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Illiberal Education: Constitutional Constraints on Homeschooling

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ILLIBERAL EDUCATION: 
CONSTITUTIONAL CONSTRAINTS ON HOMESCHOOLING

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Homeschooling in America is no longer a fringe phenomenon. Estimates indicate that well over a million children are currently being homeschooled. Although homeschoolers are a diverse group, the homeschooling movement has come to be defined and dominated by its fundamentalist Christian majority many of whom choose to homeschool in order to shield their children from secular influences and liberal values. In response to political pressure from this group states are increasingly abdicating control and oversight over homeschooling. Modern day homeschooling raises then in stark form questions about the obligations that states have toward children being raised in illiberal subgroups. Surprisingly, the legal and philosophical issues raised by homeschooling have been almost entirely ignored by scholars. This paper seeks to begin to fill this void by making a novel constitutional argument. The paper relies on federal state action doctrine and state constitution education clauses to argue that states must—not may or should—regulate homeschooling to ensure that parents provide their children with a basic minimum education and check rampant forms of sexism. This paper argues, in other words, that while there is an upper limit on how much states can constitutionally regulate and control children’s education, there is a lower limit as well. There is a minimum level of regulation and oversight over children’s education that states may not with constitutional impunity avoid.

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INTRODUCTION

Ann and Bob Smith are a devoutly religious couple who choose to homeschool their seven year old twins Susan and Sam. In accordance with their religious beliefs, they teach their children only religious doctrine and refuse to provide their children with a basic education in reading, writing and arithmetic. The Smiths are permitted by the laws of their state to adopt such a plan.

My guess is that the visceral response of many, if not most people, is that a state simply cannot permit noneducation of this sort be it by state or private actors. The question is of more than academic importance. In response to strong lobbying from homeschoolers, states have increasingly deregulated homeschooling and relinquished any oversight and control.

This paper uses federal state action doctrine to make the novel argument that states are constitutionally obligated to regulate homeschooling. The argument is not about what states should or may do, but about what they must do as a matter of federal and state constitutional law.
Homeschooling is no longer a “fringe” phenomenon.1 Homeschooling was common in the United States before the Nineteenth Century, but by the early 1980s the practice was illegal in most states.2 Since then, homeschooling has enjoyed a dramatic rebirth.3

Today, homeschooling is legal in all states.4 Estimates of the numbers of children currently being homeschooled range from 1.1 to 2 million.5 The 1.1 million estimate represents 2.2 percent of the school-age population in the country.6 Even conservative estimates place the number of homeschooled

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

2 See Patricia Lines, Homeschooling Comes of Age, 140 THE PUBLIC INTEREST 72, 77 (2000) (explaining that “not until the Nineteenth Century did state legislatures begin requiring local governments to build schools and parents to enroll their children in them”); Home-Schooling: George Bush’s Secret Army, THE ECONOMIST, February 28, 2004 at 32 (noting that in 1981 homeschooling was illegal in most states).

3 Estimates suggest that there were 10,000 to 15,000 children being homeschooled in the late 1970’s, and that there were 60,000 to 125,000 children being homeschooled in 1983. See PATRICIA M. LINES, HOMESCHOOLERS: ESTIMATING NUMBERS AND GROWTH 2-3 (1999).

4 Lines, Homeschooling Coming of Age, supra note 2, at 77.

5 See NATIONAL CENTER FOR EDUCATION STATISTICS, ISSUE BRIEF 2004-115, 1.1 MILLION HOMESCHOoled STUDENTS IN THE UNITED STATES IN 2003 (July 2004) (available at http://nces.ed.gov/nhes); Home-Schooling: George Bush’s Secret Army, supra note 2, at 32. This range is so large and the estimates are so imprecise because several states do not require homeschooling parents to notify the state of their intention to homeschool, and many homeschoolers living in states that do require notification do not comply. See LINES, HOMESCHOOLERS: ESTIMATING NUMBERS AND GROWTH, supra note 3, at 2-3 (discussing problems with getting good data on the actual number of homeschooled students); Lines, Homeschooling Comes of Age, supra note 2, at 77-78 (same); Mitchell L. STEVENS, KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT 13-14 (2001) (same); Kurt K. Bauman, Home Schooling in the United States: Trends and Characteristics, 10 EDUC. POLICY ANALYSIS ARCHIVES (2002) (available at: http://epaa.asu.edu/epaa/v.10n26html).

6 NCES, ISSUE BRIEF 2004-115, supra note 5. Demographic data suggests that homeschooling parents are likely to be at or slightly above the national mean in terms of household wealth and parental education. See L. Rudner, Scholastic Achievement and Demographic Characteristics of Home School Students in 1998, 7 EDUCATIONAL POLICY ANALYSIS ARCHIVES (1999) (available at: http://epaa.asu.edu/epaa/v.7.8/) (finding that median household income of homeschool families was higher than the median household income of families with children nationwide); National Center for Educational Statistics (NCES), Homeschooling in the United States: 1999, 3 EDUC. STATISTICS QUARTERLY (available at: http://nces.ed.gov/programs/quarterly/vol_3/3_3/q3-2.asp) (finding that parents of homeschooled students had slightly more education than parents of non homeschooled children but finding no difference in household income of homeschooling and non homeschooling parents); Clive R. Belfield, Home-Schooling in the U.S., Occasional Paper No. 88, National Center for the Study of Privatization in Education, Teachers College, Columbia University (2004) (finding that homeschooling families tend to be in the middle range socially in terms of education and income). Homeschooling parents are also significantly more likely to be white, married, and
children at twice the number of students enrolled in conservative Christian schools and more than the number of students enrolled in Wyoming, Alaska, Delaware, North Dakota, Vermont, South Dakota, Montana, Rhode Island, New Hampshire, and Hawaii—the ten lowest states in terms of student enrollment—combined. Moreover, homeschooling is estimated to be growing at a rate of between 10-20 percent per year.

The modern homeschool movement was originally dominated by liberals and educational progressives. These early pioneers came to homeschooling from a range of leftist causes and organizations: the women’s movement, the alternative schools movement, and the La Leche League. Many believed that traditional schools were rigid and intellectually stifling. They were followers of progressive school reformer John Holt, one of the early advocates of “unschooling.” Holt believed that children had a natural proclivity for learning religious than non homeschooling parents. See Lines, Homeschooling Comes of Age, supra note 2, at 78 (“According to the surveys, the typical homeschooling family is religious, conservative, white, middle-income, and better educated than the general population”); NCES, Homeschooling in the United States: 1999, supra note 6, at 6-8 (finding that 75% of homeschoolers were white as compared to 65% of non homeschoolers; 80% of homeschooled students lived in 2 parent families as compared to 66% of non homeschooled students; 62% of homeschoolers and 44% of non homeschoolers came from families with three or more children); Patricia Lines, Support for Home-Based Study, ERIC CLEARINGHOUSE ON EDUCATIONAL MANAGEMENT (2002) (available at http://eric.uoregon.edu/pdf/homeschool.pdf) (describing homeschoolers as “more religious, more conservative, white, somewhat more affluent, and headed by parents with somewhat more years of education” as compared to public school families); Kurt K. Bauman, Home Schooling in the United States: Trends and Characteristics, 10 EDUCATION POLICY ANALYSIS ARCHIVES (2002) (available at http://epaa.asu.edu/epaa/v.10n26.html) (“Home schooled children are more likely to be non-Hispanic White, they are likely to live in households headed by a married couple with moderate to high levels of education and income. They are more likely to live in households with three or more children and they are likely to live in a household with an adult not in the labor force”). Homeschooling does, however, seem to be increasing among African Americans. See Home-Schooling: George Bush’s Secret Army, supra note 2, at 32 (noting that “the number of black home-schoolers is growing rapidly”); Associated Press, Homeschools are Becoming More Popular Among Blacks, N.Y. TIMES, December 11, 2005 (available at http://www.nytimes.com/2005/12/11/education/11homeschool.html) (describing the increasing but still low numbers of blacks homeschooling).

See Lines, Homeschooling Comes of Age, supra note 2, at 75 (estimating growth at 15-20% per year); John Cloud & Jodie Morse, supra note 1, at 46. Additionally, more children are homeschooling than are in charter schools or school voucher programs combined. See John Cloud & Jodie Morse, supra note 1, at 46.

See Lines, Homeschooling Comes of Age, supra note 2, at 75 (noting that “[t]he contemporary homeschooling movement began sometime around mid century as a liberal, not conservative, alternative to the public school”).

See STEVENS, supra note 5, at 23-25

See Lines, Homeschooling Comes of Age, supra note 2, at 75-76.

See id. at 75-76; STEVENS, supra note 5, at 24 (explaining that unschooling is a pedagogy which “required neither classrooms nor teachers”). See Carolyn Kleiner, Home School Comes of Age, U.S. NEWS & WORLD REPORT, Oct. 16, 2000, at 52 (explaining that unschooling is “based on
and learned best when they were encouraged to pursue their own interests rather than being forced to follow an established curriculum as in traditional schools.\(^\text{13}\)

By the early 1990's, homeschooling had expanded and divided into two distinct movements: one secular and the other conservative Christian.\(^\text{14}\) As Mitchell Stevens, a sociologist who has performed the most extensive study of contemporary homeschooling communities to date, explains: “By the early 1990s, homeschoolers were divided into two quite different movement worlds. They read different publications, attended different support groups, and heeded different kinds of advice about how to act politically.”\(^\text{15}\)

These two factions were not, however, of equal size and strength. The Christian homeschooling movement came to dominate its secular counterpart in size, profile and political strength. In other words, while homeschoolers themselves continue to be a diverse lot,\(^\text{16}\) the homeschooling movement has become defined and driven by its conservative Christian majority.\(^\text{17}\)

At the heart of the Christian homeschooling movement is the Homeschool Legal Defense Association.\(^\text{18}\) HSLDA’s commitment to ensuring parents’
unfettered right to homeschool flows from two core ideological beliefs. The first is a belief in parental control, indeed ownership, of children. “Parental rights are under siege,” HSLDA warns. 19 “The basic fundamental freedom of parents to raise their children hangs in the balance. Have we forgotten whose children they are anyway? They are a God-given responsibility to parents,” HSLDA proclaims. 20 Indeed, Michael Farris, an HSLDA founder and its former president, argues that “[t]he right of parents to control the education of their children is so fundamental that it deserves the extraordinary level of protection as an absolute right.” 21 The second is a belief in the need for Christian families to separate and shield their children from harmful secular social values. Public schools, Farris cautions, have been “promoting values that are questionable or clearly wrong: the acceptability of homosexuality as an alternative lifestyle; the acceptability of premarital sex as long as it is ‘safe’; the acceptability of relativistic moral standards.” 22 Such indoctrination, he argues, is “probably more dangerous to our ultimate freedom than armed enemies.” 23 Fortunately, according to Farris, the moral obligation to protect one’s child from such indoctrination is protected by a constitutional right. “[P]arents have the constitutional right to obey the dictates of God concerning education of their children,” he explains. 24

Motivated by these beliefs, HSLDA, along with the National Center for Home Education (NCHE)—HSLDA’s service arm designed to link, inform and organize state homeschool leaders—and the Congressional Action Program (CAP)—HSLDA’s lobbying organization—has become a powerful political force. For the last two decades HSLDA has opposed virtually all state oversight and regulation of homeschooling. 25

HSLDA first publicly flexed its muscles in February 1994, in opposition to a proposed amendment to the Elementary and Secondary Education Act that HSLDA contended would have required homeschooling parents to be certified

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20 Id. The HSLDA also explains on its website that it has “opposed the UN Treaty on the Rights of the Child because it would strip parents of much of their authority to educate, train, and nurture their children according to the dictates of their conscience.” http://www.hslda.org/about/default.asp.

21 FARRIS, supra note 18, at 53.

22 Id. at 59-59.

23 Id. at 9-10.

24 Id. at 11.

25 See STEVENS, supra note 5, at 123-25 (describing the sophisticated organizational structure of HSLDA, NCHE and CAP which allows the groups to quickly and effectively mobilize large numbers of Christian homeschoolers).
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teachers. HSLDA sent a dire warning about the proposed amendment to its members and began courting other organizations for support. Within days of the HSLDA warning, some members of Congress had received hundreds of thousands of calls each in opposition to the amendment. HSLDA also arranged for volunteers to personally visit the office of every Representative on the Hill to explain their opposition to the amendment. Not only did the amendment fail, but language was added to the Act stating explicitly that the Education Act did not authorize any federal control over homeschools.

State lawmaker Michael Switalski encountered a similarly strong and well organized lobby when in 2001 he introduced legislation into the Michigan State Senate requiring all homeschoolers to be registered with the state and take a standardized test. Switalski received more than 100 calls a day from homeschoolers opposed to the legislation, his cosponsors withdrew their support, and the legislation died in the House Education Committee. The clout of HSLDA and its grassroots Christian homeschoolers is now well recognized in political circles. Indeed, in 2000 former U.S. Representative Bill Godling from Pennsylvania, the former chair of the House Committee of Education and the Workforce, called homeschoolers “the most effective education lobby on Capital Hill.”

In addition to preventing the passage of new state laws regulating homeschooling, HSLDA has been effective at challenging existing state laws. Over the past 15 years, HSLDA has devoted its resources to challenging teacher certification requirements for homeschool teachers, subject matter requirements for home-schools, testing requirements for homeschooled children, and home inspection visits of home-schools. As a result of HSLDA’s work, state laws regulating homeschooling have become increasingly lenient. Presently,

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26 See Lines, Homeschooling Comes of Age, supra note 2, at 85 (describing HSLDA’s opposition to H.R. 6 an amendment to an education spending act); STEVENS, supra note 5, at 157 (noting that the amendment probably would not have applied to homeschoolers and several secular homeschooling organizations did not view H.R. 6 as the threat that HSLDA did).

