLE CONCERNS OF CRITICS WHILE UPHOLDING THE RIGHT TO HOMESCHOOL | 78 |
| A. States Must Forego and Repeal Regulations of Homeschooling which Fail to Satisfy Intermediate Scrutiny                  | 78 |
| B. Legislative Proposals Balancing Parent, Child, and State Interests                                                      | 80 |
| VI. CONCLUSION                                                                                                             | 84 |

## INTRODUCTION

*“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.”<sup>1</sup>*

In 2020, the number of American schoolchildren educated at home more than doubled, from 5.4% in the spring of 2020 to 11.1% by October of that year.<sup>2</sup> The immediate explanation for this dramatic growth was the onset of the COVID-19 pandemic and the school closures that followed.<sup>3</sup> Even after public schools reopened, however, the number of children educated at home continued to increase.<sup>4</sup> Multiple explanations for the sustained growth of homeschooling are plausible.<sup>5</sup> One explanation is that after a year of hybrid education from home, some parents found that homeschooling was both more possible and desirable than they had imagined.<sup>6</sup> Another is that school closures brought greater scrutiny to the American public school system, leading to the fights over curricular content that dominated much of public debate through the summer and fall of 2021.<sup>7</sup>

Whatever the reasons for its growth, as homeschooling continues to increase, diversify, and become a more mainstream educational option,

---

1. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (Rutledge, J.).

2. Casey Eggleston & Jason Fields, *Homeschooling on the Rise During COVID-19 Pandemic*, U.S. CENSUS BUREAU (March 22, 2021), <https://www.census.gov/library/stories/2021/03/homeschooling-on-the-rise-during-covid-19-pandemic.html>.

3. *See id.*

4. *See* Steven Duvall, *Homeschooling Continues to Grow in 2021*, HSLDA (July 7, 2021), <https://hsllda.org/post/homeschooling-continues-to-grow-in-2021>.

5. *See infra* notes 6–7 and accompanying text (suggesting reasons for the recent sustained growth of homeschooling).

6. Erica Pandey, *Homeschooling Reaches Critical Mass*, AXIOS (Aug. 31, 2021), <https://www.axios.com/homeschooling-pandemic-critical-mass-013e4f01-c962-4e38-8cb7-8079bb597540.html>.

7. *See* Jeremy Barr, *Critical Race Was the Hot Topic on Fox News this Summer. Not So Anymore*, WASH. POST (Oct. 6, 2021, 3:56 PM), <https://www.washingtonpost.com/media/2021/10/06/fox-news-critical-race-theory/>; Tyler Kingkade et al., *Critical Race Theory Invades School Boards – With Help from Conservative Groups*, NBC NEWS (June 15, 2021, 3:30 AM), <https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794>.

it is likely to draw greater public and legislative attention.<sup>8</sup> Scrutiny of homeschooling, however, is not new.<sup>9</sup> Homeschooling has long been controversial, and legal scholars regularly advocate increased regulation of the practice.<sup>10</sup> The most prominent recent example of this trend is Professor Elizabeth Bartholet's 2020 article calling for a presumptive ban on homeschooling and the response it drew, including Professor S. Ernie Walton's argument that parents have a fundamental right to homeschool.<sup>11</sup>

Two deep and persistent disagreements animate the debate over homeschooling.<sup>12</sup> First is the factual question of whether homeschooling is good or bad for children in terms of freedom from abuse, academic achievement, and preparedness for modern economic and democratic life in comparison to public schooled peers.<sup>13</sup> How one answers this factual question tends to dictate how one answers the second, legal question, which is the extent to which homeschooling can and should be regulated.<sup>14</sup>

---

8. See, e.g., Emma Green, *The Pandemic Has Parents Fleeing from Schools—Maybe Forever*, ATLANTIC (Sept. 13, 2020), <https://www.theatlantic.com/politics/archive/2020/09/homeschooling-boom-pandemic/616303/>. See generally MEGHAN MCQUIGGAN & MAHI MEGRA, NAT'L CTR. EDUC. STAT., PARENT AND FAMILY INVOLVEMENT IN EDUCATION: RESULTS FROM THE NATIONAL HOUSEHOLD EDUCATION SURVEYS PROGRAM OF 2016 (2017).

9. See, e.g., Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 124 (2008); Robin L. West, *The Harms of Homeschooling*, 29 PHIL. & PUB. POL'Y Q. 7, 9 (2009); Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. 991, 991 (2010); Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children's Interests*, 46 U. BALT. L. REV. 57, 59–60 (2016); JAMES G. DWYER & SHAWN F. PETERS, HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE 67–68 (2019); Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 3–4, 73–74 (2020); Vivian E. Hamilton, *Home, Schooling, and State: Education in, and for, A Diverse Democracy*, 98 N.C. L. REV. 1347, 1391–93 (2020).

10. See Yuracko, *supra* note 9, at 124; West, *supra* note 9, at 9; Ross, *supra* note 9, at 991; Fineman & Shepherd, *supra* note 9, at 59–60; DWYER & PETERS, *supra* note 9, at 67–68; Bartholet, *supra* note 9, at 73–74; Hamilton, *supra* note 9, at 1391–93.

11. See generally Bartholet, *supra* note 9; Patrick J. Wolf et al., *Harvard Law Professor's Attack on Homeschooling Is a Flawed Failure. And Terribly Timed, Too.*, EDUC. NEXT (May 5, 2020), <https://www.educationnext.org/harvard-law-professors-attack-on-homeschooling-flawed-failure-terribly-timed/>; S. Ernie Walton, *The Fundamental Right to Homeschool: A Historical Response to Professor Bartholet*, 25 TEX. REV. OF L. & POL. 377 (2021).

12. See Bartholet, *supra* note 9, at 20–42.

13. See *id.* at 20–26.

14. See *id.* at 27–42.

Underlying the factual and legal questions surrounding homeschooling is a more foundational disagreement over the nature and source of parental rights.<sup>15</sup> Those who endorse a view of parental rights as coming from outside the realm of state power tend to endorse homeschooling as a legitimate educational option, while those who believe parental rights ultimately flow from the state tend to view homeschooling as suspect.<sup>16</sup> While critics of homeschooling often frame their position in terms of children's rights, they do not advocate minor children make their own educational decisions.<sup>17</sup> In effect, then, the question becomes who should have primary authority over and responsibility for children—parents or the state.

This Article argues on the basis of American political history and jurisprudence, particularly the Supreme Court's most recent parental rights case of *Troxel v. Granville*, that parents' rights to direct the upbringing of their children, including their education, are superior to state power.<sup>18</sup> The state's proper role, then, is as a failsafe against parents to ensure children receive their basic needs, including an adequate education.<sup>19</sup> With that framework in mind, this Article proposes that when parents choose to homeschool, states should presume that those parents are doing so for legitimate reasons and are providing an adequate education.<sup>20</sup> This presumption, and the proposed procedure for rebutting it, therefore, offers an answer to the question of how best to regulate homeschooling that affirms the state's interest in seeing children receive an adequate education while upholding the primary role of parents in directing children's education.<sup>21</sup>

Part II of this Article considers why homeschooling is controversial and synthesizes the factual and legal questions that animate the debate over homeschooling.<sup>22</sup> Part III addresses the legal and factual debates

---

15. See *infra* Section III.A (discussing the philosophical divide underlying the dispute between advocates and critics of homeschooling).

16. See *infra* Section III.A (arguing parental rights are pre-political).

17. See, e.g., Hamilton, *supra* note 9, at 1379.

18. See *infra* Section III.A (arguing parental rights are pre-political).

19. See *infra* Section III.B (describing the state's proper role as failsafe against parental neglect).

20. See *infra* Section IV.A (arguing for a presumption of legitimate homeschooling).

21. See *infra* Part IV (arguing for a presumption of legitimate homeschooling and articulating how it is the correct accommodation of parental rights).

22. See *infra* Part I (describing the contours of the homeschooling debate).

and argues that neither the caselaw nor empirical evidence justify the kinds of bans on homeschooling its critics propose.<sup>23</sup> Part IV then suggests another reason that homeschooling should not be banned: that parental rights, including the right to direct the education of one's children, are superior to the state's interest in ensuring children receive a minimally adequate education.<sup>24</sup> In light of the previous discussion, Part V argues that states should adopt a presumption of legitimate homeschooling under which parents are legally presumed to comply with state educational laws and places the burden on the state to prove otherwise.<sup>25</sup> Finally, Part VI offers legislative proposals that respond to the reasonable concerns of homeschooling's critics in line with the presumption of legitimate homeschooling.<sup>26</sup>

## I. CONTOURS OF THE HOMESCHOOLING DEBATE

The history of American homeschooling is tumultuous.<sup>27</sup> Once the primary method of education, homeschooling ebbed as public education rose until it was functionally outlawed by compulsory attendance laws in the nineteenth century.<sup>28</sup> In the 1950s, however, dissatisfaction with the perceived stifling conformism of traditional public schools inspired a small progressive homeschooling movement.<sup>29</sup> By the 1980s and '90s, the tide began to turn again as the homeschooling movement, now dominated by Christian conservatives, successfully pursued state-level legal action to re-legitimize homeschooling.<sup>30</sup> Today, homeschooling is legal in some form in all fifty states.<sup>31</sup>

---

23. See *infra* Part II (discussing why neither the facts nor precedent justify effective bans on homeschooling).

24. See *infra* Part III (outlining philosophical and precedential reasons why homeschooling should not be banned).

25. See *infra* Part IV (arguing for a presumption of legitimate homeschooling).

26. See *infra* Part V (proposing reforms to address the reasonable concerns of critics' consonant with the presumption of legitimate homeschooling).

27. DWYER & PETERS, *supra* note 9, at 108.

28. See Anthony Barone Kolenc, *Legal Issues in Homeschooling*, in THE WILEY HANDBOOK OF EDUCATION 60 (Milton Gaither ed., 2016); DWYER & PETERS, *supra* note 27, at 60 ("Throughout the first three-quarters of the twentieth century, most states' compulsory school attendance laws made no provision for homeschooling, making the practice seemingly illegal in most communities.").

29. Yuracko, *supra* note 9, at 125–26.

30. DWYER & PETERS, *supra* note 9, at 66–71.

31. See Timothy Brandon Waddell, *Bringing It All Back Home: Establishing A Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541, 543 (2010); Yuracko, *supra* note 9, at 124.

## A. Why Homeschooling is Controversial

Despite its legal victories and growing popularity, homeschooling remains a controversial practice.<sup>32</sup> This raises the question: why would anyone choose to homeschool? There are at least three theoretical reasons.<sup>33</sup> First, homeschooling allows parents to ensure that their children's school environment is safe.<sup>34</sup> Second, it enables parents to tailor curriculum and instructional methods to the specific needs and talents of their children.<sup>35</sup> Finally, it gives parents an opportunity to be especially involved in their children's upbringing, including their moral and religious education, and to develop a particularly strong parent-child bond.<sup>36</sup>

For each of these potential upsides to homeschooling, however, others see hazardous alternatives.<sup>37</sup> First, homeschooling enables parents to isolate their children in a way that allows for abuse and neglect to go undetected.<sup>38</sup> Second, the same flexibility that permits parents to provide their children with an especially good education could enable parents to neglect their children's education or to teach radical or false ideas.<sup>39</sup> Finally, homeschooling may allow parents to deny their children an "open future"—meaning the ability to make meaningful life-choices for themselves.<sup>40</sup>

Because neither the value nor the harms of homeschooling can be settled on purely theoretical grounds, both sides typically turn to empirical arguments about the practical reality of homeschooling to justify their conclusions.<sup>41</sup>

---

32. DWYER & PETERS, *supra* note 9, at 108–09.

33. MCQUIGGAN & MEGRA, *supra* note 8, at 19.

34. *Id.*

35. *Id.*

36. See Thomas Spiegler, *Parent's Motives for Home Education: The Influence of Methodological Design and Social Context*, 3 INT'L ELEC. J. ELEMENTARY EDUC. 57–70 (2010).

37. *E.g.*, Bartholet, *supra* note 9, at 3–4.

38. *Id.* at 3.

39. Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 82 (2002); Bartholet, *supra* note 9, at 57.

40. Bartholet, *supra* note 9, at 6.

41. See *infra* Section II.A (surveying the empirical evidence on homeschooling).

## B. The Factual Debate

*Motivation.* The most recent report from the National Center for Education Statistics (NCES)<sup>42</sup> found that for 34% of homeschooling parents, the most important reason for educating at home was dissatisfaction with their children's public school environment, including safety, exposure to drugs, and negative peer pressure.<sup>43</sup> A further 17% of respondents chose dissatisfaction with academic instruction at other schools, and 16% chose a desire to provide religious instruction.<sup>44</sup> When allowed to select more than one important reason, 80% cited concerns about school environment, 67% chose a desire to provide moral instruction, 61% selected dissatisfaction with academics at other schools, and 51% chose a desire to provide religious instruction.<sup>45</sup> Finally, 34% of respondents chose to homeschool due to their children's special physical or mental health needs.<sup>46</sup>

*Academic Outcomes.* In their comprehensive survey of homeschooling studies for the International Center for Home Education Research (ICHER), researchers Robert Kunzman and Milton Gaither identify two general themes related to the academic achievements of homeschoolers.<sup>47</sup> First, they find that after controlling for family background variables, "homeschooling actually does not have that much of an effect on student achievement," either positively or negatively.<sup>48</sup> Second, they report that homeschooling tends to improve students' verbal skills while somewhat limiting their mathematical capabilities, though they can only speculate as to the reasons behind that finding.<sup>49</sup>

While a recent study found that homeschoolers were 23% less likely to attend college than public schooled peers,<sup>50</sup> studies also indicate that those homeschoolers who do attend college tend to outperform public

---

42. See generally *About Us*, U.S. DEP'T EDUC.: NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/about/> (last visited Jan. 28, 2022).

43. MCQUIGGAN & MEGRA, *supra* note 8, at 19.

44. *Id.*

45. *Id.*

46. *Id.*

47. Robert Kunzman & Milton Gaither, *Homeschooling: A Comprehensive Survey of the Research*, 9 OTHER EDUC.: J. EDUC. ALTERNATIVES 253, 270, 272 (2020).

48. *Id.* at 270.

49. *Id.* at 272.

50. Ying Chen et al., *School Types in Adolescence and Subsequent Health and Well-Being in Young Adulthood: An Outcome-Wide Analysis*, 16 PLOS ONE 1, 6–7 (2021).



schooled peers with similar backgrounds, are significantly more involved in campus leadership, and show no significant differences from peers in graduation and retention rates or financial literacy.<sup>51</sup>

*Child Welfare.* Synthesizing existing studies, Kunzman and Gaither conclude that there are no significant differences in diet, exercise, or physical health of homeschoolers compared to public schooled peers.<sup>52</sup> They found that homeschoolers reported lower to comparable levels of anxiety and depression than peers.<sup>53</sup> Finally, they acknowledged that, “[t]he ability for homeschoolers to more easily hide abuse is a commonly raised concern,” and referenced a study of six Connecticut school districts which found that 36% of parents who withdrew students to homeschool were reported for suspected abuse at least once.<sup>54</sup> Nevertheless, they cautioned that published empirical studies exploring a relationship between homeschooling and child abuse are limited.<sup>55</sup>

*Socialization, Values, and Engagement.* In terms of inter-personal social skills, the results are mixed. For example, in one study of long-term outcomes, former homeschoolers reported that being homeschooled had in no way disadvantaged them and “[m]ay have in fact contributed to a strong sense of independence and self-determination.”<sup>56</sup> However, the Cardus Education Survey, which included a small but randomly selected set of homeschoolers, found that religious homeschoolers expressed less clarity about their goals, lower efficacy in dealing with life problems, and higher rates of divorce.<sup>57</sup> On the other hand, the authors of the same study that found homeschoolers are less likely to attend college commented that their data indicated “home-schooled children generally develop into well-adjusted,

---

51. Kunzman & Gaither, *supra* note 47, at 273–74.

52. *Id.* at 286.

53. *Id.*

54. *Id.* at 287.

55. *Id.* But see *Studies of Abuse & Neglect*, CRHE, <https://responsiblehomeschooling.org/research/studies-of-abuse-neglect/> (last visited Jan. 28, 2022) (cataloguing mostly unpublished studies on abuse and neglect relevant to homeschooling).

56. Kunzman & Gaither, *supra* note 47, at 277–78.

57. *Id.* at 279 (citing Ray Pennings et al., *Cardus Education Survey*, CARDUS (2011)).

responsible and socially engaged young adults,” and noted that homeschooling is associated with greater well-being.<sup>58</sup>

In terms of value-formation, “[t]he most empirically compelling data . . . suggests that parents’ religious commitments are far more significant in shaping the religiosity of their children than the method of schooling that their children experience.”<sup>59</sup> Further, a study that asked a group of Christian homeschoolers and a group of public schooling parents in the same geographic area whether “I want my child to decide for him/herself what values to believe in” found no statistical difference in responses between the groups.<sup>60</sup>

Finally, in terms of civic engagement, the empirical results are again mixed.<sup>61</sup> Some studies have found that homeschoolers are less likely to volunteer or become actively engaged in politics and public affairs.<sup>62</sup> Others reach virtually the opposite conclusion, finding formerly homeschooled adults vote at higher rates and are more likely to volunteer with a civic organization than their peers.<sup>63</sup>

### C. The Legal Debate

While regulation of education is a traditional police power of the states, such regulation may not infringe constitutional liberty rights.<sup>64</sup> For that reason, the focus of much of the legal debate over homeschooling has been Supreme Court precedent interpreting the line between parents’ rights to raise their children and the state’s right to regulate education.<sup>65</sup>

---

58. Brendan Case & Ying Chen, *What Home-Schoolers Are Doing Right*, WALL ST. J. (Nov. 10, 2012 5:12 PM), <https://www.wsj.com/articles/home-schoolers-schooling-are-doing-right-education-parents-bartholet-harvard-parenting-11636577345>.

59. Kunzman & Gaither, *supra* note 47, at 282.

60. Skylar T. Kingston & Richard Medlin, *Empathy, Altruism, and Moral Development in Home Schooled Children*, 16 HOME SCH. RSCH. 1, 5 (2005).

61. See J.P. Hill & K.R. den Dulk, *Religion, Volunteering, and Educational Setting: The Effect of Youth Schooling Type on Civic Engagement*, 52 J. SCI. STUDY RELIGION, 179–97 (2013); BRIAN D. RAY, HOME EDUCATED AND NOW ADULTS: THEIR COMMUNITY AND CIVIC INVOLVEMENT, VIEWS ABOUT HOMESCHOOLING, AND OTHER TRAITS xv–xvi (2004); Chen et al., *supra* note 50, at 1.

62. Hill & den Dulk, *supra* note 61, at 188.

63. RAY, *supra* note 61, at xv–xvi; Chen et al., *supra* note 50, at 1.

64. See *Berman v. Parker*, 348 U.S. 26, 33 (1954).

65. See *infra* Section I.C.1 (discussing Supreme Court precedent relevant to parental rights).

### 1. Supreme Court Precedent

The Supreme Court has never spoken directly to the question of homeschooling.<sup>66</sup> The result has been uncertainty as its constitutional standing, with the legal debate focusing on the proper interpretation of a relatively small canon of parental rights cases.<sup>67</sup> These cases span nearly 100 years of American history and do not give a direct answer to the critical question of what level of judicial scrutiny regulations of homeschooling will receive.<sup>68</sup> Nevertheless, several important themes emerge from existing precedent, including that parental rights are fundamental rights, but that the state has the right to require every child to attend some kind of school.<sup>69</sup>

*Parental rights, including the right to direct the education of children, are fundamental.* In its first parental rights decision, the 1932 case *Meyer v. Nebraska*, the Court struck down a state law that forbade instruction in any language other than English in public schools on the grounds that it violated a liberty interest of parents to make that decision under the Fourteenth Amendment.<sup>70</sup> The Court concluded that a person's "fundamental" liberty interests included the right to "marry, establish a home and bring up children [and] . . . give his children education suitable to their station in life."<sup>71</sup>

The Court went on to uphold and expand on the nature of parental rights over education in subsequent decisions.<sup>72</sup> Only two years after *Meyer*, the Court unanimously invalidated Oregon's compulsory public school attendance law in *Pierce v. Society of Sisters*, holding that the act "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control," including sending children to private school.<sup>73</sup> It reasoned that any

---

66. Walton, *supra* note 11, at 399.

67. See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Parham v. J. R.*, 442 U.S. 584 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Troxell v. Granville*, 530 U.S. 57 (2000).

68. *Id.*

69. *Id.*

70. *Meyer*, 262 U.S. at 403.

71. *Id.* at 399–400.