27 See STEVENS, supra note 5, at 157-58 (describing HSLDA’s lobbying effort to defeat H.R. 6).


31 See Home-Schooling: George Bush’s Secret Army, supra note 2, at 32 (“The main reason why legal restrictions on home-schooling have been swept away across so much of America is the
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according to HSLDA, only twenty-five states require standardized testing and evaluation of homeschooled students.32 Moreover, ten states, those labeled by HSLDA as having the lowest regulation of homeschooling, do not require homeschooling parents to even notify the state of their intent to homeschool.33 Consider, for example, Alaska, one of the most explicitly hands-off states with regard to homeschooling. Alaska exempts homeschooled students from its compulsory education laws and imposes no subject matter or testing requirements on homeschooled students. 34 “Homeschooling” of virtually any sort is legal under Alaska law.

32 See REICH, supra note 1, at 147 (citing Christopher Klicka, Homeschooling in the United States: A Legal Analysis (1999)).

33 HSLDA divides states into four categories based on the degree of strength of their homeschooling laws. HSLDA labels the ten states requiring no state notification of the intent to homeschool as Category One states signifying their extremely lenient response to homeschooling. According to the HSLDA, the states in this category are Alaska, Idaho, Texas, Oklahoma, Missouri, Illinois, Indiana, Michigan, Connecticut, and New Jersey. See http://www.hslda.org/laws/default.asp. While most states in this category do require that homeschooled students be taught specific subjects or be given an education that is comparable to that in the public schools, these subject matter requirements are often undercut by state laws exempting religious homeschoolers from statutory requirements that burden their exercise of religion. Missouri, for example, provides as part of its compulsory education law: “Nothing in this section shall require a private, parochial, parish or home school to include in its curriculum any concept, topic, or practice in conflict with the school’s religious doctrines or to exclude from its curriculum any concept, topic, or practice consistent with the school’s religious doctrines.” MO. ANN. STAT. 167.031.3. Several Category One states have also undercut their substantive education requirements by passing Religious Freedom Restoration Acts. These acts generally prohibit states from burdening the free exercise of religion unless the state proves that the burden “(1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.” Connecticut, for example, has a Religious Freedom Act that provides: “The state . . . may burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest” CONN. GEN. STAT. 52-571b. The HSLDA interprets this law to mean that “[i]f the parents’ free exercise of religion is substantially burdened by having to comply with the homeschool law, the parents may use the religious freedom law as a defense or file suit against the state.” See http://www.hslda.org/laws. Idaho, Illinois, Missouri Oklahoma and Texas all have Religious Freedom Act’s with similar language. See IDAHO CODE 73-401 et seq.; 775 IL CS 35/15; MO. REV. STAT. 1.302 & 1.307, OKLA. STATUTES, Section 251 of Title 51; TEX. CIV. PRAC. & REM. CODE 110.001 et seq. Indiana, Michigan and New Jersey have not passed Religious Freedom Acts. Even in Category One states in which substantive requirements remain in effect, however, the practical import of the requirements is dubious given that these states do not require parents to notify the state of their intent to homeschool.

34 Alaska is one of the most explicitly hands-off states with regard to homeschooling. The state’s homeschooling statute exempts homeschoolers’ from the state’s compulsory education law.
In short, oversight of homeschooling in several states is lax to the point of being nonexistent.\textsuperscript{35} Moreover, given the political clout of the Christian homeschool movement, the trend is away from rather than toward state oversight and regulation of homeschooling. States are, to an increasing degree, not only looking the other way when homeschoolers do not comply with state laws, but actually changing their laws so as to authorize homeschooling families to operate in whatever ways they see fit.

Surprisingly, the social and legal implications of this phenomenon have received almost no scholarly attention. For decades political theorists have worried and argued about what steps a liberal society must take to protect children being raised in illiberal communities. They have focused their attention on the extent to which a liberal society must permit or condemn such practices as polygamy, clitoridectomy, and child marriage.\textsuperscript{36} Virtually absent from the debate has been any discussion of the extent to which a liberal society should condone or constrain homeschooling, particularly as practiced by religious fundamentalist families explicitly seeking to shield their children from liberal values of sex equality, gender role fluidity and critical rationality. The notable exception among political scientists is Rob Reich.\textsuperscript{37} Reich has cautioned that

\textsuperscript{35} Federal law does not itself impose any substantive obligations on homeschoolers as the No Child Left Behind Act which imposes stringent test performance requirements on public schools explicitly exempts homeschools. The Act provides: “Nothing in this Act shall be construed to affect a home school, whether or not a home school is treated as a home school or a private school under state law, nor shall any student schooled at home be required to participate in any assessment referenced in this Act.”107 PL 110,9506; 20 USC 7886.


\textsuperscript{37} See Rob Reich, \textit{The Civic Perils of Homeschooling}, 2002 EDUCATIONAL LEADERSHIP 56; Rob Reich, \textit{Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling}, in NOMOS XLIII, 275 (2002); Reich, Bridging Liberalism, supra note 1.
homeschooling in some cases may be incompatible with the state’s obligation to ensure that children receive a liberal multicultural education that promotes at least minimal autonomy. He argues that, as a result, the state “must not forbid homeschooling but regulate it, and strictly enforce such regulations, so as to ensure that the interests of the state and the child are met.” His argument, though, is one of pure normative political theory—what a state should do—rather than one of positive legality—what a state must do.

Legal academics have been even more silent in the face of homeschooling’s dramatic rise. Most articles about homeschooling have focused on the narrow question of whether public schools must permit homeschooled students to participate in extracurricular activities. Very few have provided any critical evaluation or assessment of current homeschooling laws more generally. None have addressed the significant constitutional questions raised by state abdication of control over homeschooling.

This paper seeks to begin to fill this important void. The paper explores the constitutional limits the state action doctrine puts on states’ ability to delegate unfettered control over education to homeschooling parents. It argues that states must—not may or should—regulate homeschooling to ensure that parents provide their children with a basic minimum education and check rampant forms of sexism. States are, in other words, obligated to ensure that

38 See Reich, Bridging Liberalism, supra note 1, at 145-172 (2002); Reich, The Civic Perils of Homeschooling, supra note 37, at 56; Reich, Testing the Boundaries of Parental Authority over Education, supra note 37, at 275. See also Michael W. Apple, Away with All Teachers: The Cultural Politics of Homeschooling, 10 Int’l Studies in Sociology of Education 61 (2000) (discussing the potential civic dangers raised by the rise of illiberal homeschooling).

39 Reich, Bridging Liberalism, supra note 1, at 163.


homeschooling parents provide their children with a constitutionally mandated minimum education. This argument about the constitutionally mandated minimum that states must require of homeschools is critically important for two reasons. Conceptually, it rejects the dominant HSLDA rhetoric about absolute parental control over children’s education. It highlights the legal distinctness of parents and children and emphasizes that parental control over children’s basic education flows from the state (rather than vice versa). States delegate power over children’s basic education to parents, and the delegation itself is necessarily subject to constitutional constraints. Certainly there is an upper limit on how much states can regulate and control children’s education. Parents do have constitutionally protected liberty interests in their relationship with their children. This paper does not address the upper limits on state regulation. What it emphasizes, however, is that there is a lower limit as well. There is a minimum level of regulation and oversight over children’s education that states may not avoid. This lower limit belies the claim that parents have absolute educational control over children.

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

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

44 See Pierce, 268 U.S. at 534-35 (explaining that the Constitution guarantees the “liberty of parents and guardians to direct the upbringing and education of children.”); Troxel v. Granville, 120 S. Ct. 2054, 2060 (2000) (noting that parents have a “fundamental” right to direct the education of their children).

45 Necessarily, there is also an in-between range in which state regulation is permitted but not required. The Supreme Court has readily acknowledged this zone of discretion. See Runyon v. McCrary, 427 U.S. 160, 178 (1976) (“The Court has repeatedly stressed that . . . [parents] have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”); Pierce, 268 U.S. at 534 (“No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them,
Practically, and perhaps more importantly, the argument about a constitutionally mandated minimum demands that states bring homeschooling families into the regulatory structure. This demand, even apart from the discrete question of whether particular homeschooled children get more education as a result, is critical. It means that homeschooled parents cannot separate themselves entirely from society; they cannot exist “off the grid.” The required oversight puts a real as well as symbolic break on anti-secular separatism. Moreover, the required regulatory regime may, in turn, remind legislators of the area of discretion between the lower and upper bounds of state control over education, thereby making normative discussions both more likely and useful.

The structure of the paper is as follows. In Part I, I consider whether states may permit homeschooling parents to deprive their children of even a basic minimum education. I argue, as a matter of state and federal constitutional law, that states may not in fact permit homeschooling of this sort but are instead required to oversee and regulate homeschooling parents so as to ensure that they provide their children with the same basic minimum education as is provided in their state’s own schools. In Part II, I consider whether states may permit homeschooling parents to provide their sons with far better and more sophisticated educations than their daughters. Here too, I contend that states may not permit homeschooling of this sort. I argue that in order to comply with the federal equal protection clause, states must prohibit extreme forms of sexist homeschooling. Finally, in Part III, I explore the steps which states must take to make sure their educational obligations are being met within homeschooling families. I argue that states are constitutionally obligated not only to formally recognize children’s educational rights, but to take affirmative steps to make such rights real.

I CONSTITUTIONAL CONSTRAINTS ON NON EDUCATION

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

Anecdotal evidence suggests that at least some homeschooled children, by design or accident, may not be receiving even a basic minimum education. The of Basic Skills” but noting that “not all homeschoolers take standardized tests and one suspects the better students are the ones volunteering to do so.”). See Brian Ray, Home Schooling in 20th Century America, 1 (available at http://www.bobsheppard.com/Home_School/brian-ray-article.htm) (asserting that “[r]egardless of race, gender, socioeconomic status, parent education level, teacher certification, or the degree of government regulation, the academic achievement scores of home educated students significantly exceed those of public school students” but basing his findings on survey responses from surveys mailed directly to homeschooling families); Grant Pick, Home Rooms Whether Conservative or Liberal About Education, More Parents than Ever Think they can Teach their Children Better than Conventional Schools Can, CHI. TRIB., January 19, 2003 (available at 2003 WL 9693789) (noting that “home schoolers are finding more tolerance—if not mainstream acceptance—as studies show home-schooled children generally do as well or better than others on standardized tests”).

See Belfield, supra note 6, at 10-11 (noting the difficulties in assessing the relative performance of homeschoolers and explaining that “review of the data available across nine states with ‘high regulation’ of home-schooling yields very limited information. In five such states (WA, VT, WV, PA, NY), home-school students are not required to take state assessments or their results are not recorded” and criticizing existing studies for not controlling for family background characteristics); Lines, Homeschooling Comes of Age, supra note 2 (noting that “virtually all of the reported data show that homeschooled children score above average, sometimes well above average. Self-selection may affect this result, just as it affects other aspects of homeschooling research”); STEVENS, supra note 5, at 13 (reporting that a study funded by the HSLDA and performed by Lawrence Rudner found that homeschoolers had higher median scores than the national norm on basic skills tests for every subject and every grade but noting that the test was based on a non random convenience sample); Kariane Mari Welner & Kevin H. Welner, Contextualizing Homeschooling Data: A Response to Rudner, 7 EDUC. POL’Y ANALYSIS ARCHIVES (1999) (available at: http://epaa.asu/epaa/v7n13/html) (criticizing the methodology of the Rudner/HSLDA study); Home-Schooling: Bush’s Secret Army, supra note 2, at 33 (noting the difficulty of getting a good sense of homeschoolers’ academic performance because “[h]omeschoolers do not have to report bad results. Moreover, home-schoolers may simply come from the more educated part of the population”).

See REICH, BRIDGING LIBERALISM, supra note 1, at 147 (citing CHRISTOPHER KLICKA, HOMESCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS (1999)).

See Lines, Homeschoolers: Estimating Numbers and Growth, supra note 3, at 2-3 (discussing problems with getting good data on homeschool students because of their failure to comply with existing state regulations).

See, e.g., Kleiner, supra note 12, at 52, 54 (describing a 15 year old homeschooler who responded to a question about what he studied by saying: “To be perfectly honest, I snowboard a lot”); Cloud & Morse, supra note 1, at 47, 52 (quoting a 15 year old homeschooler who described her educational experience as follows: “I make pretty much all the decisions about
fact that one cannot know for sure how rare such occurrences are is itself a problem. I contend in this Part that as a matter of federal and state constitutional law states may not permit such deprivation.

A. Constitutional Guarantees of a Basic Education

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

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

Education clauses in the second category speak not only of a general requirement to provide public education but “emphasize the quality of public education.” West Virginia’s education clause falls into this category. The West

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53 Id. at 815.

54 N.C. CONST. art. IX §2. Other states whose constitutional education provisions fall in this category are: Alaska, Arizona, Connecticut, Hawaii, Kansas, Louisiana, Nebraska, New Mexico, New York, Oklahoma, South Carolina, Utah, Vermont. For a complete list of these constitutional provisions see Ratner, supra note 52, at 815 n. 143.

55 Ratner, supra note 52, at 815.
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Virginia Constitution provides: “The legislature shall provide, by general law, for a thorough and efficient system of free schools.”

Education clauses in the third category “contain a much stronger and more specific education mandate” than those in the first two groups. Wyoming’s education clause falls within this category. The Wyoming Constitution provides: “The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every kind and grade, a university with such technical and professional departments as the public good may require and the means of the State allow, and such other institutions as may be necessary.”

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

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

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56 W. VA. CONST. art. XIII, §1. Other states whose constitutional educational clauses fall into this category include: Arkansas, Colorado, Delaware, Florida, Idaho, Kentucky, Maryland, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Wisconsin. For a complete list of these constitutional provisions see Ratner, *supra* note 52, at 815 n. 144.


58 WYO. CONST. art. VII, §1. Other states whose constitutional education clauses fall into this category include: California, Indiana, Iowa, Massachusetts, Nevada, Rhode Island, South Dakota. For a complete list of these constitutional provisions see Ratner, *supra* note 52, at 816 n. 145.

59 Ratner, *supra* note 52, at 816.

60 WASH. CONST. art. IX, §1. Other states whose education clauses fall in this category include: Illinois, Maine, Michigan, Missouri, and New Hampshire. For a complete list of these constitutional provisions see Ratner, *supra* note 52, at 816 n. 146.

61 William Thro originated the wave metaphor for school financing cases which has now become ubiquitous. See William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990). The first wave of cases began in the late 1960s and involved challenges to state school financing policies brought under the federal equal protection clause. See Palfrey, *supra* note 51, at 13; Ryan & Saunders, *supra* note 51, at 465-66. The second wave of cases, roughly from 1973 to 1988, also involved equal protection challenges to state school financing policies but this time the cases were brought under state constitutions. See Palfrey, *supra* note 51, at 17. The third wave of cases began in 1989 with *Rose v. Council for Better Education*, 790 S.W. 2d 186 (KY, 1989), and argued that school financing plans violated state constitutional requirements that states provide students with an adequate basic education. See Palfrey, *supra* note 51, at 21 (noting that [a]dequacy plaintiffs contend that students are constitutionally entitled to a minimum quality of education’’); Ryan & Saunders, *supra* note 51, at 467 (explaining that “[t]he third wave began, according to traditional accounts, in 1989 when the Kentucky Supreme Court declared the entire state system of education unconstitutional under the state education clause. The Kentucky Supreme Court
interpreted North Carolina’s education clause requiring the provision of a “uniform system of free public schools” as establishing “a right to a sound basic education.”\(^{62}\) “An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work” the Court explained, “is devoid of substance and is constitutionally inadequate.”\(^{63}\) In *Pauley v. Kelly*, the Supreme Court of West Virginia interpreted its education clause requiring the creation of a “thorough and efficient system of free schools” as one that “develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.”\(^{64}\) In *Campbell City School District v. State*, the Wyoming Supreme Court interpreted that state’s education clause “as a mandate to the state legislature to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.”\(^{65}\) Finally, in *Seattle School District No. 1 v. State*, the Washington Supreme Court explained that its education clause stating that education is the “paramount duty of the state” meant that “the state’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the marketplace of ideas.”\(^{66}\) As Gershon Ratner concludes, “[e]ach of the four kinds of state constitutional education provisions relied on an adequacy theory rather than an equity theory”). See also Michael Heise, *State Constitutions, School Finance Litigation and the “Third Wave”: From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1152 (1995) (describing the three waves of school finance litigation).


\(^{63}\) Id.

\(^{64}\) Pauley v. Kelly, 162 W. Va. 672, 705 (W.Va. S.Ct., 1979). Indeed, the West Virginia Supreme Court was very specific about the nature of the education that was constitutionally required. According to the Court:

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


\(^{66}\) Seattle School District No. 1 of King County v. State, 90 Wash. 2d 476, 516 (Wash. S.Ct. 1978).
can and should be construed to require, at a minimum, that states provide an adequate education in basic skills.”

Although a matter of greater debate, some scholars argue that the federal constitution too creates a right to a basic minimum level of public education. Most often scholars point to the substantive due process clause as the source of the right. Susan Bitensky, for example, argues that under the different methodological models for finding a fundamental right set forth by the Supreme Court in *Michael H. v. Gerald D.*, a minimum basic education should be such a right. *Michael H.* involved a claim by an unwed father to a constitutionally protected right to a relationship with his child who was born into a preexisting marital unit. In rejecting Michal H’s contention that such a relationship was a fundamental right, the justices discussed the processes for finding such a right. Justice Scalia, writing a plurality opinion, proposed the most restrictive test. According to Scalia, in order for an interest to be a fundamental due process right the interest “need not take the form of an explicit constitutional provision or statutory guarantee,” but there must be some evidence that the interest has been an “important traditional value.”

Scalia emphasized that the critical question in determining whether an interest is a fundamental right is whether the interest is “rooted in history and tradition” of the society. Bitensky argues that the right to a basic minimum education satisfies this criterion. “School-age

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70 *Id.* at 123 n. 2.

71 *Id.* at 123. Justice Scalia outlined the criteria for finding a fundamental right most clearly in footnote 6 of his opinion. Scalia explained in this footnote that tradition should be determined by “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Id.* at 127 n. 6. Chief Justice Rhenquist joined in the opinion. Justices O’Connor and Kennedy joined the opinion in all but footnote 6. Justice O’Connor wrote a concurring opinion in which Justice Kennedy joined. Justice Brennan wrote a dissent in which Justices Marshall and Blackmun joined.
“Children” she explains, “are blessed with a rich legacy of historical tradition, continued to this day, specifically protective of an entitlement to government- provided public elementary and secondary education.”\footnote{Bitensky, supra note 68, at 586-89.} Moreover, Bitensky argues that since the alternative methods for determining a fundamental right set forth in the concurring and dissenting opinions of Michael H. are more flexible than the standard set forth by Scalia, a fundamental right to a basic education should be recognized under those standards as well.\footnote{See Id. at 584 (“Although the Justices’ methodological models of substantive due process rights selection are at variance with each other, each model can be legitimately construed to support recognition of an affirmative due process right to public elementary and secondary education.”). Justice O’Connor in a concurring opinion in which Kennedy joined agreed that historical traditions were relevant in determining whether an interest was a fundamental right under the due process clause but thought Scalia’s focus on the “most specific level at which a relevant tradition . . . can be identified” was too narrow. 491 U.S. at 132. Justice Brennan in a dissenting opinion joined by Justices Marshall and Blackmun also agreed that tradition should play a role in identifying fundamental rights but favored a more expansive and flexible concept of tradition. Id. at 137-41.}

Although the Supreme Court has not ruled directly on the question of whether there is a federal constitutional right to a basic minimum education, its dicta in several cases is positively suggestive. In \textit{San Antonio Independent School District v. Rodriguez}, for example, the Supreme Court considered a challenge to a property-tax-based school funding policy that resulted in poor children attending schools that were inferior to those attended by wealthy children.\footnote{411 U.S. 1 (1973).} In upholding the policy’s constitutionality the Court held that poor children did not have a constitutionally protected right to an education of equal quality to that of their wealthier peers. Nonetheless, the Court emphasized that the right to a basic minimal education was not at issue in the case and that the Court might have decided differently had the right to a basic minimum education been at stake.\footnote{The Supreme Court explained: Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [to free speech or to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees’ argument might have if a state’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process. Id. at 36-37.}
Indeed, the Court’s suggestion that it might recognize such a right has been called by some scholars the “unheld holding” of Rodriguez.76

The Court did address a more absolute denial of education in Plyler v. Doe and again suggested that a basic minimum education might indeed be a fundamental right.77 Plyler involved a challenge brought by Mexican children who had entered the country illegally to a Texas statute which authorized public school districts to deny free enrollment to undocumented children and which withheld state funds from public schools for the education of illegal immigrant children.78 Although the Court repeated its dicta from Rodriguez that education was not a “right,” the Court also emphasized that a basic minimum education was more than a privilege or “benefit.” 79 Importantly, in assessing the constitutionality of the challenged statute, the Court applied a heightened standard of review that fell somewhere below strict but above rational review.80 The Court explained that in light of the significant harms at stake in the case, the state could only justify denying children a basic education if such denial furthered some substantial goal of the state.81 Because the Court found that the state had no such interest, it held the Texas statute unconstitutional.82

76 See Penelope A. Preovolos, Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education, 20 SANTA CLARA L. REV. 75, 78-83 (1980); Bitensky, supra note 68, at 595 (“the Rodriguez Court’s ‘unheld holding’—hypothesizing a positive right to some quantum of education—comes close to acknowledging that such means must be provided as a constitutional matter”).


78 Id. at 205-06.

79 Id. at 221. According to the Court, while “public education is not a ‘right’ granted to individuals by the Constitution . . . neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.” Id.

80 Id. at 223-24. See also Bitensky, supra note 68, at 568 (explaining that although “the Court did not opt to review the legislation under a strict scrutiny standard, the Court also did not choose the least rigorous standard of review—the rational relationship test—which had been employed in Rodriguez. Instead, the Plyler Court invoked the intermediate or, as it is sometimes called, heightened scrutiny standard of review based, in part, on the status of education under the Constitution.”).

81 The Court explained: “In determining the rationality of [the Texas state statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.” 457 U.S. at 223-24. Chief Justice Burger in dissent challenged the majority for engaging in what he called a “quasi-fundamental-rights analysis.” Id. at 244.

82 Id. at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.”).
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Alternatively, some scholars have looked to the privileges or immunities clause as the source of a constitutional right to a basic minimum education. Although the Supreme Court was widely regarded as eviscerating the privileges or immunities clause in the *Slaughter House Cases*, Karen Millonzi, for example, argues that the Supreme Court resurrected the original meaning of the clause in *Saenz v. Roe*. In *Saenz*, the Supreme Court used the privileges or immunities clause to invalidate a California law that limited welfare benefits of new residents to the level of benefits they would have received in their prior state of residence. The Court found that the law violated that component of the right to travel that included the right of “travelers who elect to become permanent residents, . . . . to be treated like other citizens of that state.”

This right, the Court held, stemmed from the privileges or immunities clause. According to Millonzi, “The legislative history of the privileges or immunities clause suggests that these rights are defined by their importance to the survival of our nation.” This return to original meaning, Millonzi argues, should also lead the Court to find a federal right to a basic education. Just as “[t]he framers envisaged the

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83 See, e.g., Karen A. Millonzi, *Education as a Right of National Citizenship under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1311 (2003) (“The recognition of the right to education under the Privileges or Immunities Clause suggests that public school systems that fail to provide an adequate education to our nation’s youth are unconstitutional”); Bitensky, *supra* note 68, at 615 (“the time seems long overdue for bringing the Privileges or Immunities Clause out of obscurity and into the fray as the legitimate source of a positive right to education”); Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Came Round at Last?”* 1972 WASH. U. L. Q. 405, 419 (1972) (“With all due respect to those who have labored so hard in the vineyard, equal educational opportunity is not the essence of the claim. It is not equality but quality with which we are concerned. For equality can be secured on a low level no less than a high one. The claim that will have to be developed will be a claim to adequate and appropriate educational opportunity. And this, I submit, derives more cogently from concepts of privileges and immunities rather than equality of treatment.”).

84 83 U.S. (16 Wall) 36 (1873). In the *Slaughter House Cases*, the Supreme Court upheld a Louisiana law establishing a slaughterhouse monopoly against plaintiffs’ challenge that the monopoly interfered with their right to carry on trade as protected by the privileges or immunities clause. Scholars generally view the *Slaughter House Cases* as turning the privileges or immunities clause into surplusage by limiting its protection to rights already protected elsewhere in the Constitution. See Bitensky, *supra* note 68, at 607 n. 334; John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 22-23 (1980); Lino A. Graglia, *Do We Have an Unwritten Constitution? – The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L. & PUB. POL’Y 83, 83 (1989).


86 526 U.S. at 503.

87 Id. at 498.

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

89 Millonzi, *supra* note 83, at 1311.
right to travel as integral to the development and growth of our nation[,] Likewise,” she contends, “the framers recognized the necessity of an educated public to the functioning of a successful democracy.”

Goodwin Liu has found a federal constitutional right to a basic minimum education by reading the privileges or immunities clause in tandem with the Fourteenth Amendment’s citizenship clause. The citizenship clause provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . .” The two clauses together, Liu argues, create an affirmative right to national citizenship and obligate “the national government to secure the full membership, effective participation, and equal dignity of all citizens in the national community.” This obligation, he contends, “encompasses a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship.”

While the question of whether there is a federal constitutional right to a basic minimum education is certainly not settled, there is at least reason to believe that such a fundamental right does exist. The existence of state constitutional rights to this effect is considerably more certain.

B. State Action Doctrine and the Basic Minimum

The state and federal education obligations discussed above are by their own terms limited to state not private actors. Nonetheless, federal state action doctrine binds even private actors by state constitutional obligations when these entities act like the state in performing a public function.

For at least 60 years, education has been recognized as a core public function. Indeed, as the Supreme Court asserted in 1954 in *Brown v. Board of Education*, “education is perhaps the most important function of state and local governments.” Moreover, as the prior discussion has shown, it is one which entails, as a matter of state and perhaps also federal constitutional law, providing children with the opportunity for a basic minimum education.

To the extent that homeschooling parents control the public function of providing basic education they are bound by the state’s own constitutional

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90 Id. at 1313.
91 Liu, *supra* note 67, at 334 (arguing that “the Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation”).
92 U.S. Const. amend XIV, §1.
93 Liu, *supra* note 67, at 335.
94 Id. at 336.
96 See discussion Part I.A.
obligations. There are two related but conceptually distinct state action arguments for why this is so. 97

1. Public Function Doctrine

One core reason to impose constitutional restraints on state rather than private conduct is because of the monopolistic power of the former and its ability to foreclose exit options for those who disagree. 98 State policies bind all citizens and preclude conflicting private conduct. 99 State action forecloses both exit options and private pluralism. 100 In contrast, when private parties act, both the scope of their power and the effect of their conduct is less severe. Private individuals are diverse and do not, as a rule, operate monopolistically. 101 Private conduct is unlikely to be uniform or coherent. As a result, private conduct is

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97 I am in this part and the next separating out several muddled strands of the Supreme Court’s state action doctrine. As Stephen Gardbaum explains: “Standard treatments variously identify three or four strands within the labyrinth of the Court’s doctrine.” Stephen Gardbaum, The “Horizontal Effect” of Constitutional Rights, 102 Mich. L. Rev. 387 (2003). “The first is the ‘public function’ test, which . . . holds that when a private actor exercises functions ‘traditionally exclusively reserved to the State,’ its actions will be deemed state action for constitutional purposes.” Id. at 412 (internal citations omitted). “The second strand asks whether the state is significantly entangled with, or jointly participating in, the actions of a private actor. If such a ‘nexus’ is found, the actions will be attributed to the state.” Id. “The third strand makes the state responsible for private action when it ‘has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.’” Id. at 413 (internal citations omitted). “Under the final strand . . . court orders enforcing certain voluntary private actions have been deemed to be state action triggering constitutional scrutiny, but not others.” Id.

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

99 See id. at 145 (noting that “[w]hen the state adopts its own policy, there can be no pluralism: the citizens have no choice but to submit . . . . The essence of state action is thus the preclusion of private pluralism.”).