72. See *Pierce*, 268 U.S. at 534; *Prince*, 321 U.S. at 166.

73. *Pierce*, 268 U.S. at 534–35.

attempt by the state to “standardize its children by forcing them to accept instruction from public teachers only” violated the “fundamental theory of liberty” upon which the Constitution rests.<sup>74</sup>

Moreover, nearly twenty years later, in *Prince v. Massachusetts*, the Court held that “the custody, care and nurture of the child reside first in the parents,” including the right to provide moral and religious instruction.<sup>75</sup> “And it is in recognition of this,” the Court continued, “that these decisions [including *Pierce*] have respected the private realm of family life which the state cannot enter.”<sup>76</sup>

In 2000, in its most recent parental rights decision, *Troxel v. Granville*, the Court employed similar language to *Prince*, holding that, “The liberty interest at issue in this case—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.”<sup>77</sup>

*The state has the right to require every child to attend some kind of school.* Despite the exalted language it has used to discuss parental rights in these cases, the Court has simultaneously upheld the power of the states to require and regulate education.<sup>78</sup> In *Meyer*, the Court noted that, “The power of the state to compel attendance at some school and to make reasonable regulation for all schools . . . is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum.”<sup>79</sup> Similarly, even as it upheld the right to attend private school, the Court affirmed in *Pierce* that,

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.<sup>80</sup>

---

74. *Id.* at 535.

75. *Prince*, 321 U.S. at 166.

76. *Id.*

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

78. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 533 (2000).

79. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

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

Finally, in *Prince*, the Court upheld the conviction of a mother for violating state child labor laws by allowing her infant daughter to distribute religious pamphlets in the street.<sup>81</sup> In so doing, it held that the family is not beyond “regulation in the public interest,” including that the state “as *parens patriae* may restrict the parent’s control by requiring school attendance.”<sup>82</sup>

## 2. State Regulation

Because the re-legalization of homeschooling was achieved primarily through state-by-state legal action, regulation of homeschooling varies widely across the country both in method and degree.<sup>83</sup> While homeschooling regulations generally fall into one of three broad categories—private school laws, equivalency laws, or home education laws<sup>84</sup>—many states offer multiple ways to homeschool or blended versions of these requirements.<sup>85</sup>

*Private School Laws.* Sixteen states regulate homeschools as private schools.<sup>86</sup> For example, Texas’s compulsory attendance law exempts a child who “attends a private or parochial school that includes in its course a study of good citizenship.”<sup>87</sup> Because the statute does not explicitly exempt homeschoolers, in 1981 the Texas Education Agency began to treat homeschooling as illegal and school districts began prosecuting homeschooling parents.<sup>88</sup> In response, a class of homeschooling parents brought suit in *Leeper v. Arlington Independent School District*, in which the Texas Supreme Court held that a homeschool is a private school so long as it is operated in a bona fide manner with a written curriculum “designed to meet basic education

---

81. *Prince*, 321 U.S. at 163–64.

82. *Id.* at 166.

83. See generally *Homeschool Laws by State*, HSLDA, <http://hsllda.org/legal> (last visited Jan 28, 2022).

84. Ronald Kreager Jr., *Homeschooling: The Future of Education’s Most Basic Institution*, 42 U. TOL. L. REV. 227, 234 (2010).

85. See generally *Homeschooling in My State*, CRHE, <https://responsiblehomeschooling.org/> (last visited Dec. 9, 2021).

86. See *id.*

87. TEX. EDU. CODE ANN. § 25.086(a)(1) (2021).

88. *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 436–37 (Tex. 1994).

goals of reading, spelling, grammar, mathematics and a study of good citizenship.”<sup>89</sup> Since then, Texas has not required standardized testing, particular teacher qualifications, or mandatory registration—only notice of withdrawal from public schools.<sup>90</sup>

While Texas is particularly friendly towards homeschooling, some other states that regulate homeschools as private schools impose greater restrictions.<sup>91</sup> For example, Kentucky requires parents to submit an annual notice of intent to homeschool to the local board of education, provide 1,062 instructional hours in no less than 185 days per year, and keep written records of attendance and grades.<sup>92</sup> Some states, including California, require children to be instructed by “persons capable of teaching” but generally deny state officials the power to make that determination.<sup>93</sup>

*Equivalency Laws.* Equivalency laws exempt children from compulsory public school attendance so long as they receive “equivalent instruction” elsewhere.<sup>94</sup> For example, Connecticut represents a low-regulation equivalency system under which parents may homeschool if they are “able to show that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools.”<sup>95</sup> While the State Education Commission has issued guidelines suggesting that local boards of education require declarations of intent to homeschool and annual portfolio reviews, those guidelines lack the force of law.<sup>96</sup>

Massachusetts’s equivalence law resembles Connecticut’s but, through caselaw, imposes greater restrictions on homeschooling.<sup>97</sup> In

89. *Id.* at 439.

90. See *Texas, Homeschooling in My State*, CRHE, <https://responsiblehomeschooling.org/state-by-state/texas/> (last visited Dec. 9, 2021); Letter from Mike Morath, Comm’r of Educ., to Administrator Addressed (July 11, 2019) (on file with the Texas Education Agency).

91. See, e.g., *Kentucky, Homeschooling in My State*, CRHE, <https://responsiblehomeschooling.org/state-by-state/kentucky/> (Sept. 2018).

92. KY. REV. STAT. ANN. §§ 159.010, 159.160, 159.040 (West 2020).

93. CAL. EDUC. CODE § 48222 (West 2022). See also KAN. STAT. ANN. § 72-1111(a)(2) (2004).

94. LINDA DOBSON, *THE HOMESCHOOLING BOOK OF ANSWERS* 7–8 (1998).

95. CONN. GEN. STAT. § 10-184 (2022).

96. Memorandum from Conn. State Dep’t Educ. on Information Concerning Educating Children at Home to Individuals Inquiring about Homeschooling in Conn. (Jan. 1, 2011) (on file with Connecticut Department of Education).

97. MASS. GEN. LAWS ch. 76, § 1; See generally *Care & Prot. of Charles*, 504 N.E.2d 592 (Mass. 1987); see generally *Brunelle vs. Lynn Public Schools* 702 N.E.2d 1182 (Mass. 1988).

particular, parents must obtain advance approval from local school districts to homeschool.<sup>98</sup> In obtaining that approval, parents bear the burden of proving to local school boards that they will provide an education equal “in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town.”<sup>99</sup> If parents begin homeschooling without approval, the burden shifts to the school district to prove that the instructional plan fails the equivalency standard.<sup>100</sup> Because regulation is controlled by school districts, requirements may vary, including standardized testing or portfolio reviews.<sup>101</sup>

Finally, New Jersey, which also employs an equivalence system, requires that if the adequacy of a homeschooler’s education is challenged, the parents must supply sufficient evidence to infer that they are providing an equivalent education to their child.<sup>102</sup> The burden of persuasion then shifts to the state to prove beyond a reasonable doubt that the child is not receiving an equivalent education.<sup>103</sup>

*Home Education Laws.* Most states (thirty-five) regulate homeschooling specifically by statute.<sup>104</sup> As with private school and equivalency law states, regulation varies widely regarding notification requirements, teacher qualifications, curriculum requirements, standardized testing, instructional hours, record-keeping, and immunization.<sup>105</sup>

Michigan’s homeschooling statute, for example, exempts a child from compulsory public school attendance if “the child is being educated at the child’s home by his or her parent or legal guardian in an organized educational program.”<sup>106</sup> While the statute requires instruction in reading, spelling, mathematics, science, history, civics,

---

98. *Charles*, 504 N.E.2d at 600.

99. MASS. GEN. LAWS ch. 76, § 1 (2022); *Charles*, 504 N.E.2d at 600–01.

100. *Charles*, 504 N.E.2d at 601.

101. *Massachusetts, Homeschooling in My State*, CRHE, <https://responsiblehomeschooling.org/state-by-state/massachusetts/> (last visited Dec. 9, 2021).

102. *State v. Vaughn*, 207 A.2d 537, 540 (N.J. 1965).

103. *State v. Massa*, 231 A.2d 252, 255 (Morris County Ct. 1967) (explaining that the burden is beyond a reasonable doubt because the offense is quasi-criminal) (quoting *State v. Vaughn*, 207 A.2d 537, 540 (1965)).

104. McMullen, *supra* note 39, at 89; *see generally Homeschooling in My State*, *supra* note 85 (showing that approximately thirty-five states regulate homeschooling by particular statutes).

105. *Homeschool Laws by State*, *supra* note 83.

106. MICH. COMP. LAWS § 380.1561(3)(f) (2022).

literature, writing, and grammar, it does not mandate notification of homeschooling, particular teacher qualifications, bookkeeping, or assessments.<sup>107</sup> Moreover, the state does not include failure to educate within its definition of “neglect,” denying state child protective services the power to investigate on those grounds.<sup>108</sup> In challenging the educational adequacy of a homeschool, the state bears the burden of proving that education is not taking place.<sup>109</sup> Finally, under Michigan law homeschools may also register as “nonpublic schools” and submit to regulation as a private school.<sup>110</sup>

Tennessee provides three options to homeschool: as an independent homeschool, in association with a church-related school, or through a distance-learning program.<sup>111</sup> The homeschooling statutes require annual notice of intent to homeschool, including basic data and the subjects to be offered, a proposed number of educational hours, and the qualifications of the teacher.<sup>112</sup> Parents must hold at least a high school diploma or GED, provide four hours of instruction each day for 180 days per year, and maintain records of attendance and proof of vaccinations, which must be submitted to local school boards each year.<sup>113</sup> Students are required to take standardized tests after fifth, seventh, and ninth grades.<sup>114</sup> Should they fall six to nine months behind grade-level, parents must develop a remedial course in partnership with a licensed teacher, and failure to catch up allows the local director of schools to require the child to attend public school.<sup>115</sup>

Washington state’s homeschooling statutes impose a relatively high degree of regulation, primarily because of its stringent teacher qualifications.<sup>116</sup> Parents must either be (1) supervised by a certified teacher, who must have at least one contact hour per week with the

---

107. *Id.*

108. *Michigan, Homeschooling in My State*, CRHE, <https://responsiblehomeschooling.org/state-by-state/michigan/> (last visited Dec. 9, 2021).

109. *Id.*

110. MICH. COMP. LAWS § 380.1561(3)(a) (2022).

111. *How to Comply with Tennessee’s Homeschool Law*, HSLDA, <http://hsllda.org/post/how-to-comply-with-tennessee-s-homeschool-law> (last visited Dec. 9, 2021).

112. *See* TENN. CODE ANN. § 49-6-3050(1) (West 2022).

113. *Tennessee, Homeschooling in My State*, CHRE, <https://responsiblehomeschooling.org/state-by-state/tennessee/> (last visited Dec. 9, 2021).

114. *Id.*

115. *Id.*

116. *Washington, Homeschooling in My State*, CHRE, <https://responsiblehomeschooling.org/state-by-state/washington/> (last visited Dec. 9, 2021).



child; (2) hold a certain number of college credits; (3) have completed a course in home education; or (4) be deemed “sufficiently qualified” by the local school superintendent to homeschool.<sup>117</sup> Moreover, students must take standardized tests annually under qualified supervision, although their scores do not have to be reported.<sup>118</sup> Finally, while parents are presumed to provide the mandated instruction, failure to meet those requirements rescinds exemption from compulsory attendance.<sup>119</sup>

## II. WHY HOMESCHOOLING SHOULD NOT BE BANNED: THE FACTS AND THE LAW

Having surveyed the two primary arenas in which the debate over homeschooling takes place—the facts and the law—this section argues that neither the data nor Supreme Court precedent justifies a ban on homeschooling. In fact, precedent suggests that homeschooling should be protected by at least intermediate scrutiny.<sup>120</sup>

### A. Addressing the Factual Debate: The Evidence Does Not Warrant a Ban

Normative arguments about the legal status of homeschooling typically revolve around empirical claims, which both advocates and critics then use to advance policy arguments.<sup>121</sup> The problems with data-driven arguments about homeschooling, however, are three-fold.<sup>122</sup> First, much of homeschooling research is qualitative, rather than quantitative, using surveys of self-selected participants, which limits its utility.<sup>123</sup> Second, partisans on both sides of the debate tend to discredit research based on the viewpoints of those who conducted or funded the

---

117. WASH. REV. CODE ANN. §§ 28A.225.010 (4)(a, b, c) (West 2022).

118. § 28A.200.010(1)(c).

119. § 28A.225.020.

120. *See infra* Section II.B (arguing that precedent indicates parental rights, including the right to direct children’s education, warrants intermediate scrutiny).

121. *See, e.g.*, Bartholet, *supra* note 9 at 25–26.

122. Kunzman & Gaither, *supra* note 47, at 254–55.

123. *Id.*

studies.<sup>124</sup> Finally, even perfectly collected and curated data could not resolve questions that are fundamentally philosophical.<sup>125</sup>

Despite the limits of the data, empirical studies of homeschooling suggest that homeschooled students fare well in the common areas of concern for critics: (1) adequacy of education, (2) protection against child abuse, (3) self-determination or autonomy, and (4) citizenship or preparation for life in a democratic society.<sup>126</sup> While education researchers Kunzman and Gaither's comprehensive survey of the most recent studies on home education suggests a less rosy picture of homeschooling than its advocates often paint, they generally find that homeschoolers perform comparably to public-schooled peers, with somewhat different patterns of advantages and disadvantages.<sup>127</sup>

What a survey of homeschooling studies primarily demonstrates is the heterogeneity of home education.<sup>128</sup> As Kunzman and Gaither observe, in considering the apparent diversity of levels of academic achievement among homeschoolers, "One obvious reason for the potential finding that homeschooling heightens performance at the extremes of the distribution curve is that it by definition magnifies the role of the parent in a child's education."<sup>129</sup> Moreover, because there are as many ways to homeschool as there are to parent, the practice of home education does not lend itself to study as a monolithic group.

Concerning the debate over homeschooling, however, the most significant finding is that nothing in the data which Kunzman and Gaither survey suggests that homeschooled students are distinctly educationally disadvantaged, abused at a higher rate than other children, or unprepared for independent life and responsible citizenship.<sup>130</sup> In many cases, empirical studies suggest just the opposite.<sup>131</sup> This is not to

---

124. See, e.g., Bartholet, *supra* note 9 at 24–27; David Sikkink, *The Social Realities of Homeschooling*, INST. FAM. STUD. (May 7, 2020), <https://ifstudies.org/blog/the-social-realities-of-homeschooling>.

125. See *infra* Section III.A (discussing the philosophical divide underlying the dispute between advocates and critics of homeschooling).

126. See Kunzman & Gaither, *supra* note 47, at 270–75 (finding academic achievement of homeschooled students relatively consistent with public schooled peers); see also *id.* at 286–87 (finding that there is no significant data on risks of child abuse to homeschoolers).

127. Kunzman & Gaither, *supra* note 47, at 270–75, 286–87.

128. See *supra* Section I.B (outlining the inconclusive nature of empirical studies of homeschooling).

129. Kunzman & Gaither, *supra* note 47, at 272.

130. See *supra* Section I.B (discussing Kunzman and Gaither's findings with respect to the effects of homeschooling on student outcomes).

131. See, e.g., RAY, *supra* note 61, at xv–xvi.

invalidate the concerns of critics that homeschooling may be used as a cover by neglectful or abusive parents, but it does suggest that presumptively banning homeschooling as several important critics have advocated, is not warranted by the evidence.<sup>132</sup>

### **B. Addressing the Legal Debate: Homeschooling Warrants at Least Intermediate Scrutiny**

Despite the Court's apparently inconsistent pronouncements on the constitutional status of parental rights versus state interests in education, both critics and advocates of homeschooling have recently argued that precedent indicates intermediate scrutiny is the appropriate level of scrutiny.<sup>133</sup> Under that standard, regulations of homeschooling must be substantially related to an important government purpose to pass constitutional muster.<sup>134</sup> The caselaw generally bears out this conclusion.<sup>135</sup> For example, the two oldest parental rights cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, both describe parental rights in the language of fundamental rights while affirming the power of the states to compel school attendance.<sup>136</sup> These cases represent the use of a balancing test with the Court weighing parental interests in directing children's upbringing against state interests in education, characteristic of an intermediate scrutiny analysis.<sup>137</sup>

While homeschooling advocates sometimes argue that *Wisconsin v. Yoder* established a fundamental right to homeschool, two key facts militate against that conclusion.<sup>138</sup> First, while *Yoder* carved out an exception to compulsory school attendance laws based on sincere

---

132. *Contra* Bartholet, *supra* note 9 at 72–74; Hamilton, *supra* note 9, at 98.

133. *See* Bartholet, *supra* note 9, at 29; Walton, *supra* note 11, at 394–96.

134. *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3(a)(iv) (May 2021 update) (discussing the Court's use of intermediate scrutiny; *see also* Bartholet, *supra* note 10, at 29; Walton, *supra* note 11, at 394–96).

135. *See* *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Troxel v. Granville*, 530 U.S. 57, 65, 80 (2000).

136. *Meyer*, 262 U.S. at 401–02; *Pierce*, 268 U.S. at 534.

137. *See* Bartholet, *supra* note 9, at 30.

138. *See* Billy Gage Raley, *Safe at Home: Establishing A Fundamental Right to Homeschooling*, 2017 B.Y.U. EDUC. & L. J. 59, 63 (2017); *see also* *Tradition of Parental Rights*, PARENTAL RTS. FOUND., [https://parentalrightsfoundation.org/legal/parental\\_rights\\_tradition/](https://parentalrightsfoundation.org/legal/parental_rights_tradition/) (last visited Jan. 25, 2022).

religious objection, the holding of that case was carefully tailored to the facts of the Amish community which extend to few other groups, especially not to those who homeschool for secular reasons.<sup>139</sup> Second, the Court's holding in *Employment Division v. Smith* has left the status of *Yoder* as good law in doubt.<sup>140</sup>

The Court's most recent parental rights case, *Troxel v. Granville*, further indicates the use of intermediate scrutiny.<sup>141</sup> On the one hand the plurality opinion, penned by Justice O'Connor, concludes that, "[T]he liberty interest at issue in this case—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."<sup>142</sup> On the other hand, the plurality never specifies the appropriate level of scrutiny for restrictions of that liberty interest, though fundamental rights canonically merit strict scrutiny. Rather, the plurality chides the state court for failing to accord the decision of a fit parent "special weight" before overriding her decision to restrict grandparent visitation time.<sup>143</sup> Thus, *Troxel* suggests a unique and puzzling standard of heightened scrutiny in parental rights cases which combines aspects of both strict and intermediate scrutiny.<sup>144</sup>

The Supreme Court should clarify its meaning and, as Justice Thomas argued in *Troxel*, specify the level of scrutiny restrictions on parental rights should receive.<sup>145</sup> Strengthening the case for strict scrutiny, two recent pro-homeschooling articles in the legal literature argue the Court should recognize a fundamental right to homeschool under its substantive due process jurisprudence.<sup>146</sup> Professor of law S. Ernie Walton argues that the historical practice of home education in America and the traditional responsibility of parents to direct the upbringing of their children, including the duty to educate, are so

---

139. See *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); see also Walton, *supra* note 11, at 395.

140. See generally *Emp. Div., Dep't of Hum. Res. Of Oregon v. Smith*, 494 U.S. 872 (1990). See also Walton, *supra* note 11, at 396 (explaining that *Smith* directly overruled *Yoder*'s interpretation of the First Amendment, though not the case itself).

141. See *Troxel v. Granville*, 530 U.S. 57, 65, 80 (2000).

142. *Id.* at 65.

143. *Id.* at 69.

144. See Meyer, *supra* note 78, at 549.

145. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) ("I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case . . . I would apply strict scrutiny to infringements of fundamental rights.").

146. See generally Raley, *supra* note 138; Walton, *supra* note 11, at 389.

“deeply rooted in this Nation’s history and tradition” as to establish a fundamental right to homeschool under the Court’s *Washington v. Glucksberg* framework.<sup>147</sup> Professor Billy Gage Raley argues, alternatively, that in a parallel to its holding in *Obergefell v. Hodges*, the Court should establish a fundamental right to homeschool by holding that it falls under the already-established right to direct the education of children.<sup>148</sup>

Regardless of the merits of these arguments, the Court has already described parental rights, including the right to “direct the upbringing and education of children under their control,” as “fundamental” and yet declined to specify that it will apply strict scrutiny to restrictions of that right.<sup>149</sup> Consequently, even if the Court were to hold that a right to homeschool is fundamental, there is no guarantee the Court would apply strict scrutiny to regulations of it.<sup>150</sup> Professor David Meyer has described this phenomenon as the “paradox of family privacy” because, for nearly a century, the Court has used the exalted language of fundamental rights in describing the sanctity of family autonomy while actually applying a moderate standard closer to intermediate scrutiny.<sup>151</sup>

Despite the confused nature of the parental rights cases and the fact that the Court has never spoken directly to the question of homeschooling, it has, nevertheless, provided legislators with some guidance that regulations of homeschooling must satisfy at least intermediate scrutiny—that is, such regulations must substantially further an important government interest—to be constitutional.<sup>152</sup> Rather than advocate for the Court to hold that there is a fundamental right to homeschool, this Article argues why even under a lower standard of scrutiny, homeschooling should not be banned.<sup>153</sup>

---

147. Walton, *supra* note 11, at 389–90 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1999) (internal quotation marks omitted)).