100 See Lee Goldman, Toward a Colorblind Jury Selection Process: Applying the ‘Batson Function’ To Peremptory Challenges in Civil Trials, 31 Santa Clara L. Rev. 147, 178 (1990) (“In effect, the state action doctrine creates a presumption of limited harm when there is an ‘exit option’ available to the victim of a private party’s conduct.”).

101 Schwarzschild explains the importance of this distinction as follows: “If government is one, however, nongovernmental ‘persons’ are many. Certainly the individual citizens are many, with individual tastes, interests and values. Non governmental institutions are many, as well: under American law, none—at least in principle—may operate monopolistically unless the monopoly is actually established and regulated by the government.” Schwarzschild, supra note 98, at 137.
unlikely to foreclose options in the same way or to the same degree that state action does.  

When, however, private actors exercise monopolistic control over a traditionally public function, courts treat the private actor as if it were the state for the purposes of constitutional challenge. The private actor becomes subject to the same federal and state constitutional obligations that bind the state in its performance of the public function.

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

A similar argument has been made, with more limited success, with regard to modern day homeowners’ associations. Several scholars have argued,

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102 As Schwarzschild has argued: “The Constitution properly requires the government—a monopoly which must act upon one principle or another—to act upon the principle of racial equality, But private persons, who are many, should not be constitutionally precluded from acting upon conflicting values, lest some authentically good values be suppressed altogether.” *Id.* at 154.

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


105 The company owned the town’s streets and sidewalks. It rented retail space to businesses and paid for the town’s policeman. *Marsh*, 326 U.S. at 502. As the Court noted, the town “*is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town.*” *Id.* at 502.

106 *Id.* at 507.

107 *Id.* at 508. The Court noted that the company was subject not only to 14th Amendment obligations but to commerce clause restrictions as well. *Id.* See also *Evans v. Abney*, 396 U.S. 435, 438 (1970) (explaining that “the public character of [the park left in trust for the use of white people only] *requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.*)” *(quoting Evans v. Newton, 382 U.S. 296, 302 (1966)*).
for example, that because of the range of traditional municipal functions that homeowners’ associations control, they should be treated as state actors. This argument has gained some traction in the courts, with its success tied largely to the scope and degree of control exercised by a homeowners’ association in any particular case.

The Supreme Court has made clear that what is important for the public function doctrine is not only that the private actor control a public function but that it control a public function that has been “traditionally the exclusive prerogative of the state.” This makes sense. Private entities should be treated with the same constitutional requirements as state actors. See Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 890 A.2d 947, 960 (N.J. Super., 2006) (holding a homeowners’ association is a “constitutional actor” required to “respect fundamental rights protected by the New Jersey Constitution” like the right to free speech); Guttenberg Taxpayers & Taxpayers Ass’n v. Galaxy Towers Condominium Ass’n, 297 N.J. Super. 404, 411 (Ch. Div. 1996) (holding that “[a] level playing field requires equal access to this condominium because it has become in essence a political ‘company town’ . . . in which political access controlled by the Association is the only ‘game in town.’”); Riley v. Stoves, 526 P.2d 747, 751-54 (Ariz. Ct. App. 1974) (holding that a residential association was a state actor but its age-restrictive covenants were nonetheless not impermissible discrimination). But see Brock v. Watergate Mobil Home Park Ass’n, 502 So.2d 1380, 1382 (Fla. Dist. Ct. App. 1987) (finding “[a] homeowners’ association lacks the municipal character of a company town”); Devine v. Fischer, No. 941809B, 1996 WL 1249885, (Mass. Super. Ct. Mar. 29, 1996) (holding that a condominium complex was not a state actor); Midlake on Big Boulder Lake, Condo Ass’n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (holding that a condominium association was not a state actor under Marsh v. Alabama).

As the Supreme Court explained in Rendell-Baker v. Kohn:

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108 See Frank Askin, Free Speech, Private Space, and the Constitution, 29 Rutgers L. J. 947, 960 (1998) (arguing in favor of treating common interest communities as state actors subject to constitutional requirements because “[i]f grass roots organizers cannot go to the new town squares or go door to door in gated communities to disseminate their messages, their opportunity to be heard is greatly reduced in the modern age’’); Brett Jackson Coppage, Balancing Community Interests and Offender Rights: The Validity of Covenants Restricting Sex Offenders from Residing in a Neighborhood, 38 Urb. Law. 309, 328 n. 129 (2006) (noting numerous similarities between municipalities and common interest communities, including: “(1) both usually operate under a central constitution or other document; (2) both have elected members to represent their contingency; (3) the homeowner’s association is able to enforce covenants and restrictions and enforce fines like a municipal actor; (4) members of homeowner’s associations pay fees similar to taxes; and (5) homeowner’s associations often provide services commonly offered by the public, like road maintenance, the maintenance of water and sewer systems, security services, trash removal, etc.”). See also EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER’S ASSOCIATIONS AND THE RISE OF RESIDENTIAL GOVERNANCE 122-149 (1994) (referring to common interest communities as “private governments’’); ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 73-78 (2005) (comparing common interest communities with municipalities because of the range of typically governmental services they provide); Susan F. French, Making Common Interest Communities Work: The Next Step, 37 Urb. Law. 359, 362-65 (2005) (comparing common interest communities and cities); David J. Kennedy, Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 Yale L.J. 761 (1995) (arguing that the “transfer of authority from government to [homeowner] association endows the latter with the status of a state actor”).

109 See Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 890 A.2d 947, 960 (N.J. Super., 2006) (holding a homeowners’ association is a “constitutional actor” required to “respect fundamental rights protected by the New Jersey Constitution” like the right to free speech); Guttenberg Taxpayers & Taxpayers Ass’n v. Galaxy Towers Condominium Ass’n, 297 N.J. Super. 404, 411 (Ch. Div. 1996) (holding that “[a] level playing field requires equal access to this condominium because it has become in essence a political ‘company town’ . . . in which political access controlled by the Association is the only ‘game in town.’”); Riley v. Stoves, 526 P.2d 747, 751-54 (Ariz. Ct. App. 1974) (holding that a residential association was a state actor but its age-restrictive covenants were nonetheless not impermissible discrimination). But see Brock v. Watergate Mobil Home Park Ass’n, 502 So.2d 1380, 1382 (Fla. Dist. Ct. App. 1987) (finding “[a] homeowners’ association lacks the municipal character of a company town”); Devine v. Fischer, No. 941809B, 1996 WL 1249885, (Mass. Super. Ct. Mar. 29, 1996) (holding that a condominium complex was not a state actor); Midlake on Big Boulder Lake, Condo Ass’n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (holding that a condominium association was not a state actor under Marsh v. Alabama).
as state actors when they supersede the state in controlling a public function exclusively and monopolistically. It is under such conditions that third parties no longer have diverse private options and need constitutional protections to ensure access.

Certainly education was never the exclusive domain of the state. Private schooling preceded public education and continues to exist alongside it. Nonetheless—in the absence of state regulation—homeschooling parents do exercise precisely the kind of monopolistic control over education with which the public function doctrine is concerned.

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

2. Delegation as State Action

There is, however, a second, conceptually distinct, argument for why homeschooling parents are subject to constitutional restraint. This argument focuses on states’ role in delegating power over education to them. As a general matter, states cannot avoid their own constitutional obligations by delegating control over public functions to private actors.

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Consider, for example, the Supreme Court’s rulings in the white primary cases of *Smith v. Allwright* and *Terry v. Adams*. In *Smith*, a black citizen of Harris County, Texas challenged as unconstitutional his race-based exclusion from the state’s Democratic Party primary. The Texas Democratic Party limited its membership, and the right to vote in its political primaries, to white citizens of the state. In response to plaintiff’s claim that the state violated his Fourteenth, Fifteenth and Seventeenth Amendment rights by failing to redress the discrimination, the state argued that “the Democratic party of Texas is a voluntary organization” not bound by the constitutional obligations imposed on state actors. The Supreme Court rejected the state’s arguments. In doing so it emphasized the public function at issue and the state’s inability to avoid its own constitutional obligations by delegating control over voting to private parties. “[S]tate delegation to a party of the power to fix the qualifications of primary elections is” the Court explained, “delegation of a state function that may make the party’s action the action of the state.” While “[t]he privilege of membership in a party may be . . . no concern of a state[,] . . . when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state.” The Democratic Party was, in other words, bound by the state’s own constitutional obligations with respect to the public function of voting.

*Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 334 (1985) (explaining that “it is equally clear that government’s freedom to leave distribution to the market does not extend, under our Constitution, to all the things someone might need in order to exercise various constitutional rights—even those not clearly rendered affirmative by the constitutional text itself. Access to the franchise, for example, cannot be treated by government as a commodity, left to be bought and sold at a private auction. Access to basic education may well be of the same character . . . .”).

115 345 U.S. 461 (1953).
116 321 U.S. at 650-51.
117 Id. at 656-57.
118 Id. at 651, 657.
119 Id. at 660.
120 Id. at 664-65. *Allwright* was one in a series of cases challenging the disenfranchisement of blacks from Texas elections through increasingly indirect means. In *Nixon v. Herndon*, 273 U.S. 536 (1927), for example, the Supreme Court held unconstitutional a Texas state statute that denied African Americans the right to vote in Democratic party primary elections. In *Nixon v. Condon*, 286 U.S. 73 (1932), the Supreme Court held unconstitutional a decision by the Texas Democratic Party to exclude African Americans from voting in party primaries because it was the State Executive Committee of the party that had adopted the exclusionary policy. In *Grovey v. Townsend*, 295 U.S. 45 (1935), however, the Supreme Court upheld against constitutional challenge the exclusion of African Americans from Democratic Party primaries where the decision to exclude blacks had been made by a convention of the membership of the party rather than by the State Executive Committee. In denying the plaintiff’s claim, the Court framed the case as one in which only the right to membership in a private party, rather than the right to vote, was at stake. Id. at 55. In response to the plaintiff’s claims, the Court explained: “The argument is that as a negro may not be denied a ballot at a general election on account of his race or color, if
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*Terry v. Adams* involved yet another constitutional challenge to racial disenfranchisement effectuated by private rather than state conduct. The plaintiffs in *Terry*, black citizens of Fort Bend County, Texas, sued the state alleging that they were denied their Fifteenth Amendment right to vote by being excluded from the Jaybird Party primaries because of their race.\(^{121}\) The state argued in defense that the Jaybird Party was a private club not bound by constitutional obligations.\(^{122}\) In rejecting the state’s defense, the Court emphasized the degree of control that the Jaybirds had been permitted by the state to exercise over the traditionally public function of voting in county elections.\(^{123}\) Again the Court held that the state could not absolve itself of its Fifteenth Amendment obligations by effectively delegating control over its public elections to a private party.\(^{124}\) Instead, the state was constitutionally required to protect its black citizens “from future discriminatory Jaybird-Democratic-general election practices which deprive citizens of voting rights because of their color.”\(^{125}\)

A similar issue has arisen in cases in which prisoners allege constitutional rights violations by private prisons. In this context as well, courts have held that states cannot absolve themselves of their constitutional obligations by delegating the traditionally public function of prison management to private handlers. In *Rosborough v. Management & Training Corp.*, for example, the Fifth Circuit held that a prisoner in a private prison could file suit under 42 U.S.C. §1983 alleging cruel and unusual punishment in violation of the Eighth Amendment.\(^{126}\) In holding that the private prison management company and its employees were

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\(^{121}\) 345 U.S. at 462.

\(^{122}\) *Id*. at 462-63 (“The Jaybirds deny that their racial exclusions violate the Fifteenth Amendment. They contend that the Amendment applies only to elections or primaries held under state regulation, that their association is not regulated by the state at all, and that it is not a political party but a self-governing voluntary club.”).

\(^{123}\) The Court explained: “The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded.” *Id*. at 469-70.

\(^{124}\) The Court held that “the combined Jaybird-Democratic-general election machinery has deprived these petitioners of their [Fifteenth Amendment] right to vote on account of their race and color.” *Id*. at 470.

\(^{125}\) *Id*. at 470.

\(^{126}\) 350 F.3d 459, 461 (5th Cir. 2003).
acting under “color of state law,” as required for a §1983 action, the court explained that “[c]learly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function.” The Sixth Circuit permitted a similar §1983 suit against a private prison in *Skelton v. Pri-Cor, Inc.*, again emphasizing that the private prison was “performing a public function traditionally reserved to the state.”

Similar analysis has also been applied in the context of education. In *Griffin v. County School Board of Prince Edward County*, Prince Edward County, in an attempt to avoid racial desegregation, closed its public schools and delegated control over education to private parties. The private parties then chose to operate exclusively white private schools. Plaintiffs, black school students, argued their civil rights were violated. The court agreed, stating that private schools were acting under “color of state law” and were therefore subject to §1983 suits.

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127 Id. at 461. The Supreme Court has repeatedly interpreted §1983’s under color of state law requirement as requiring the same showing as the Fourteenth Amendment's state action requirement. See *United States v. Price*, 383 U.S. 787, 794 n. 7 (1966) ("In cases under §1983, ‘under color’ of law has consistently been treated as the same thing as the ‘state action’ required under the Fourteenth Amendment"); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("The ultimate issue in determining whether a person is subject to suit under §1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights ‘fairly attributable to the State?’"); cf *Polk County v. Dodson*, 454 U.S. 312, 325, 322 n. 12 (1981) (holding that the actions of a public defender are not under color of state law and suggesting that there might be some distinction in certain cases between the state action and under color of state law analyses but declining to elaborate on what it might be).

128 963 F.2d 100, 102 (6th Cir. 1991). See also *Scott v. District of Columbia*, Civil Action 98-01645, 1999 U.S. Dist. LEXIS 21616 *15-16 (D.D.C. 1999) (stating that just as “contracting out medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in custody . . . the District may not avoid its Eighth Amendment obligations to its prisoners by a delegation to an independent contractor”) (internal citation omitted); *Plain v. Flicker*, 645 F. Supp. 898, 907 (D.N.J. 1986) ("[I]f a state contracted with a private corporation to run its prisons it would no doubt subject the private prison employees to §1983 suits under the public function doctrine"). Although the Supreme Court has not ruled directly on whether private prisons should be treated as state actors, it has suggested as much. In *West v. Atkins*, 487 U.S. 42 (1988), for example, the Supreme Court held that a private doctor under contract with a state prison to provide medical care acted under color of state law and was subject to the requirements of the Eighth Amendment. In reaching this conclusion, the Court emphasized the state’s monopolistic control over the petitioner in the case and over his medical care. The Court explained that “[i]f [the defendant] misused his power by demonstrating deliberate indifference to West’s serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State’s exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care.” Id. at 55. See also *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72 n. 5 (2001) (stating in dicta that “state prisoners . . . already enjoy a right of action against private correctional providers under 42 U.S.C. §1983”) (emphasis omitted).


130 The background facts of *Griffin* are as follows. In 1959, following *Brown v. Board of Education*, the Fourth Circuit ordered Prince Edward County to desegregate its formally racially segregated public schools. In response, the supervisors of Prince Edward County closed the schools. Private schools were then established for white students and tuition grants for private schools were made available by the city for children of all races. *Id.* at 221-23.
children living in Prince Edward County, sued alleging that the County’s delegation of educational authority to private entities deprived them of equal protection.\textsuperscript{131} As in \textit{Marsh}, the Court agreed, holding that the state could not avoid its constitutional obligations with respect to education by delegating its provision to private parties.\textsuperscript{132}

Certainly it was important to the Court in \textit{Griffin} that the success of the private schools in that case depended on county programs providing tuition grants and tax credits to students in such schools.\textsuperscript{133} Yet the Court’s remedy in the case indicates that what bothered the Court most was not continued state entanglement with private conduct, but the nature of the good over which the state had attempted to delegate control. In ruling for the plaintiffs and remanding the case, the Court did not simply order that the county must either take back control of education and desegregate its public schools or disentangle itself entirely from private educational choices. Instead, the Court remanded the case to the district court “with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the state’s public schools.”\textsuperscript{134} Disentanglement, the court made clear, would not itself provide absolution for the state.\textsuperscript{135}

\textsuperscript{131} \textit{Id.} at 230.
\textsuperscript{132} \textit{Id.} at 232 (holding that “closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws”).
\textsuperscript{133} \textit{Id.} at 233 (noting that the county’s payment of tuition grants and tax credits had been essential for the success of its program to close the public schools).
\textsuperscript{134} \textit{Id.} at 234.
\textsuperscript{135} The Supreme Court in \textit{Griffin} also emphasized that by closing its public schools, Prince Edward County was trying to do via private action what it could no longer do via public action—namely maintain racially segregated schools. The Supreme Court emphasized the importance of this discriminatory motive for its holding that the delegation was unconstitutional. The Supreme Court explained: “[T]he record in the present case could not be clearer that Prince Edward’s public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the state, that white and colored children in Prince Edward County would not, under any circumstances, go to the same schools. Whatever, nonracial grounds might support a state’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to segregation do not qualify as constitutional.” \textit{Id.} at 231. Nonetheless, in \textit{Palmer v. Thompson}, 403 U.S. 217 (1971), the Supreme Court made clear that simply because a state had a discriminatory motive for its authorization of private conduct did not mean that the private conduct would be subject to constitutional obligations. In \textit{Palmer}, the Supreme Court held that the City of Jackson, Mississippi’s decision to close its public pools rather than desegregate them, and to permit private parties to operate all the pools on a racially segregated basis, did not violate the equal protection rights of black citizens. According to the Court: “the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike.” 403 U.S. at 226. The Supreme Court noted that there was evidence of a racially discriminatory motive in \textit{Palmer} explaining: “Here, for example, petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the
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State delegation of control over a public function to a private party is most troubling when the delagatee exercises monopolistic control over the function in question. This was the case in Allwright, Terry and Griffin. Private parties controlled all access to voting and education in the relevant counties. Certainly, the state has not delegated to parents control over the entire field of education. Homeschooling remains one option alongside which public and private schools continue to operate. Yet, as the public function analysis above suggests, there is a respect in which the delegation to homeschooling parents looks importantly similarly to that in Allwright, Terry and Griffin. As in those cases, homeschooling parents have been delegated power by the state to control completely (at least certain) third parties’ access to the public good of education. With respect to their own children, homeschooling parents have control over the public good that is as monopolistic and absolute as was the case in Allwright, Terry, and Griffin.136

Under both the public function and delegation analyses, homeschooling parents are bound by states’ own constitutional obligations with respect to the public function of education. Yet homeschooling parents are only so bound to the extent that they control the public function of education. This public function cannot plausibly exceed the basic minimum level of education that public schools themselves are required to provide. Therefore, when homeschooling parents provide their children with schooling that exceeds the basic minimum, they are no longer acting as quasi state actors and are no longer bound by the constitutional restraints imposed on state actors. Parents may, as a result, operate religiously oriented homeschoools, or send their children to religious private schools. Since the religious instruction provided is, at least theoretically, on top of the basic education, the religious instruction does not implicate access to the public function.

In short, when access to a basic minimum education is not at stake, homeschooling parents are not providing a public function and are not subject to the constitutional constraints imposed on public schools. However, because homeschooling parents do control their children’s entire education, and have taken over the state’s public function in this regard, they are bound by the state’s own constitutional obligations to provide a basic minimum education.137

record appears to support this argument.” 403 U.S. at 224-25. Nonetheless, the Court concluded, “Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of ‘the equal protection of the law.’” 403 U.S. at 226.

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

137 Private schools, as agents of parents, are bound by the same substantive obligations. Parents may not themselves send their children to a private school that does not provide the basic minimum. Private schools are monitored and policed as a way to police parents. A similar phenomenon is at play in employment law where antidiscrimination laws prohibit
C. Waiver

I have argued thus far that states cannot free themselves of their own constitutional obligations regarding education by allowing homeschooling parents unfettered control over their children’s education. Parents are, in other words, bound by states’ own minimum education obligations. However, whether this means that parents are in fact obligated to provide their children with a minimum education begs further analysis of states’ own obligations. It depends in particular on whether state education obligations are waivable by the intended beneficiaries. If states’ obligations are waivable, then states may allow homeschooling parents to decline education for their children while still satisfying the state’s own constitutional obligations.

In its starkest form the question about waivability is as follows: Can a state, consistent with its own constitutional obligations, establish a system of public schools but make attendance at these schools (as well as participation in any other form of education) wholly optional for children of any age? Certainly, states may make many educational opportunities optional for students. Students may choose whether to take AP calculus or basic algebra, whether to take physics or stop at chemistry, and whether to take typing or drivers’ education. The question here, however, is whether states may also make the learning of basic skills optional for children.

As a practical matter, the waiver that is relevant here is not children’s, but that of parents’ acting on their behalf. Young children have neither the cognitive ability nor the legal authority to make important decisions. Parents are expected to speak for and on behalf of their children.  

discriminatory customer preferences by policing employers as customer agents. See Mark Kelman, Market Discrimination and Groups, 53 STAN. L. REV. 833, 848 (2001) (arguing that employee’s right to be treated “with regard only to their economic function, without regard to their status” is vindicated not by suing customers but by policing the conduct of their agents, employers).

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

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

140 See Parham v. J.R., 442 U.S. 584, 621 (1979) (Stewart, J. concurring) (“For centuries it has been a canon of the common law that parents speak for their minor children. So deeply embedded in our traditions is this principle of law that the Constitution itself may compel a state to respect it.”); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”). See also John Alan Cohan, Judicial Enforcement of Lifesaving Treatment for Unwilling Patients, 39 CREIGHTON L. REV. 849, 860 (2006) (noting that “[i]t is well established that parents
Many, if not most, constitutional rights are waivable by their intended beneficiaries. Criminal defendants can, for example, waive their Fifth Amendment right against self incrimination and their Sixth Amendment rights to assistance of counsel and trial by jury. Likewise, individuals may waive their Fourth Amendment right to be free from unreasonable searches and seizures. Permitting waiver of constitutional rights makes sense when the justification for the right is primarily to bolster and reinforce the autonomy of the right holder and where permitting waiver does not undermine any larger social goals.

141 See Edward L. Rubin, Toward a General Theory of Waiver, 28 UCLA L. REV. 478 (1980-81) (describing the vast range of instances in civil and criminal cases in which waiver of constitutional rights is permissible).


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

146 See Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. PA. L. REV. 1293, 1383 (1984) (noting that “[i]f the constitutional right in question is designed to secure an area of autonomy for the citizen against the state, it would seem that the exercise or non exercise within that area should be in the hands of the citizen”). Certainly the conditions under which a waiver is made must be scrutinized for voluntariness, but the permissibility of waiver...
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Yet waiver does not make sense, and is not permissible, when constitutional rights and obligations are intended to serve broader social functions such as establishing a particular structure of government or reinforcing foundational social norms.\textsuperscript{147} Consider for example, Article III limitations on federal court jurisdiction. The purpose of such limitations is not to protect individual autonomy but to define a federalist form of government. As such, Article III limitations on jurisdiction are not waivable by the parties involved in a dispute.\textsuperscript{148} Similarly, the establishment clause of the First Amendment is intended to ensure a government in which church and state are separate. The goals and benefits of the establishment clause are primarily social and structural, not individual. As such, individuals may not choose to waive the protections of the establishment clause.\textsuperscript{149}

Other constitutional rights “define[] not the structure of government, but the structure of a decent society.”\textsuperscript{150} These too are not waivable. Most clear in this regard is the Thirteenth Amendment’s prohibition on slavery.\textsuperscript{151} Individuals may not waive the right to be free from slavery no matter how knowing and voluntary the waiver.\textsuperscript{152} As Seth Kreimer explains: “Slavery is forbidden whether or not a person ‘consented’ to it.”\textsuperscript{153} Similar is the Eighth Amendment’s protection against cruel and unusual punishments. Individual defendants cannot, for example, choose to accept a particularly cruel punishment in exchange for lower jail time.\textsuperscript{154}

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\textit{See generally} Rubin, \textit{supra} note 141 (discussing the protections that should be required to make waivers valid).
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\textsuperscript{147} See Tribe, \textit{supra} note 113, at 333 (1985) (explaining that “rights that are relational and systemic are necessarily inalienable: individuals cannot waive them because individuals are not their sole focus”); Kreimer, \textit{supra} note 146, at 1387-88 (referring to all three rationales as justifications for various constitutional rights and protections).


\textsuperscript{149} As Seth Kreimer explains: “even if a parolee were to agree to a parole conditioned on regular church attendance, the condition would be ineffective, for the government would be barred from seeking such a waiver.” Kreimer, \textit{supra} note 146, at 1391 (citing Jones v. Commonwealth, 185 Va. 335 (1946) holding that a state may not make probation contingent on defendant attending Sunday school and church). Similarly, Laurence Tribe notes that “it is plain that a church or church-related school could not, for example, ‘waive’ the right to avoid intrusive governmental entanglement in order to receive direct monetary aid from the public treasury.” See also Tribe, \textit{supra} note 113, at 333 n. 14

\textsuperscript{150} Kreimer, \textit{supra} note 146, at 1387-88.

\textsuperscript{151} Id. at 1387-88 (“one of the messages of the Reconstruction Era was that a decent American society does not allow slavery. The burden of the Thirteenth Amendment was not only the protection of individual liberty, but the eradication of a social practice deemed incompatible with a free society.”)

\textsuperscript{152} See Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905).

\textsuperscript{153} Kreimer, \textit{supra} note 146, at 1386.

\textsuperscript{154} See, e.g., State v. Brown, 326 S.E.2d 410, 412 (S.C. 1985) (reversing trial court order sentencing defendants convicted of rape to a suspended prison term if they would submit to
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State constitutional education obligations too serve social goals and purposes that go well beyond the interests of any individual child. As many state constitution education clauses themselves emphasize, an educated citizenry is necessary for the maintenance of a stable, democratic and free society. Several refer to the duty to educate as the duty to preserve “the rights and liberties of the people.” Other clauses describe the purpose of education as protecting “a free government” while still other clauses emphasize the importance of education to maintain the “stability of a republican form of government.” Courts interpreting these state constitution clauses have similarly emphasized the democracy and citizenship promoting purposes of the clauses as well as their importance for economic prosperity. Given these broad social purposes, state constitutional education obligations, like other constitutional obligations with similarly broad social purposes, are appropriately nonwaivable.

surgical castration on the grounds that the sentence violated the state constitution’s prohibition on cruel and unusual punishment); Davis v. Berry, 216 F. 413, 418 (D.C. Iowa 1914) (holding that a state statute providing for mandatory vasectomies for twice convicted felons violated Eighth Amendment), rev’d on other grounds, 242 U.S. 468 (1917). See also Kreimer, supra note 146, at 1388 (“If a state were to grant inmates a choice between tolerable prison conditions and a five year shorter term in an unreconstructed Arkansas prison farm, it seems unlikely that a court would sustain the program, however beneficial the inmates thought it.”).

155 See Cal. Const. art. IX, §1; Me. Const. art. VIII, §1; Tex. Const. art. VIII, §1; Mass. Const. pt. 2 ch. V, §2 (requiring the “preservation of their rights and liberties”).

156 See Ill. Const. art. VIII §1, Ind. Const. art. VIII §1; Ark Const. art. XIV, §1 (calling education the “safeguard of liberty and the bulwark of a free and good government”).

157 See Idaho Const. art. IX, §1; Minn. Const. art. XII, §1; S.C. Const. art. VIII, §1.

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

159 Both Tribe and Kreimer have reached similar conclusions. Tribe, supra note 113, at 334 (suggesting that government cannot treat basic education as a market good that individuals may either voluntarily or involuntarily lose access to based on their preferences and resources); Kreimer, supra note 146, at 1388 & n. 344 (noting that “the right to education, resurrected in Plyler v. Doe, might well not be subject to waiver by its beneficiaries” because “[i]f the basis of the holding in Plyler is a constitutional aversion to the establishment of a permanent ‘underclass’ reminiscent of the caste system imposed by slavery, the willingness of a particular child to decline education may be irrelevant”).
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What this means is that parents delegated control over their children’s education are in fact bound to provide their children with a basic minimum education. They are bound by the states’ own constitutional education obligations and these obligations are not waivable by parents acting on their children’s behalf.