148. Raley, *supra* note 138, at 63.

149. *See Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

150. Meyer, *supra* note 78, at 549.

151. *Id.*

152. *See supra* Section II.B (discussing why regulations of homeschooling are likely to receive intermediate scrutiny).

153. *See infra* Part III (arguing why a pre-political view of parental rights is preferable to a state-conferred view and is implied by the reasoning underlying *Troxel*).

### III. WHY HOMESCHOOLING SHOULD NOT BE BANNED: THE PHILOSOPHICAL FOUNDATIONS OF *TROXEL V. GRANVILLE*

Given that neither the empirical evidence nor Supreme Court precedent warrants the kind of presumptive ban on homeschooling its critics propose, this section offers a further, more foundational argument against a ban on homeschooling in two parts.<sup>154</sup> First, this section argues that the debate over homeschooling is fundamentally driven by a disagreement as to the nature of parental rights—whether they are ultimately conferred by the state or are pre-political.<sup>155</sup> On the basis of American political history, legal precedent, and moral reasoning, it argues that the pre-political view is superior, which entails that the state’s authority to intervene in the parent-child relationship is limited.<sup>156</sup>

Second, it argues that *Troxel*, the Court’s most recent parental rights case, not only implicitly accepts the pre-political view of parental rights but also endorses the view that determining the best interests of children is properly left to fit parents while the state’s primary role is to ensure children receive their basic needs.<sup>157</sup> Although this argument does not prove a right to homeschool, it suggests the primacy of parents over the state with regard to children’s upbringing, including their education, which sets the stage for the presumption of legitimate homeschooling proposed in Part V.<sup>158</sup>

#### A. Parental Rights are Pre-Political

At the heart of the factual and legal debates over homeschooling is a deeper disagreement about the nature and source of parental rights.<sup>159</sup> Most agree that because children are not fully developed, rational, and autonomous individuals, they require a guardian of their interests until

---

154. See *supra* Part II (arguing that neither empirical evidence nor precedent justifies a presumptive ban on homeschooling).

155. See *infra* Section III.A (exploring how the debate over homeschooling is motivated by a theoretical disagreement over the source or parental rights).

156. See *infra* Section III.A (advancing three arguments for the pre-political view).

157. See *infra* Section III.B (analyzing how *Troxel* and family law principles imply the state’s proper role in child welfare is as a failsafe against parental abuse or neglect).

158. See *infra* Part IV (proposing that courts should rebuttably presume any given homeschool is providing an adequate education).

159. Compare DWYER & PETERS, *supra* note 9, at 123 (“In addition to choosing parents, the state must decide what content the legal-parent role will have”), with Walton, *supra* note 11, at 433–34 (“parents have a fundamental right to educate their children at home.”).

they reach the age of majority.<sup>160</sup> Most would also agree that such guidance should normally be exercised by parents.<sup>161</sup> The disagreement arises as to the source of those rights.<sup>162</sup> One side tends to argue that parental rights are inherent, natural, and pre-political.<sup>163</sup> The state may recognize and legally enshrine parental rights but lacks moral authority to intervene in the parent-child relationship absent special circumstances.<sup>164</sup> Call this the pre-political rights view. The other side, instead, identifies ultimate parental authority as flowing from the state as *parens patriae* and merely delegated to parents.<sup>165</sup> Call this the state-conferred rights view.

These are not reconcilable positions, and they lead to remarkably different conclusions about the legitimacy of home education. To those who adopt the pre-political parental rights view, homeschooling is likely to appear an unobjectionable option for parents acting in the best interests of their children.<sup>166</sup> Attempts to closely regulate or substantially ban homeschooling, consequently, may appear as attacks on the very nature of the parent-child relationship.<sup>167</sup> At its extreme, this view leads to parental rights absolutism.<sup>168</sup> To those who adopt the state-conferred rights view, claims of a right to homeschool are a bold attempt to induce the state to limit itself by granting parents extraordinary rights over children—rights which, at least in principle, enable isolation,

---

160. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity of judgement required for making life’s difficult decisions.”).

161. *See id.* (stating the law’s concept of the family “historically . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children.”).

162. *See infra* Section III.A (discussing the source of parental rights as either pre-political or conferred by the state).

163. *See, e.g.*, Kolenc, *supra* note 28, at 61 (“The defining principle that drove this conflict [between parents and school districts] was the belief by homeschooling advocates that parents possess a God-given right, ‘fundamental’ legal right to educate their children as they see fit.”).

164. *See id.*

165. *See DWYER & PETERS, supra* note 9, at 123 (“In addition to choosing parents, the state must decide what content the legal-parent role will have”); Hamilton, *supra* note 9, at 1384 (“the state should presumptively place children in the care, and under the authority, of their parents.”).

166. *See generally* Walton, *supra* note 11.

167. *Id.*

168. *E.g.*, John R. Sutton, *Stubborn Children Law and the Socialization of Deviance in the Puritan Colonies*, 15 *FAM. L.Q.* 31, 31 (1981) (describing how colonial Massachusetts law permitted fathers to put their sons to death for stubborn rebelliousness). *See also* Bartholet, *supra* note 9, at 49–52.

radicalization, and mistreatment.<sup>169</sup> At its extreme, this view suggests that the state could assign children guardians irrespective of biological parenthood.<sup>170</sup>

There is no uniquely rational answer to which of these views of rights is correct. It is the kind of question about which reasonable people can disagree and depends largely on prior philosophical commitments. Nevertheless, there are at least two persuasive reasons for preferring the pre-political view of parental rights.<sup>171</sup>

First, the view that parental rights are conditional grants of authority from the state is out of step with both American political history and Supreme Court jurisprudence.<sup>172</sup> The clearest example of this is the Declaration of Independence's statement that "all men . . . are endowed by their Creator with certain unalienable rights," which not only proclaims the existence of pre-political rights but also identifies certain of them as inviolable.<sup>173</sup> This is buttressed by the Ninth Amendment's declaration that the enumeration of certain rights cannot be "construed to deny or disparage others retained by the people."<sup>174</sup> Even as he dissented in *Troxel* on the grounds that unenumerated rights do not warrant constitutional protection, Justice Scalia acknowledged that, in his own opinion, the right to direct the upbringing of one's children is inalienable and among the other rights "retained by the people" under the Ninth Amendment.<sup>175</sup>

Many of the Court's holdings also imply the pre-political view of parental rights.<sup>176</sup> For example, in *Smith v. Organization of Foster Families*, which concerned the procedural due process rights of foster parents in family reunification actions, the Court noted that "[t]he

169. DWYER & PETERS, *supra* note 9, at 121.

170. *See, e.g., id.* at 123 ("In addition to choosing parents, the state must decide what content the legal-parent role will have.").

171. *See infra* notes 172–184 and accompanying text (articulating two reasons to prefer a pre-political view of parental rights).

172. *See* U.S. CONST. amend. IX. *See generally* DECLARATION OF INDEPENDENCE para. 2 (1776).

173. DECLARATION OF INDEPENDENCE para. 2 (1776).

174. U.S. CONST. amend. IX.

175. *Troxel v. Granville*, 530 U.S. 57, 91–93 (2000) (Scalia, J., dissenting). *Id.* at 91 (explaining that in his view the right to direct the upbringing of one's children is among the "other rights retained by the people" under the Ninth Amendment, but "the Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be . . .").

176. *See, e.g., Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 845 (1977) (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977)).



liberty interest in family privacy has its source . . . not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.’”<sup>177</sup> Similarly, in *Santosky v. Kramer*, the Court held that preponderance of the evidence was too low a burden to justify termination of parental rights because parents’ interest in retaining custody is “commanding” and “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their *natural* relationship.”<sup>178</sup>

Moreover, the state-positing view of parental rights denies the idea that the parent-child relationship is biologically and morally unique.<sup>179</sup> Consider, for instance, why the state requires adoptive parents to meet stringent criteria before licensing adoption, or why the state must prove a parent is not simply worse than the alternatives but *unfit* before his or her custodial rights may be terminated, or why a core policy of child welfare is to make “reasonable efforts” to avoid removal of children and achieve family reunion.<sup>180</sup> Each of these policies embodies the view that the parent-child relationship is special.<sup>181</sup> Philosopher Melissa Moschella’s explanation is that parents owe profoundly high obligations to their children because of the uniquely close nature of the parent-child relationship.<sup>182</sup> That is, biological parents owe particularly high duties to their children because they are literally responsible for their lives and the needs of adolescent children are especially great.<sup>183</sup> Fulfillment of these high duties by parents, in turn, imparts special rights to make decisions on their children’s behalf with which the state may not interfere absent special circumstances.<sup>184</sup>

The move, here, is neither to deny the legal aspects of the parent-child relationship nor to disparage the bonds of adoptive parenthood. Rather, the argument is that because the parent-child relationship is normally recognized and regulated but not created by the state, the state

---

177. *Id.*

178. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (emphasis added).

179. See generally Melissa Moschella, *Natural Law, Parental Rights and Education Policy*, 59 AM. J. JURIS. 197 (2014).

180. See John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 459 (2008); Moschella, *supra* note 179, at 202.

181. Moschella, *supra* note 179, at 202.

182. *Id.* at 197.

183. *Id.* at 202.

184. *Id.*

lacks legitimate authority to recharacterize that relationship without constraint.<sup>185</sup> This does not establish a right to homeschool, but it does suggest limits on the power of the state to ban the practice.<sup>186</sup>

### **B. Principles for Regulation: Basic Needs vs. Best Interests**

Even if one accepts that parental rights, including the right to direct the education of children, are pre-political and protected by at least intermediate scrutiny, such that homeschooling should not be banned, the question of how homeschooling should be regulated remains open. The answer depends on the weights of the interests at stake.<sup>187</sup> Parents, children, and the state all have legitimate, overlapping interests in children's education, but they are neither identical nor equally weighty.<sup>188</sup>

Children have the weightiest interest in their own education because it is ultimately the quality of their own lives that is at stake.<sup>189</sup> As political theorist Robert Reich puts it, children have two primary interests in their education.<sup>190</sup> The first is to develop into "independently functioning" adults in the sense of self-sufficient and economically productive members of society.<sup>191</sup> The second is to become "minimally autonomous" in the sense of self-governing individuals capable of cultivating and pursuing individual interests and participating in democratic life.<sup>192</sup>

Parents and the state both share these interests in children's education because adolescent children are "not yet capable of meeting their own needs or acting in their own interest."<sup>193</sup> American jurisprudence has long recognized this, and the canon of parental rights

---

185. *See supra* notes 172–84 and accompanying text (articulating two reasons to prefer a pre-political view of parental rights).

186. *See infra* Part IV (discussing how states should regulate homeschooling given the limits of state power to ban the practice).

187. Rob Reich, *Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling*, 43 *NOMOS: MORAL & POL. EDUC.* 275, 291–93 (2001).

188. *Id.*

189. *Id.* at 289–90.

190. *Id.* at 290.

191. *Id.* at 291.

192. *Id.*

193. *Id.* at 284.

cases are examples of the Court attempting to strike an appropriate balance between the fiduciary roles of both parents and the state.<sup>194</sup>

The important question, then, is which party—parents or the state—should be the primary guardian of children’s interests including in their education. *Troxel* offers a relatively clear answer in favor of parents in its statement that

so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.<sup>195</sup>

The plurality opinion continues that when tasked with reviewing a fit parent’s decision about the upbringing of a child, the court must accord the parent’s determination “special weight” and that a judge’s “mere disagreement” as to the child’s best interests is insufficient to outweigh the parent’s choice.<sup>196</sup> This suggests that parents’ interests in children are weightier than the state’s and that unless they are failing to provide adequate care, the state should generally not override parents’ determinations of their children’s best interests.<sup>197</sup>

While *Troxel* does not define “adequate care” or “best interests,” many states have adopted statutory grounds for rebutting the fit parent presumption.<sup>198</sup> Those grounds commonly include severe or chronic abuse or neglect, sexual abuse, abandonment, long-term mental illness or other deficiency, and incapacity due to persistent abuse of drugs or

---

194. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 845 (1977).

195. *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); *Parham*, 442 U.S. at 604; *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982); *Reno v. Flores*, 507 U.S. 292, 304 (1993).

196. *Troxel*, 530 U.S. at 68, 70.

197. *See Reich, supra* note 187, at 284.

198. *Grounds for Involuntary Termination of Parental Rights*, U.S. DEP’T HEALTH & HUMAN SERVS.: CHILD WELFARE INFO. GATEWAY (2021), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/groundtermin/>.

alcohol.<sup>199</sup> In other words, states do not intervene in the parent-child relationship because a parent fails to act in his or her child's best interests, but only when parents fail to provide for children's basic needs.<sup>200</sup> These basic needs, Reich argues, include the "shelter, food, protection, and not least nurture, affection, and love" necessary for children to develop into independently functioning and minimally autonomous adults.<sup>201</sup> Thus, absent such failure, parents are the primary guardians of their children's interests.<sup>202</sup>

Finally, there are independent reasons for the state to be cautious in determining a child's best interests. As Reich points out, "best interests" is not an objective standard; rather, what it means to act in a child's best interests depends on how one defines the good life.<sup>203</sup> Instead, the proper role for the state, as the Court and state legislatures have at least implicitly recognized, is to operate as a failsafe to parents in ensuring that children are not deprived of the basic necessities required for achieving a good life under any plausible definition of the term.<sup>204</sup>

The foregoing discussion suggests that while parents and states both possess legitimate interests in children's education, it falls primarily to parents to act in the best interests of their children.<sup>205</sup> The state, therefore, should accord special weight to parental decisions unless those decisions threaten a child's basic needs.<sup>206</sup> While those basic needs include the education required to develop into independently functioning and minimally autonomous adults, this is not a high standard.<sup>207</sup> And the state should resist reading too much content into these terms to avoid codifying a particular definition of a good life.<sup>208</sup>

Thus, this discussion suggests a general limiting principle for the regulation of homeschooling: unless homeschooling itself constitutes a

---

199. *Id.*

200. *See id.*

201. Reich, *supra* note 187, at 285.

202. *See id.*

203. *Id.* at 284.

204. *See id.* at 288–89 (“[W]ith respect to the education necessary to develop into independent adulthood, the state rightly interferes with parents’ educational choices only when they are plainly negligent or abusive, and thereby impede the development of children into normal, healthy adults.”).

205. *Id.*

206. *Troxel v. Granville*, 530 U.S. 57, 69 (2000); Reich, *supra* note 187, at 291.

207. *See* Reich, *supra* note 187, at 285.

208. *Cf. Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (holding “[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 . . .”).

failure to provide adequate care, the state will normally have no grounds to interfere with a parent's decision to educate at home.<sup>209</sup> A per se ban on homeschooling would, therefore, infringe parents' fundamental rights to direct the upbringing of their children.<sup>210</sup>

#### IV. A PRESUMPTION OF LEGITIMATE HOMESCHOOLING BEST CONFORMS WITH THE CONSTITUTIONAL STANDING AND NATURE OF PARENTAL RIGHTS

Under the Supreme Court's parental rights precedent, including *Troxel*, a court may not terminate parental rights without an individualized finding that a parent is unfit.<sup>211</sup> Parents are presumed to be fit, and fit parents are presumed to act in the best interests of their children.<sup>212</sup> Thus, when a fit parent's decision is challenged on the grounds that it is not in his or her child's best interests, the court must balance the interests at stake, giving special weight to the fit parent's determination.<sup>213</sup> Only when a parent is proven unfit may a court freely substitute its own determination of a child's best interests for a parent's.<sup>214</sup>

This section argues, based upon this understanding of *Troxel*, that states should adopt a presumption of legitimate homeschooling.

##### A. The Presumption of Legitimate Homeschooling

When parents choose to homeschool, states should presume that those parents are doing so for legitimate reasons and are providing an adequate education. An adequate education, as argued above, is one that equips a child to become an independently functioning and minimally autonomous adult.<sup>215</sup> Consequently, there are two instances in which a court might find that the state has rebutted the presumption of legitimate

---

209. See *Troxel*, 530 U.S. at 68–69.

210. See *Pierce*, 268 U.S. at 534–35.

211. *Troxel*, 530 U.S. at 68–69. See also *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

212. E.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

213. *Troxel*, 530 U.S. at 68–69.

214. *Id.* at 70.

215. Reich, *supra* note 187, at 285.

homeschooling and mandate action the court determines to be in the child's best interests.<sup>216</sup>

The first instance in which a court might override a parent's decision to homeschool is upon a showing of clear and convincing evidence that a parent is unfit under that state's law.<sup>217</sup> Typically, this requires a showing of chronic abuse or neglect, which in at least twenty-five states may include failure to educate.<sup>218</sup> Once the fit parent presumption is rebutted, it falls to the court to determine the course of action in the best interests of the child, including potential termination of parental rights.<sup>219</sup>

Under *Troxel*, a court may sometimes override even a fit parent's decision to homeschool so long as the fit parent's decision is accorded special weight and reflects more than a judge's mere belief that a different decision would be "better."<sup>220</sup> In other words, a court finding a parent unfit is a sufficient but not a necessary condition to rebut the presumption of legitimate homeschooling.<sup>221</sup>

While the *Troxel* plurality does not provide more beyond its general instruction to accord fit parent's decisions special weight, a close reading of its specific reasoning is instructive.<sup>222</sup> First, the plurality chastises the trial court for failing to presume that the fit parent, Granville, had acted in the best interests of her children in limiting visitations with their paternal grandparents.<sup>223</sup> In doing so, the opinion approvingly cites the statutes of other states which mandate that a court may not overrule a fit parent's decision about grandparent visitation except by clear and convincing evidence.<sup>224</sup> Moreover, the plurality notes the trial court failed to give "material weight" to the fact that Granville had assented to shorter but reasonable visitations with her children's grandparents.<sup>225</sup>

The foregoing analysis of *Troxel* suggests that when a fit parent's decision to homeschool is challenged, courts should require clear and

---

216. See *infra* notes 217–219, 219–221 (discussing the two scenarios in which a court may find the presumption of legitimate homeschooling rebutted).

217. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

218. *Grounds for Involuntary Termination of Parental Rights*, *supra* note 198.

219. *Id.* at 5.

220. *Troxel v. Granville*, 530 U.S. 57, 70, 73 (2000).

221. See *id.* at 70.

222. *Id.*

223. *Id.* at 69–70.

224. *Id.* at 70.

225. *Id.* at 72.

convincing evidence that this decision is not in the best interests of the child and give material weight to the reasonable efforts of a parent to provide an adequate education before finding that the presumption of legitimate homeschooling is rebutted.<sup>226</sup>

To rebut the presumption of legitimate homeschooling against a fit parent, states should require proof that the child is either at significant risk of educational neglect or that the parent is unfit to homeschool. Factors demonstrating parental unfitness to homeschool include lack of a high school diploma or GED, mental incapacity, or other permanent disability preventing a parent from providing an adequate education.<sup>227</sup> Factors demonstrating significant risk of educational neglect include failure to provide adequate instructional hours or curricular content appropriate to the child's age, including refusal to offer instruction in state-mandated subject areas; chronic illness preventing a parent from devoting adequate time and attention to their child's education; or regular employment which does not leave adequate time for appropriate instruction.<sup>228</sup>

Once rebutted, the parent's educational wishes for his or her child are no longer commanding, and the court must choose a course of action based on the best educational interests of the child.<sup>229</sup> Upon finding that a child is at substantial risk of educational neglect, the court may require public school attendance until the parent has followed a mandated plan to remove the risk—for example, adjustment of curriculum to meet minimum standards, change of working hours, or recovery from chronic illness.<sup>230</sup> However, when the risk is immediately curable through an educational plan, the court need not require public school attendance.<sup>231</sup> Similarly, a court finding a parent curably unfit to homeschool should

---

226. *See id.* at 69–73; *see also* *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

227. *See Policy Recommendations*, CRHE, <https://responsiblehomeschooling.org/advocacy/lawmakers/policy-recommendations/> (last visited Jan 28, 2022).

228. *See Homeschooling & Educational Neglect*, CHRE, <https://responsiblehomeschooling.org/advocacy/policy/educational-neglect/> (last visited July 12, 2022).