In sum, I have argued in this Part that states have a constitutional obligation, stemming from both state and federal constitutions, to provide children with a basic minimum education. When homeschooling parents take on this public function, they too become bound by the basic minimum obligation. States violate their own constitutional obligations when they permit homeschooling families to reject this basic minimum. Given that states have a constitutional obligation to ensure that homeschoolers receive a basic minimum education, the next question becomes whether the federal equal protection clause may entitle at least some children to something more than this basic minimum. It is to this question that I now turn.

II

CONSTITUTIONAL CONSTRAINTS ON SEXIST EDUCATION

Review of commercial Christian homeschooling curricula suggests that the teaching of sexist values—most notably that women should be subordinate to men in marriage—is not uncommon. How often and to what extent such ideology also leads to significantly inferior substantive educations for

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160 For example, in a chapter on the Family, the Weaver Curriculum, a mail order homeschooling curriculum, provides the following lesson: “Using the patterns . . . outline them onto felt of various colors and cut them out. Also, cut out the word "GOD." After cutting them out, place them in the order God intended for the family; God, father, mother, children. Point out that Daddy answers to God, Mother answers to Daddy and God, and children answer to Mother, Daddy, and God.” REBECCA L. AVERY, THE WEAVER CURRICULUM, VOLUME 1 at 213 (1986). A Family Life Skills coursebook provided by Bob Jones University provides the following description of the role of a wife: “God’s pattern for the Christian wife is clear. Beginning in Genesis 3:16, the Bible says that the wife’s desire shall be toward her husband, and he will ‘rule over’ her. This relationship is not a form of slavery but is God’s plan, meant for the wife’s best interests. . . . The wife’s responsibilities are different, then, from her husband’s. She is primarily responsible for the atmosphere in the home. . . . The daughter who does not respect and obey her father will find it difficult to be a submissive wife.” FAMILY LIFE SKILLS FOR CHRISTIAN SCHOOLS, TEACHER’S ED., 2D ED. at 5-6 (2004). More is known about the sexist beliefs and practices of religious private schools. As James Dwyer explains: “Substantial evidence indicates that a great number of religious schools in this country . . . deliberately and systematically inculcat[e] in their students the belief that females are inferior to males, that a woman’s purpose in life is to serve a husband and raise children, and that only men should pursue careers outside the home, become active in public affairs, or assert opinions about matters beyond the home. The strongest evidence of sexist teaching pertains to fundamentalist Christian schools.” Dwyer, The Children We Abandon, supra note 43, at 1343 (1996). It seems likely that religiously-oriented homeschools would ascribe to many of the same beliefs and practices adopted by religious schools of their denomination.
homeschooled girls is, under existing laws, impossible to know. Yet the equal protection clause, I argue, imposes limits on the degree of sexist homeschooling states may permit, entitling some girls—those in households where boys receive far more extensive instruction—to a level of education above the basic minimum.

The equal protection clause prohibits states from discriminating against protected group members in the delivery of goods, services, benefits and privileges. The clause is importantly distinct from the substantive due process and privileges or immunities clauses discussed in Part I. While the latter guarantee fundamental rights to all individuals, the equal protection clause guarantees equal treatment across protected groups with respect to both fundamental rights and trivial interests. As a result, the equal protection clause effectively guarantees individuals a constitutional right to goods and services to which they do not otherwise have a right.

Consider for example, the case of *Shapiro v. Thompson*. In *Shapiro* the Supreme Court held on equal protection grounds that it was unconstitutional to exclude individuals from participation in a welfare program because they had not lived in the state for one year. Although there was no suggestion in the case that the state was obliged to provide welfare benefits to anyone, the Court made clear that if the government did provide such benefits to some people, it might be required to provide them to others as well. As David Currie explains, when an equal protection violation is found, “the practical effect may often be the same as if there were an absolute duty to provide services . . . .”

A. The State Action Doctrine and Private Inequality

Like the constitutional clauses discussed in the last Part, the equal protection clause applies to state not private action. Nonetheless, in *Shelley v. Kraemer* the Supreme Court made clear that even when a public function is not at stake, state authorization of private conduct may violate the equal protection clause. In *Shelley* the Supreme Court held that state authorization and

161 One study of academic achievement of homeschoolers concluded that “[t]here were no significant differences in overall academic achievement between” male and female homeschoolers. See Lyn T. Boulter, *Academic Achievement in High School*, ERIC, ED 446 385, EA 030 679 (1999) at 12. The study suffers, however, from significant methodological problems, namely, its sample included only 110 homeschooled students, and all participants had parents who requested an individually administered assessment of their children’s academic progress. Certainly, parents who did not care about their daughters’ educational development or believed such development was improper, would be unlikely to request such an assessment. Accurate information about the scope and degree of sexist homeschooling does not exist and would probably be impossible to gather given present homeschooling laws.


163 Id.


enforcement of racially restrictive private covenants violated the equal protection clause of the federal Constitution.\footnote{Id. at 20 (holding that “in granting judicial enforcement of the restrictive agreements in this case, the states have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand”).}

In the years since, there has been much discussion by courts and scholars about the continued viability of Shelley. Some argue that its precedential value is limited to race cases.\footnote{See, e.g., Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 259-60 (1st Cir. 1993); Davis v. Prudential Securities, Inc., 59 F.3d at 1191 (11th Cir. 1996) (“The holding of Shelley, however, has not been extended beyond the context of race discrimination”); Lebron v. National Railroad Passenger Corp., 12 F.3d 388, 392 (2d Cir. 1993), rev’d on other grounds, 513 U.S. 374 (1995) (noting that race is treated differently under the state action doctrine); United Egg Producers v. Standard Brands, Inc., 44 F.3d 940, 943 (11th Cir. 1995) (limiting Shelley to “the racial discrimination context”); Parks v. “Mr. Ford”, 556 F.2d 132, 136 n. 6a (3d Cir. 1977) (noting that Shelley “has been limited to cases involving race discrimination”). See also Maureen A. Weston, Universes Colliding: The Constitutional Implications of Arbitral Class Actions, 47 WM. & MARY L. REV. 1711, 1759 n. 208 (2006) (noting that Shelley’s application “has been limited to racial contexts”); Frank Askin, Free Speech, Private Space, and the Constitution, 29 RUTGERS L.J. 947, 948 (1948) (explaining that “the doctrine of Shelley v. Kraemer appears to have been limited by most courts to the enforcement of racially discriminatory provisions”)}

Others argue that its holding has been limited to its own facts.\footnote{See Golden Gateway Center v. Golden Gateway Tenants Assoc., 29 P.3d 797, 810 (Cal. 2001) (“Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action, it has largely limited this holding to the facts of those cases”); Jojola v. Wells Fargo Bank, No. 71-900 SAW, 1973 WL 158166 at * 4 (N.D. Cal. 1973) (holding Shelley limited to its facts). See also Edward Brunet, Arbitration and Constitutional Rights, 71 N.C. L. REV. 81, 111 (1992) (stating that Shelley “has been interpreted as limited to its facts”); Kevin L. Cole, Federal and State “State Action”: the Undercritical Embrace of a Hypercriticized Doctrine, 24 GA. L. REV. 327, 353 (1990) (opining that Shelley has been limited to its own facts).} According to Mark Rosen, for example, ”Shelley has not been extended beyond the context of racial discrimination, with the result that courts regularly enforce private agreements containing substantive provisions that could not have been enacted into general law. Even more surprisingly, the Supreme Court repeatedly refused to apply Shelley even in situations of racial discrimination.”\footnote{Mark D. Rosen, Was Shelley v. Kraemer Incorrectly Decided? Some New Answers, 95 CAL. L. REV. at 7 (forthcoming, 2007).}

Shelley, Rosen concludes, “has not survived.”\footnote{Id. at 2.}

Yet reports of Shelley’s demise are greatly exaggerated. Shelley’s core holding -- that there are some forms of private conduct which a state simply cannot with constitutional impunity authorize and enforce—has in fact been repeated in numerous cases, either with or without explicit reliance on Shelley itself. Indeed, in an important recent article, Don Herzog has catalogued a vast array of cases in which courts have held state deference and enforcement of wholly private preferences to be unconstitutional.\footnote{See also Don Herzog, The Kerr Principle, State Action and Legal Rights, 105 MICH. L. REV. 1, 46 (2006) (discussing the scope of what he calls the Kerr principle, derived from Kerr v. Enoch}
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Consider, for example, *Griffin v. Maryland*.\(^{172}\) In *Griffin* black and white protestors were arrested and convicted for trespassing after refusing to leave a private amusement park that segregated on the basis of race.\(^{173}\) As in *Shelley*, but without reference to it, the Supreme Court held that the state could not enforce the defendant’s discriminatory preferences consistent with its own Fourteenth Amendment obligations.\(^{174}\) Likewise, in *NAACP v. Thompson* the district court held that Frederick County, Maryland violated the plaintiffs’ constitutional rights when it granted the Ku Klux Klan a permit to hold a public rally on private property from which it knew the KKK would exclude nonwhites.\(^{175}\) Despite the fact that the permit itself was facially neutral as regards to race,\(^{176}\) that it explicitly disavowed any approval of the organization holding the permit,\(^{177}\) and that the County did not participate in the exclusion of nonwhites from the rally,\(^{178}\) the court nonetheless found an equal protection violation.\(^{179}\) Simply by authorizing a private event at which the county knew that race discrimination would take place, the county had violated its constitutional obligations.\(^{180}\)

Moreover, as Herzog emphasizes, the *Shelley* principle has not been limited to race cases.\(^{181}\) Herzog points in particular to heckler’s veto cases, in

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Pratt Library of Baltimore, 149 F.2d 212 (4th Cir. 1945), which provides that “sometimes the state may not justify an action by appealing to the views of private third parties” and emphasizing that “the Kerr principle doesn’t mean only that the state can’t serve as a conduit for malign preferences. It means too that sometimes the state actively has to combat such preferences.”).\(^{172}\)


\(^{174}\) Id. at 133.

\(^{175}\) Id. at 137. As Herzog asks with regard to the case: “Why . . . is it unconstitutional for an amusement park to invoke trespass against unwelcome blacks, but not for a white homeowner to?” Herzog, supra note 171, at 41.

\(^{176}\) 648 F. Supp. 195 (D. Md. 1986)

\(^{177}\) Id. at 197.

\(^{178}\) Id. at 197.

\(^{179}\) Id. at 198.

\(^{180}\) Id. at 224-25.

\(^{181}\) As Herzog explains: “That ‘race is different’ connects some dots in this puzzle, but its not enough to stop there, partly because that point desperately needs some justification, and partly
which courts hold that the state may not, without violating the First Amendment, allow private preferences to govern what speech may be heard in a public forum. Nor may states defer to private preferences in determining what kinds of signs may be displayed in a public setting. Perhaps a closer analogy to the facts of Shelley itself are those cases holding unconstitutional state enforcement of non race-related housing covenants. In Franklin v. White Egret Condominium, for example, the court held unconstitutional state enforcement of a restrictive housing covenant barring children under the age of twelve from living in the subdivision. In West Hill Baptist Church v. Abbate, the court held that judicial enforcement of a restrictive covenant excluding houses of worship from a subdivision was unconstitutional.

While Shelley is not dead, its skeptics are correct that that the case’s underlying rationale as well as its scope remain unclear. In this section, I consider three separate conceptions of Shelley, and I explore what each account suggests about the limits states must impose on extreme forms of sexist homeschooling.

1. All Private Action as State Action

The first and most expansive interpretation of the Court’s holding in Shelley is that the Court eviscerated the distinction between state and private action rendering all private conduct, or at least all that which the state is called upon to recognize and enforce, bound by constitutional constraints. Several courts and scholars have recognized, if not necessarily endorsed, this possible interpretation of Shelley. As Ronald Krotoszynski explains: “Shelley has proven controversial because it could be read to mean that any court involvement in an essentially private dispute satisfies the state action requirement. Under this interpretation of Shelley, court involvement will transform private contract or property disputes into matters subject to the constitutional restrictions applicable because we find the same odd turns when race has nothing to do with it.” Herzog, supra note 171, at 40-41.

See Boos v. Barry, 485 U.S. 312, 316 (1988) (striking down a statute prohibiting the display of signs within 500 feet of a foreign embassy if those signs would bring the embassy into ‘public odium’ or ‘public disrepute’), United Food & Commercial Workers Union Local 1099 v. Sw. Ohio Reg’l Transit Authority, 163 F.3d 341, 346 (6th Cir. 1998) (holding that SORTA policy excluding advertising that might adversely affect ridership violated the First Amendment).

Whether the state has simply recognized a particular private right or actually been called upon to enforce the right in court seems immaterial since to have a right means definitionally that the state will protect one’s expression of it. See Schwarzschild, supra note 98, at 135 (explaining that “you have a ‘right’ to do anything you are not prohibited from doing, and if you have a ‘right’ to do it, then the state will enforce an obligation upon everyone else to respect your ‘right.’”).
to the government’s behavior.” Judge Skelley Wright in Edwards v. Habib, expressed a similarly expansive view of the Court’s holding in Shelley. In Wright’s view, “There can now be no doubt that the application by the judiciary of the state’s common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government. . . . This may be so even where the court is simply enforcing a privately negotiated contract.”

Under this view of Shelley, homeschools would effectively be bound by the same antidiscrimination obligations as are public schools. While homeschooling parents might be permitted to adopt different teaching styles or techniques for girls and boys, they would not be permitted to provide their daughters with educations of an overall inferior level. Educational decisions could not be based on assumptions about appropriate roles for women and men; and sex equality as a social goal would have to be both practiced and preached. While the Constitution might permit some gender-based

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189 Id. at 691.

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

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from
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educational differences, it would not permit the gender-based disadvantage of homeschooled girls. States would be constitutionally required to prohibit virtually all forms of sexist homeschooling.