229. *Troxel*, 530 U.S. at 70.

230. *Cf. Parent or Caregiver Factors That Contribute to Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/can/factors/parentcaregiver/> (last visited Jan. 28, 2022) (discussing common risk factors for child abuse).

231. *Cf. supra* Section I.C.2 (surveying state policies on when homeschool students may be required to enroll in public school).

permit a reasonable period in which the parent may become fit by, for example, obtaining a GED.<sup>232</sup> Finally, given that the child's best educational interests must guide a court's decision, judges should carefully consider the disruptive impact on the child and the likelihood he or she will receive a better education before mandating a child attend public school.<sup>233</sup>

### **B. The Presumption of Legitimate Homeschooling Satisfies Intermediate Scrutiny**

The proposed presumption of legitimate homeschooling will likely appear to go too far in regulating home education to its advocates and not far enough to its critics.<sup>234</sup> Both advocates and critics of homeschooling should accept the presumption, nevertheless, because it promotes the core goals of both blocs while responding to the law as it stands.<sup>235</sup> While *Troxel* was decided without a majority opinion, its plurality opinion is the best indication of the constitutional standing of parental rights available.<sup>236</sup> That opinion simultaneously affirmed the fundamental status of parental rights while urging a heightened standard of scrutiny for regulation of those rights.<sup>237</sup>

The presumption of legitimate homeschooling responds to *Troxel* by comporting with intermediate scrutiny, which requires that a regulation be substantially related to an important government purpose to pass constitutional muster.<sup>238</sup> First, the presumption recognizes that for children to receive an education adequate to become independently functioning and minimally autonomous adults is an important government interest.<sup>239</sup> By denying the state the power to intervene in a particular homeschool absent clear and convincing evidence that a

---

232. See *Policy Recommendations*, *supra* note 227 (recommending states require homeschooling parents to meet similar educational qualifications).

233. Cf. *Troxel*, 530 U.S. at 70 (describing how judges must generally refrain from substituting their own judgments of a child's best interests over a parents').

234. See *infra* Section IV.A (proposing a presumption of legitimate homeschooling and outlining the scenarios in which it might be rebutted).

235. See generally *supra* Part I (discussing the core concerns of homeschooling critics and advocates).

236. See generally *Troxel v. Granville*, 530 U.S. 57 (2000).

237. *Id.* at 57, 68–69.

238. See ROTUNDA & NOWAK, *supra* note 134 at § 18.3(a)(iv).

239. See *supra* Section IV.A.



parent is failing to meet those minimal standards likewise ensures that state intervention is substantially related to that important purpose.<sup>240</sup>

Advocates of homeschooling should, therefore, embrace the presumption of legitimate homeschooling because by upholding the pre-political nature of parental rights and properly limiting the state's interest in education to basic needs, it precludes the kinds of effective bans that Bartholet and other critics urge.<sup>241</sup> Moreover, this should go some way in addressing advocates' likely concern that judges opposed to homeschooling will always find ways to override even a fit parent's decision to educate their children at home.<sup>242</sup> Further, the presumption achieves this purpose without requiring the Court to affirm a fundamental right to homeschool.<sup>243</sup> Finally, the presumption's foundation in Supreme Court jurisprudence provides a more secure basis for the right to homeschool than the political pressure the homeschooling movement has often relied upon.<sup>244</sup>

Critics of homeschooling should also find value in the presumption of legitimate homeschooling because it affirms the legitimacy of the state's interest in education by recognizing its prerogative to set basic educational standards.<sup>245</sup> Further, it affirms the authority of the state as *parens patriae* to ensure that parents provide their children with an adequate education and empowers the state to respond when they fail to do so in a more robust way than many states currently allow.<sup>246</sup> Moreover, this is achieved without requiring the Court to establish that children have a constitutional right to an education, which it has explicitly rejected before.<sup>247</sup>

---

240. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

241. Bartholet, *supra* note 9, at 3–4, n.73–74; Hamilton, *supra* note 9, at 1391–93.

242. *Cf. Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY, [https://www.childwelfare.gov/pubpdfs/best\\_interest.pdf](https://www.childwelfare.gov/pubpdfs/best_interest.pdf) (last updated June 2020) (demonstrating the varying factors used in determining the best interest of the child).

243. *See generally* Walton, *supra* note 11; Raley, *supra* note 138, at 69–70.

244. *See* Bartholet, *supra* note 9, at 44–47 (describing the political tactics of the homeschooling movement).

245. *See supra* Section III.B (discussing the state's legitimate interests in children's education).

246. *See supra* Section I.C.2 (surveying current state regulations of homeschooling).

247. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding there is no constitutional right to an education). *But see* Gary B. v. Whitmer, 957 F.3d 616, 648–49 (6th Cir. 2020) (holding access to literacy is a fundamental right), *reh'g en banc granted, opinion*

Nevertheless, critics' most likely concern is that the presumption does not go far enough in ensuring children receive an adequate education, in part because of the relatively minimal definition of "adequate" it incorporates.<sup>248</sup> The definition of an adequate education, however, must be set at a relatively minimal level for multiple reasons: to prevent applying a standard to homeschools that many public schools would not meet, to avoid usurping the right of parents in directing their children's education, and to refrain from enforcing one view of what it means to lead a successful or good life.<sup>249</sup>

## V. LEGISLATIVE PROPOSALS: STATES SHOULD ADDRESS THE REASONABLE CONCERNS OF CRITICS WHILE UPHOLDING THE RIGHT TO HOMESCHOOL

Having articulated and defended the presumption of legitimate homeschooling, this section begins by considering how the presumption would affect current state regulation of homeschooling.<sup>250</sup> The section concludes by taking the reasonable concerns of homeschooling's critics seriously by proposing legislation addressing the potential problems of undetected abuse and neglect without impeding the parental right to homeschool.<sup>251</sup>

### A. States Must Forego and Repeal Regulations of Homeschooling which Fail to Satisfy Intermediate Scrutiny

The presumption of legitimate homeschooling is a proposal for states to bring their review of parents' decisions to homeschool into accord with *Troxel* and the pre-political nature of parental rights.<sup>252</sup> Consequently, the presumption embodies the principles that (1) the state will normally have no reason to interfere with a fit parent's decision to homeschool, but (2) when challenged and subject to judicial review,

---

*vacated*, 958 F.3d 1216 (6th Cir. 2020). See generally Carmen Green, Note, *Educational Empowerment: A Child's Right to Attend Public School*, 103 GEO. L. J. 1089, 1103–04 (2015) (arguing for a child's right to education).

248. See *supra* notes 206–08 (discussing the need to avoid building too much content in the term "adequate").

249. See *supra* notes 248–49 (discussing the importance of the state enforcing one view of the good life).

250. See *infra* Section V.A.

251. See *infra* Section V.B.

252. See *supra* Part III (discussing the requirements of *Troxel*).

courts must accord substantial weight to the fit parent's decision.<sup>253</sup> Under this standard, a parents' right may only be outweighed by clear and convincing evidence that the child is at significant risk of educational neglect or that the parent is unfit to homeschool.<sup>254</sup> Therefore, states should forego or repeal laws inconsistent with the presumption.

First, laws which place an initial burden on parents to seek state preclearance or to prove their fitness to homeschool violate the presumption.<sup>255</sup> This includes laws such as Massachusetts's, which require pre-approval from the state to homeschool.<sup>256</sup> Similarly, laws that require presumed fit parents to submit to home visits by child protection agents, like Illinois's proposed House Bill 3560, before they may homeschool would likewise violate the standard urged here.<sup>257</sup> Such regulations are impermissible because they preemptively limit the rights of parents to direct the upbringing of their children without first requiring clear and convincing evidence that the parent is failing to provide their child an adequate education.<sup>258</sup>

Second, laws that mandate homeschooling instruction in areas beyond those required for children to mature into independently functioning and minimally autonomous adults likely violate the presumption of legitimate homeschooling.<sup>259</sup> While the state has an important interest in children's education, the content of that interest is limited to the minimally adequate standard outlined above.<sup>260</sup> Thus, the state is unlikely to succeed in demonstrating that instruction exceeding that standard is substantially related to the government's interest, as required by intermediate scrutiny.<sup>261</sup> For example, Texas's important interest in children receiving an adequate education justifies its requirement that homeschooling curricula "meet basic education goals of reading, spelling, grammar, mathematics and a study of good

---

253. *See supra* Part III (discussing the requirements of *Troxel*).

254. *See supra* Part III (discussing the requirements of *Troxel*).

255. *See, e.g.*, *Care & Prot. Of Charles*, 504 N.E.2d 592, 600 (1987).

256. *Id.*

257. H.R. 3560, 101st Gen. Assemb. (Ill. 2019).

258. *See supra* Part III (discussing the requirements of *Troxel*).

259. *See* Reich, *supra* note 187, at 291.

260. *Id.*

261. *See supra* Section IV.B (arguing that regulations of homeschooling should be evaluated under intermediate scrutiny).

citizenship.”<sup>262</sup> It would not, however, justify Texas in requiring homeschoolers to participate in orchestra or study advanced calculus because, though worthy pursuits and even essential for certain career-paths, they are not necessary to mature into an independently functioning and minimally autonomous adult.<sup>263</sup>

Nevertheless, as the Court has consistently affirmed, states retain the authority to regulate education.<sup>264</sup> That authority must simply be balanced against the rights of parents to direct the educational upbringing of their children, with special weight given to the decisions of fit parents.<sup>265</sup> Consequently, under the presumption, states may regulate home education in any way that respects the primary role of parents in directing the upbringing of their children and is substantially related to the government’s important interest in ensuring children receive a minimally adequate education.

### **B. Legislative Proposals Balancing Parent, Child, and State Interests**

Critics of homeschooling worry that the practice too easily leads to undetected abuse, educational neglect, and inadequate preparation for adult life and responsible citizenship.<sup>266</sup> Based on these concerns, critics then advocate states regulate homeschooling far more strictly or even ban it. This Article has argued against such bans primarily on the grounds that parents possess rights to direct the upbringing of their children which precludes them. For the same reason, the state should be cautious in enforcing one particular model of what it means to lead a successful life. Moreover, the empirical evidence in no way indicates either that homeschoolers are unprepared for adult life or that the reality of homeschooling is so perilous for children as to justify its prohibition.