This expansive conception of the Court’s holding in Shelley is, however, both normatively unappealing and clearly wrong as a statement of actual law. Probably very few people would favor having all their private dealings subject to constitutional obligations and protections.¹⁹¹ Not only would such constraints be burdensome on individuals, they would, as Maimon Schwarzchild has argued, deprive society of a value pluralism that can be vibrant and enriching.¹⁹² Moreover, although Shelley can certainly be read to suggest this expansive view of constitutional constraints on state authorization of private conduct, this view is certainly not the legal reality. As a practical matter, it is clear that states may authorize private individuals to engage in conduct that the state may not itself engage in directly. Catholic schools may teach the catechism even though public schools may not.¹⁹³ Private individuals may discriminate on the basis of race in allowing guests on their property even though the state itself may not. A narrower reading of Shelley is appropriate.¹⁹⁴

2. Select Private Action as State Action

A second interpretation of Shelley sees the case not as eviscerating the distinction between state and private conduct but as blurring it by making some, but not all, state authorization of private conduct subject to constitutional restraint. Under this view, only state authorization of private conduct that itself

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¹⁹¹ As Shelley Ross Saxer explains: “If court action to effect [private] rights is subject to constitutional considerations, then any private right under state law must adhere to constitutional norms. Common law actions such as nuisance, trespass, invasion of privacy, and contract breach will be potentially subject to assertions by defendants that court enforcement of these rights will violate some constitutional guarantee such as freedom of expression.” Saxer, supra note 186, at 103.

¹⁹² Schwarzchild, supra note 98, at 138 (“The Constitution binds the public monopoly of government to the public values expressed in the Constitution. But there exist many other conflicting values. Private ‘persons’ are also many. The pluralist case for the state action doctrine is that there should be no constitutional bar to diverse persons pursuing diverse values—values that conflict, yet values that are all good in the eyes of at least some people some of the time.”).

¹⁹³ See, e.g., Evans v. Newton, 382 U.S. 296, 300 (1966) (“While a state may not segregate public schools so as to include one or more religious groups, those sects may maintain their own parochial educational systems”).

substantially undermines the social and economic participation rights of protected group members is subject to constitutional constraint. The interests affected must be highly important in order for the state’s authorization of the discriminatory private conduct to trigger constitutional review. Harold Horowitz takes this view of *Shelley*. According to Horowitz, in deciding “whether the definition and enforcement by a state of legal relations between private persons was unconstitutional state action . . . [t]he primary inquiry would be to determine in each case the exact effect on the individual of the particular state action.”195

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

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

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> The cases which have been discussed have illustrated some of the factors which would be considered in deciding whether the definition and enforcement by a state of legal relations between private persons was unconstitutional state action. For example, in the realm of problems dealing with racial discrimination, does the state action compel, or only permit, discrimination against a person because of his race? In what context does the discrimination based on race arise? Does it concern opportunity to purchase or use land, or opportunity to be buried in a particular private cemetery, or opportunity to enjoy the facilities of a public inn or theatre, or opportunity to be benefited by a private or charitable trust or opportunity to vote in public elections?

*Id.* See also Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L. Q. 893, 902 (1974-75) (explaining that “the reasonableness, not the existence, of state action is the issue in every case involving permissive actions”); Henkin, supra note 194, at 490 (arguing that when the state enforces private conduct the enforcement is not subject to the exact same equal protection requirements as if the state was acting directly because the private privacy interests in some cases are strong enough to outweigh the state’s equal protection obligations); Herzog, supra note 171, at 45-46 (explaining that “in apparently parallel cases the state does just the same sort of thing, but there is no constitutional violation in sight” and noting as an example that “the constitutionality of the law of trespass goes one way when blacks ‘intrude’ in an amusement park, another when they intrude in a private home.”)
condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Indeed, the Supreme Court in *Shelley* probably could have reached its desired outcome—prohibiting state enforcement of racially restrictive covenants—by relying on traditional common law property principles. It chose instead to frame the case as a constitutional one and to emphasize the fundamental property rights at stake.

Some lower courts have adopted this view of *Shelley*. In *Abbate*, for example, the plaintiff church sought a declaratory judgment holding that enforcement of private covenants which limited the use of covered land to residential and agricultural uses and thereby prohibited the construction of houses of worship was unconstitutional. The court agreed with the plaintiff in the case that enforcement of the private covenants would violate their First Amendment rights. In finding such enforcement unconstitutional, the court emphasized the importance of the interest at stake for the plaintiffs. According to the court, “While it is true, of course, that when the effect of such a covenant upon the exercise of one’s freedom of religion is small and the public interest to be protected is substantial such freedom is to give way to the public interest, that situation does not here exist.” Similarly in *White Egret Condominium*, a Florida state court refused to enforce a condominium covenant prohibiting children under age 12 from living on the premises. In holding that state enforcement of the covenant was unconstitutional, the court here too emphasized the

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196 *Shelley*, 334 U.S. at 10. Similarly, the Court emphasized: “We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.” *Id.* at 20-21.

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

198 *Shelley*, 334 U.S. at 20 (holding that “in granting judicial enforcement of the restrictive agreements in this case, the states have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand”).


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

201 *Id.* at 201-02.

202 358 So.2d 1084 (Fla. 1978).
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importance of the rights burdened by the covenant—in this case landowners’ rights to marry and procreate.\footnote{Id. at 1088 (holding that “[t]his restriction is an unconstitutional violation of this defendant’s rights to marry and procreate. Further, no compelling reason has been shown for refusing to allow children under twelve (12) to reside in the condominium.”).} This conception of Shelley also helps make sense of the Court’s holdings of no unconstitutional state authorization in the cases of Palmer v. Thompson\footnote{403 U.S. 217 (1971).} and Moose Lodge v. Irvis.\footnote{407 U.S. 163 (1972).} In Palmer, the Supreme Court held that the City of Jackson, Mississippi’s decision to close its public pools rather than desegregate them, and to permit private citizens to operate the pools on a racially segregated basis, did not violate the equal protection rights of black citizens.\footnote{According to the Court: “the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of ‘the equal protection of the law.’” 403 U.S. at 226.} In Moose Lodge, the Supreme Court upheld against constitutional challenge the state’s authorization of individuals to choose members of their own private clubs—even if they did so in a racially discriminatory manner.\footnote{407 U.S. at 164-65.} In both cases, the Court focused on the trivial or limited nature of the third party interest at stake as a result of the private discrimination. In Moose Lodge, for example, the Court noted that “Moose Lodge is a private social club in a private building.”\footnote{Id. at 175.} In Palmer, Justice Blackmun, in explaining why he joined the opinion of the Court allowing the pools to be closed, emphasized: “The pools are not part of the city’s educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities.”\footnote{403 U.S. at 229.}

Under this second view of Shelley, then, state authorization of private conduct does not violate the equal protection clause in the full range of cases that more direct forms of state action do.\footnote{State action is direct when it is either “proprietary” or “mandatory.” See Alexander, supra note 195, at 896. Conduct is proprietary when it is performed by state officials acting either in accordance with or in flagrant violation of state law. Id. Conduct is mandatory if it is required by state law. Id. An example of the former is the conduct of police officers carrying out an arrest. An example of the latter is the state law at issue in Buchanan v. Warley, 345 U.S. 60 (1917), prohibiting black people from occupying houses in predominantly white blocks and prohibiting whites from doing so in predominantly black blocks.} Such authorization is only unconstitutional when the private conduct implicates important third party interests in social or economic participation. The equal protection clause becomes in effect embedded with a substantive minimum. Only when state...
authorized private conduct hampers sufficiently important social and political interests of third parties is the equal protection clause implicated.

Access to education reflects just such an important interest. Adequate education is essential to one’s ability to participate in the political, economic and social life of the community. Yet education is not a binary good like the right to vote or the right to own property, which one either possesses or does not. Instead, education is a positional good. The amount of education one needs to participate meaningfully and effectively in society depends in significant part on how one’s education compares with that of one’s peers.211

Some state supreme courts in interpreting their own education clauses have in fact explicitly recognized the positional, rather than binary, nature of the right to education. In Abbott v. Burke, for example, the Supreme Court of New Jersey interpreted the state’s constitutional provision requiring the state to provide a “thorough and efficient system of free public schools” as not only requiring that public schools provide all children with a basic minimum education, but also requiring that rich and poor school districts provide children with a sufficiently comparable education so as to enable all children to participate meaningfully and effectively in the economic life of the community.212 The Court then held that the disparity then existing “between education in these poorer urban districts and that in the affluent suburban districts . . . is severe and forms an independent basis for our finding of a lack of a thorough and efficient education in these poorer urban districts.”213

As applied to the homeschooling context, this second narrower conception of Shelley suggests that state authorization of severe forms of sex-based educational inequality within homeschooling families violates the equal protection clause.214 Severe forms of educational inequality deny those who are

211 As Goodwin Liu has argued: Educational “adequacy must entail a limit to inequality, a point at which the maldistribution of educational opportunity puts too much distance between the bottom and the rest of society. Adequacy is thus a function of the range and contours of the overall distribution. It is a principle of bounded inequality.” Liu, supra note 67, at 347.

212 Abbott v. Burke, 375 A.2d 359, 363 n. 1 (N.J. 1990) (the New Jersey educational clause at issue provided: “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for all the children in the state between the ages of five and eighteen”).

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

214 The result is similar to but narrower than the equal protection obligation imposed upon white parents after the Supreme Court ordered the racial desegregation of public schools. White
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disadvantaged the ability to compete meaningfully and effectively against those who are more privileged. It effectively deprives the disadvantaged of their right to a basic adequate education, a right important enough to trigger constitutional protection regardless of whether the deprivation is carried out by the state directly or by state authorized private actors.

3. Encouragement as State Action

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

a. Symbolic Encouragement

The broader state action as encouragement view of Shelley finds unconstitutional state authorization of private conduct when the state has sent a message encouraging private discrimination that might not otherwise exist. The state may not encourage private discrimination, even through purely symbolic measures, and then use its power to enforce discrimination once it occurs.

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

This symbolic encouragement conception of Shelley also explains why the Supreme Court in Reitman v. Mulkey held that state authorization of private race-based discrimination in residential property sales was unconstitutional. In Reitman the state of California passed a constitutional amendment permitting property owners to make sale and lease decisions based on any factors they

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parents were effectively told that whatever level of education they wanted to provide for their own children they would have to provide for black children as well. This attempt at substantive educational equality was, of course, undermined significantly by white flight out of public schools and to private schools.

wanted—thereby voiding the state’s preexisting statutes prohibiting race-based housing discrimination. The amendment signaled the state’s approval of race-based housing discrimination, and this approval served as a form of encouragement for race discrimination. The amendment changed the status quo, the California Supreme Court noted, from one in which race-based housing discrimination was prohibited “to one wherein it is encouraged.” Such encouragement even if only symbolic was unconstitutional. As the California Supreme Court explained, “a prohibited state involvement could be found ‘even where the state can be charged with only encouraging,’ rather than commanding discrimination.” The United States Supreme Court agreed with both the California Supreme Court’s characterization of the amendment and its conclusion regarding the amendment’s unconstitutionality. According to the Court, “Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”

Under this symbolic encouragement conception of Shelley, states’ permissiveness toward extreme forms of sexist homeschooling is again

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216 The California constitutional amendment challenged in Reitman provided: “Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.” Id. at 371.

217 Id. at 375 (quoting state supreme court decision).

218 Id. at 375 (quoting state supreme court decision).

219 Id. at 376 (stating that “[t]here is no sound reason for rejecting this judgment” of the state supreme court regarding the amendment’s unconstitutional encouragement of discrimination). The Court approvingly described the ruling of the California Supreme Court as follows: [The California Supreme Court] did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations. . . . [I]t held the intent of s 26 was to authorize private racial discriminations in the housing market, to repeal the Unruh and Rumford Acts and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. Hence the court dealt with s 26 as though it expressly authorized and constitutionalized the private right to discriminate. Third, the court assessed the ultimate impact of s 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.

Id. at 376.