Despite the lack of concrete evidence that homeschoolers are abused at a higher rate than other children, and even some evidence to the contrary, critics raise reasonable concerns that an unregulated homeschooling environment may, at least in theory, enable parents to isolate and abuse their children more easily than others. To address the

---

262. Texas Educ. Agency v. Leeper, 893 S.W.2d 432, 435 (Tex. 1994).

263. See Reich, *supra* note 187, at 291.

264. Meyer v. Nebraska, 262 U.S. 390, 402 (1923); Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925).

265. See Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

266. Bartholet, *supra* note 9, at 3–4.

reasonable concerns of critics without significantly burdening the right of parents to homeschool, legislatures should adopt the following proposals.

*Mandatory reporting.* Exposure to mandatory reporters is one of the primary reasons critics of homeschooling advocate requiring all children to attend public school.<sup>267</sup> Currently, only eighteen states require all adults to report abuse or neglect regardless of profession.<sup>268</sup> The remaining thirty-two states should classify all adults as mandatory reporters to decrease the likelihood that a homeschooled child may be abused without detection.<sup>269</sup> While every state but Wyoming imposes penalties ranging from civil liability to state jail felonies on mandatory reporters who “knowingly or willfully” fail to report suspected abuse or neglect, underreporting is a consistent theme across the child welfare literature.<sup>270</sup> Consequently, all fifty states should increase their efforts to enforce existing penalties for knowing failure to report suspected child abuse.<sup>271</sup>

*Failure to educate as a form of neglect.* Approximately half the states include failure to educate under their definitions of child neglect, and the remainder of the states should adopt similar provisions.<sup>272</sup> The primary reason for this proposal is, given the presumption of legitimate homeschooling and the fact that homeschooling is generally treated as an exception to compulsory attendance laws, the state needs some means by which to perform its important role in ensuring homeschooling parents are meeting their children’s basic educational needs.<sup>273</sup> Adopting such a definition simultaneously affirms the state’s

---

267. Hamilton, *supra* note 9, at 1351.

268. *Mandatory Reporters of Abuse and Neglect*, U.S. DEP’T HEALTH & HUMAN SERVS.: CHILD WELFARE INFO. GATEWAY 1, 2 (Apr. 2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

269. *See generally id.*

270. *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect*, U.S. DEP’T HEALTH & HUMAN SERVS.: CHILD WELFARE INFO. GATEWAY 1, 2, n.2 (Feb. 2019), <https://www.childwelfare.gov/pubpdfs/report.pdf>.

271. *See generally id.*

272. *Definitions of Child Abuse and Neglect*, U.S. DEP’T HEALTH & HUMAN SERVS.: CHILD WELFARE INFO. GATEWAY 1, 3 (March 2019), <https://www.childwelfare.gov/pubPDFs/define.pdf>.

273. Green, *supra* note 247, at 1103–04 (discussing the need for educational neglect statutes).

role in education and parents' primary responsibility for the education of their children.<sup>274</sup>

*Required enrollment.* Each school year parents must declare their intention to send their children to public school, private school, or homeschool.<sup>275</sup> To alleviate advocates' likely worry that this will lead to intrusive supervision by local school districts, this reporting system should be operated by state-wide education agencies.<sup>276</sup> Those who choose to homeschool should be required to provide the name, age, and grade-level of their students, as well as their home address or primary place of education, and the name of their primary instructor.<sup>277</sup> This regulation serves dual purposes. First, it would ensure that every school-age child is accounted for while enabling researchers to collect more accurate data on homeschooling and begin filling in the often-cited research gap.<sup>278</sup> Moreover, requiring declaration of intent from all parents rather than treating homeschooling as an exception to a norm would counter the perception that homeschooling is not a form of schooling at all.<sup>279</sup>

*Closing the drop-out loophole.* Some parents abuse the right to homeschool by withdrawing students to avoid discipline.<sup>280</sup> Likewise, school districts sometimes encourage parents to withdraw struggling students for varying reasons.<sup>281</sup> States should enact programs to incentivize schools to work harder for students rather than suggest they withdraw to homeschool.<sup>282</sup> Moreover, upon exercising the right to

---

274. See *supra* Part III (arguing why parents have primary responsibility for the education of children).

275. See *Policy Recommendations, supra* note 227 (recommending states require annual notification of homeschooling).

276. *Id.*; see also Bartheolet, *supra* note 9, at 53.

277. See generally *Policy Recommendations, supra* note 227 (proposing, among other things, standards for notification of intent to homeschool and record-keeping by homeschooling parents).

278. See, e.g., Bartheolet, *supra* note 9, at 21.

279. See, e.g., George Shepherd, *Homeschooling's Harms: Lessons from Economics*, 49 AKRON L. REV. 339, 339–40 (2016) (describing homeschooling as attending “no school”).

280. See, e.g., Rachel Coleman, *Left in Limbo: Examining Kentucky's 2018 Report on Homeschooling*, CHRE (Mar. 23, 2021), <https://responsiblehomeschooling.org/left-in-limbo-examining-kentuckys-2018-report-on-homeschooling/> (discussing report that four in five Kentucky truancy officers see parents withdraw children from public school to homeschool to avoid consequences of truancy).

281. See Jeanne Faulconer, *Pushed Out: When the School Says to Homeschool*, HOMESCHOOL MOM, <https://www.thehomeschoolmom.com/pushed-school-says-homeschool/> (last visited Jan. 28, 2022).

282. See *id.*

withdraw a student to homeschool, states should require parents to aver that they are doing so because they believe it to be in their child's best educational interests, that they were not pressured by school officials to withdraw their student, and, if necessary, that the parent is withdrawing against the school's advice.<sup>283</sup> Finally, a school official's belief that a parent withdrawing his or her child is unfit to homeschool or that the child will be at significant risk of educational neglect would justify a report to the appropriate state agency.<sup>284</sup>

*Right to public school.* Based on the concern that a technically adequate but unimpressive homeschool education may hamper children's future, states should adopt a quasi-emancipation procedure by which children entering the ninth grade and no younger than fourteen years old may petition to attend public school.<sup>285</sup> For a petitioner to succeed, the court must find that (1) the petitioner is sufficiently rational and mature to make this educational decision in their own best interest, and (2) the petitioner pled sufficient evidence to rationally infer that attending public school is in the child's best interests.<sup>286</sup>

Under the presumptions of legitimate homeschooling and fit parenthood, statutes enabling this procedure must be carefully tailored to avoid infringing parental rights.<sup>287</sup> The rationale behind the proposal is to acknowledge that children have a legitimate and weighty interest in their own education.<sup>288</sup> However, a finding that a particular child is capable of making this decision in their own best interest is not a finding that the parent is unfit or even unfit to homeschool. Rather, it recognizes that in certain cases, parents and mature children may reasonably disagree as to the child's best interests and because of the weight of the child's interest in education, in this narrow circumstance, their interest should override their parents'.<sup>289</sup>

---

283. See generally *Homeschool Laws by State*, HSLDA, <https://hsllda.org/legal> (last visited Jan. 28, 2022) (providing details on current withdrawal procedures in every state).

284. See *supra* notes 272–74 and accompanying text (advocating states classify failure to educate as a form of neglect).

285. See Green, *supra* note 247, at 1123–24 (proposing a similar procedure).

286. See *id.*

287. Cf. *id.* at 1125–31 (discussing whether a judicial by-pass procedure would infringe parental rights).

288. See *supra* notes 189–92 and accompanying text (discussing children's interests in their own education).

289. See Green, *supra* note 247, at 1131.

Nevertheless, to safeguard both fit parents' rights to direct the education of their children and children's interests, any such procedure should ensure parents an opportunity to present specific evidence that their child is not competent to act in their own best interests in this case.<sup>290</sup> Moreover, that the home education includes religious instruction or reasonable parental discipline should be explicitly excluded as evidence in favor of educational emancipation, and judges must be constrained from substituting their own judgement of the child's best interests.<sup>291</sup>

*Right to participation.* One area of agreement among advocates and critics of homeschooling is that homeschooled children should have access to school-sponsored extracurricular activities.<sup>292</sup> Thirty-five states now have legislation, like Texas's UIL Equal Access Bill, which allow school districts to opt into participation.<sup>293</sup> The remaining states should adopt similar legislation, and all states should work towards guaranteeing non-enrolled student access. For those skeptical towards homeschooling, such legislation accomplishes several valuable objectives at once. First, it increases opportunities for the detection of child abuse by school officials.<sup>294</sup> Second, because non-enrolled students who wish to participate in these activities are required to meet grade-level standards, they may be required to pass standardized proficiency exams, which allow direct comparison between homeschooled and public schooled students.<sup>295</sup> Finally, participation may foster civic engagement based around local schools.

## VI. CONCLUSION

In the wake of its explosive recent growth, greater public scrutiny of the law of homeschooling is likely. The current uncertainty as to the efficacy and proper legal standing of homeschooling intensifies the

---

290. See *supra* Section III.A (discussing why parents high duties to children entail strong rights to direct their upbringing).

291. See *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000).

292. See *Hamilton*, *supra* note 9, at 1392; *The UIL Equal Access Bill Shouldn't Be Controversial for Homeschoolers*, TEX. HOMESCHOOL COAL., <https://thsc.org/uil-equal-access-shouldnt-be-controversial/> (last visited Jan. 28, 2022).

293. TEX. EDUC. CODE ANN. § 33.0832 (West 2021); *Tim Tebow Filled in in the 2017 Texas Legislature*, TEX. HOMESCHOOL COAL., <https://thsc.org/tim-tebow-bill-filed/> (last visited Jan. 28, 2022).

294. See *Bartholet*, *supra* note 9 at 68, 76.

295. See, e.g., TEX. EDUC. CODE ANN. § 33.0832(f) (West 2021).



debate as advocates see their right to homeschool as only ever one legislative session away from extinguishment while critics see a dangerously underregulated environment in which parents may use homeschooling as a cover for abuse and educational neglect. Thus, legislators may soon face difficult decisions about how to properly regulate homeschooling.

Answering this question, however, first requires understanding the bounds of parental and state authority over children. Underlying critics' arguments that homeschooling should be effectively banned or stringently regulated is an assumption that ultimate authority over children rests with the state. Yet nearly 100 years of precedent, as synthesized in *Troxel v. Granville*, while never denying the right of the state to establish minimum educational standards, affirms the fundamental right of parents to direct the upbringing of their children. Thus, while states should respond to the reasonable worries of homeschooling's critics, they should do so in a way that affirms the pre-political nature of parental rights and protects the right to homeschool. In proposing a presumption of legitimate homeschooling, this Article charts a way forward for legislators that upholds the right to homeschool while protecting children.