220 Id. at 381.
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problematic. By exempting homeschools from many of the requirements of public and private schools, states encourage homeschooling parents to think of homeschooling as more distinct and different from these forms of schooling than they would if homeschools were subject to the same requirements. The creation of different rules just for homeschools may send a message that homeschooling is for those who want to separate themselves out not only from the standard secular, heavily regulated public schools but even from the more lightly regulated and often religious private schools. The effect may be to encourage those who homeschool to adopt more distinct and distinctly antisecular and illiberal stances toward education than they would otherwise. The very process of deregulating homeschooling—like the process of deregulating property decisions in Reitman—may encourage a greater degree of illiberal homeschooling than would otherwise exist. To the extent that states’ lack of oversight over homeschooling actually encourages more extreme forms of discriminatory homeschooling, state permissiveness toward such homeschooling is unconstitutional.

b. Material Encouragement

There is, however, a still narrower version of the encouragement as unconstitutional state action conception of Shelley. This version focuses not on the state’s symbolic encouragement of discrimination but on the state’s functional and material facilitation of it. Under this view, what made state authorization and enforcement of private discrimination unconstitutional in Shelley was that the state had taken concrete steps to overcome the organizational problems which would otherwise have made the discriminatory agreements in the case ineffective. At its core, the right to contract entails the power to exchange promises and, at a higher level of state involvement, the right to call upon the state to enforce such promises against participants. State enforcement of contracts by and against successor owners who are not part of the original exchange of promises involves a far greater degree of state involvement in private contracts and a move beyond core contract rights. It is this extension of traditional contract rights that made racially restrictive covenants so powerful. Without allowing third party enforcement of private agreements against successor owners it is unlikely that individuals would have been able to overcome the free rider problems that plague most attempts at group organization. Individual homeowners would be likely to violate racially restrictive covenants when faced with sufficiently high offer prices. Third party enforcement of racially restrictive covenants against successor landowners was critical to their power and impact. By enforcing restrictive covenants, the state in effect chose to use its power to overcome the problems of private organization.
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In doing so, the state facilitated a pattern of racial discrimination that could not have emerged with such depth and sustainability otherwise.\footnote{What is important here is that the state is acting in such a way as to facilitate intentional private discrimination. It does not matter whether the state itself intended to facilitate and encourage such discrimination. There is a similarly narrow version of Reitman that focuses on the state taking concrete steps to facilitate racial housing discrimination by making it impossible for state or local lawmakers to prohibit such discrimination in the future through normal legislative means. As Justice White writing for the Court, explained: “[p]rivate discriminations in housing were now not only free from [existing antidiscrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discrimination, including the right to discriminate on racial grounds, was now embodied in the State’s basic charter, immune from legislative, executive or judicial regulation at any level of the state government. Those practicing racial discrimination need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.” Reitman, 387 U.S. at 277. See also Charles L. Black, Jr., Forward: “State Action,” Equal Protection, and California’s Proposition 14, 81 HARV. L. REV. 69, 75 (1967-68) (contending that what the amendment in Reitman does “is to lay a sweeping prohibition on all subdivisions of government within the state, and not merely on the state legislature, saying that none of them may do anything to place any limitation on the absolute discretion of owners to decline to deal with chosen objects of discrimination among would-be buyers and tenants of residential property”).}

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

This most narrow conception of Shelley, one which effectively limits the Court’s holding regarding unconstitutional authorization of private conduct to state enforcement of racially restrictive housing covenants, is, however, inadequate and anemic. As discussed previously, while the precise contours of Shelley are certainly fuzzy, it is clear that the case’s core holding regarding the unconstitutionality of state authorization of certain private conduct, extends well beyond that narrow range of cases involving enforcement of racially restrictive covenants.\footnote{See supra text accompanying notes 181-185.}

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

B. Refining and Defending the Equal Protection Mandate for Homeschoolers

221 What is important here is that the state is acting in such a way as to facilitate intentional private discrimination. It does not matter whether the state itself intended to facilitate and encourage such discrimination. There is a similarly narrow version of Reitman that focuses on the state taking concrete steps to facilitate racial housing discrimination by making it impossible for state or local lawmakers to prohibit such discrimination in the future through normal legislative means. As Justice White writing for the Court, explained: “[p]rivate discriminations in housing were now not only free from [existing antidiscrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discrimination, including the right to discriminate on racial grounds, was now embodied in the State’s basic charter, immune from legislative, executive or judicial regulation at any level of the state government. Those practicing racial discrimination need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.” Reitman, 387 U.S. at 277. See also Charles L. Black, Jr., Forward: “State Action,” Equal Protection, and California’s Proposition 14, 81 HARV. L. REV. 69, 75 (1967-68) (contending that what the amendment in Reitman does “is to lay a sweeping prohibition on all subdivisions of government within the state, and not merely on the state legislature, saying that none of them may do anything to place any limitation on the absolute discretion of owners to decline to deal with chosen objects of discrimination among would-be buyers and tenants of residential property”).

222 See supra text accompanying notes 181-185.
As I have hinted at already, the nature and scope of the equal protection entitlement that flows from *Shelley* is both limited and odd in the homeschooled context. It is worth being more explicit about how, before defending the clause’s usefulness.

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

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

Moreover, this intra-family limitation means that the equal protection clause does not create the kind of group right that it does in other contexts. Normally, the equal protection clause elevates the status of an entire group by tying its entitlements to those of another group that the state has treated better. For example, even though no one has a substantive due process right to police protection or welfare, the equal protection clause demands that if the state provides such benefits to whites, then blacks get a right to them as well. Blacks as a group are entitled to a particular level of protection or welfare

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223 See *Rodriguez*, 411 U.S. at 24 (explaining that “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages”).

224 In *Deshaney v. Winnebago County Dept. of Social Services*, for example, the Supreme Court held that the state did not have a due process obligation to provide protective services to its citizens. 489 U.S. 189, 196-197 (1989). “Of course,” the Court emphasized, “the state may not . . . selectively deny its services to certain disfavored minorities without violating the Equal Protection Clause.” *Id.* at 197 n. 3. See also *Currie*, supra note 164, at 881-82 (noting that the practical effect of the Equal Protection Clause “may often be the same” as if there were an absolute right to a particular good or service).
measured by that which the state has chosen to provide to whites. The clause
overcomes group-based disparities by providing entitlements to all members of
the disadvantaged group. In the homeschooling context, however, the equal
protection clause does not improve the educational entitlement of all girls. It
bestows constitutionally protected educational rights beyond the bare minimum
only on those girls whose brothers are receiving the most advanced educations.
Girls as a group get no educational benefit.

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

III
ENFORCEMENT OBLIGATIONS

I have argued thus far that states cannot permit homeschooling parents to
engage overtly in certain extreme forms of illiberal education. Yet the fact that
states must prohibit overt miseducation does not say anything about what states
must do to ensure that homeschooled children actually receive the educations to
which they have a formal right. Most educational deprivation will not be overt
but covert, with parents claiming to be educating their children while in fact
failing to do so. This Part considers the extent to which the educational rights
that I have asserted on behalf of homeschooled children impose enforcement and
monitoring obligations on states.

It is a common trope that the federal constitution guarantees negative
rather than positive rights.\footnote{See, e.g., Currie, supra note 164, at 866 ("The due process clauses confer rights of protection from rather than by the government").} The constitution protects individuals from state
intrusions into their liberties but does not entitle them to the state action
necessary to make such rights real or meaningful. As Judge Posner explained in
\textit{Jackson v. City of Joliet}, "[t]he men who wrote the Bill of Rights were not
concerned that Government might do too little for people but that it might do too
much for them. The Fourteenth Amendment, adopted in 1868, at the height of
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Laissez-Faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.”

Certainly the Supreme Court has been explicit about the negative rather than positive nature of the federal due process clause. In *DeShaney v. Winnebago County*, for example, the Supreme Court held that individuals did not have an affirmative right to police protection from third party violence. The case involved four year old Joshua DeShaney who was beaten so severely by his father that he was left with permanent brain damage and confined to an institution for the profoundly retarded. Prior to this incident, state authorities had temporarily taken Joshua from his father’s home because of signs of abuse. The state returned Joshua to his father but continued to receive indications that Joshua was being abused. After the final beating, Joshua’s mother sued the county Department of Social Services on Joshua’s behalf alleging that it had violated Joshua’s Fourteenth Amendment due process rights “by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known.” The Supreme Court affirmed the lower court’s summary judgment for the county holding that while the due process clause “forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law,’ [ ] its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”

John Goldberg has argued that while the federal due process clause does require states to enact a body of tort law prohibiting certain types of private harms, it does not require them to make such protections real. Goldberg distinguishes between the right to law and the right to a benefit stating that the due process clause guarantees the former but not the latter. The due process clause, Goldberg argues, entitles individuals to a “body of law, including the

226 715 F.2d 1200, 1203 (7th Cir. 1983).
227 *DeShaney*, 489 U.S. at 195.
228 *Id.* at 193.
229 *Id.* at 193.
230 *Id.* at 195. See also *Town of Castle Rock v. Gonzales*, 125 S.Ct 2796, 2810 (2005) (holding that plaintiff had no “property interest in police enforcement of her restraining order” when police failed to respond to her notification that her husband had taken their children resulting in their murder). Although this interpretation of the due process clause is quite settled by the court it is not without criticism. Steven Heyman, for example, argues that the Supreme Court’s interpretation of the Fourteenth Amendment’s due process clause is inaccurate and that the clause does in fact impose upon states a positive obligation of protection from third party harms. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L. J. 507, 546 (1991-92) (explaining that “[a] central purpose of the Fourteenth Amendment and Reconstruction legislation was to establish the right to protection as a part of the federal Constitution and laws”).
Institutions necessary to administer it” prohibiting private torts, but does not entitle individuals to the affirmative benefit of state protection from harm.232

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

Unlike the federal due process clause which provides, “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law,”233 these state education clauses do establish positive as opposed to merely negative rights.234 Although, as stated previously, these state clauses can be distinguished based on the strength of the educational obligation they create, the clauses all share the same affirmative form directing that states “shall” provide their children with certain educational opportunities, rather than that they “shall not” deprive them.235 Indeed, while state courts differ in how they define the minimum adequate education that states must provide,236 the success of the third

232 Id. at 594.
233 U.S. CONST. amend. XIV §1.
234 See Cochran, supra note 51, at 430-31 (noting that “[u]nlike the United States Constitution many state constitutions use positive phrasing to describe core rights and government services. This affirmative language creates a much stronger textual basis for arguing that state governments have a duty to provide support for needy citizens, public education, and other basic services and even that the constitutional requirements apply to private actors”).
235 See, e.g., CAL. CONST. art. IX § 5 (providing that “[t]he legislature shall provide for a system of common schools”); Tex. Const. art. VII, § 1 (providing that “it shall be the duty of the legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools”).
236 State courts have used three different approaches, sometimes in combination, to define the minimally adequate education required by their constitutions’ education clauses. First, courts have looked at children’s performance on the state’s own tests. Satisfactory performance on the state’s proficiency tests would suggest that the state’s minimal requirements for a basic and adequate education are being met. See Leandro v. State, 488 S.E.2d 336, 259 (1997) (instructing trial court to look to state adopted standards to determine whether children are being denied their right to a basic education); Hoke County Bd. of Educ. v. State, 358 N.C. 605, 626 (2004) (stating that in determining whether children were receiving the basic education they were entitled to it was relevant to look at their scores on subject matter tests). Second, courts have outlined a substantive list of the skills and capabilities that were deemed necessary for effective civic and economic participation. Courts then looked to see how successful the state schools were in ensuring that children possessed these necessary capabilities. See Rose v. Council for Better Education, 790 S.W.2d 186, 212 (KY. 1989) (describing the seven capacities that children must possess in order to have a constitutionally adequate education); McDuffy v. Secr. of Exec. Office of Educ., 415 Mass. 545, 619 (1993) (noting that the Rose “guidelines accord with our Constitution’s emphasis on educating our children to become free citizens on whom the Commonwealth may rely to meet its needs and to further its interests”); Opinion of the Justices,
wave of school financing cases has been in getting state courts to recognize and enforce the positive obligations that these clauses impose. As discussed in Part I, the obligation that states have to provide children with a basic minimum education holds regardless of whether it is the state or homeschooling parents doing the actual educating.

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

The right to vote is protected by the 14th, 15th, 19th and 24th Amendments. Although the earliest interpretations of the 15th Amendment’s prohibition on race discrimination in voting construed the right to vote as only a negative right to be free from state interference, the right to vote has gradually taken on a more affirmative cast.

In United States v. Cruikshank and the Ku-Klux cases, decided just years after the Amendment’s passage, the Supreme Court held that the Fifteenth Amendment guarantees a right to vote that is both affirmative and equal. The Court held that the right to vote includes a right to vote in a free and equal manner, and that states may not discriminate on the basis of race.

The right to vote is also protected by the 15th and 19th Amendments. The 15th Amendment provides that the right to vote shall not be denied or abridged on account of race, color, or previous condition of servitude. The 19th Amendment guarantees the right to vote to women.

The 24th Amendment prohibits the poll tax as a condition of voting in federal elections. The 26th Amendment grants the right to vote to citizens 18 years old or older.

In recent years, the Supreme Court has expanded the right to vote to include a right to vote in a free and equal manner, and to vote in a manner that is not discriminatory.

See generally James E. Ryan, Sheff, Segregation, and School Finance Litigation, 74 N.Y.U. L. REV. 529, 534 (1999) (explaining that “the key to understanding the broader possibilities of school finance litigation is to recognize that the right to an adequate or equal education is an affirmative right, which creates a corresponding obligation on the part of the state”). For an overview of cases challenging state financing plans as in violation of state education clauses, see id. at 533 n. 15.

237 See generally James E. Ryan, Sheff, Segregation, and School Finance Litigation, 74 N.Y.U. L. REV. 529, 534 (1999) (explaining that “the key to understanding the broader possibilities of school finance litigation is to recognize that the right to an adequate or equal education is an affirmative right, which creates a corresponding obligation on the part of the state”). For an overview of cases challenging state financing plans as in violation of state education clauses, see id. at 533 n. 15.

238 See U.S. CONST. amends. XIV, XV, XIX, XIV. Perhaps most important in ensuring an affirmative right to vote is the Fifteenth Amendment. The Fifteenth Amendment provides: “Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend XIV §§1&2. Pursuant to Section 2 of the 15th Amendment, Congress passed the Enforcement Act the same year. The Enforcement Act is the Civil Rights Act of 1870, 16 Stat. 140, amended by Act of February 28, 1871, 16 Stat. 433 (codified as amended at 18 U.S.C. 241-242 and 42 U.S.C. 1971(a), 1983 (1976)).

239 See United States v. Reese, 92 U.S. 214 (1875) (stating that “the Fifteenth Amendment does not confer suffrage upon anyone” it just creates a right to be free from race based discrimination in voting).

240 92 U.S. 542 (1876)

241 Ex Parte Yarbrough, 110 U.S. 651 (1884)
Amendment protected individuals not only from racially motivated state interference with the right to vote but from racially motivated forms of private interference as well. In *Cruikshank* the Court considered criminal indictments against private defendants who were charged with conspiring to prevent two African Americans from exercising their right to vote in violation of Section 6 of the Enforcement Act, which was passed shortly after and pursuant to the 15th Amendment.\(^{242}\) Although the Court threw out the indictments it did so not because the 15th Amendment did not protect against such private action, but because it had not been averred in that case that the defendants had been motivated by race.\(^{243}\) The Supreme Court made the Amendment’s scope of coverage more explicit in the *Ku-Klux cases* in which it affirmed the convictions under section 6 of the Enforcement Act of several white men for conspiring to deprive a black man of his right to vote by beating him.\(^{244}\) In doing so, the Supreme Court made clear that the scope of 15th Amendment’s right to vote protected individuals from private as well as state interference.\(^{245}\) Likewise, in the white-primary cases, the Supreme Court held that the 15th Amendment guaranteed protection not only from direct state efforts to block blacks from voting but from ostensibly private conduct with the same effect.\(^{246}\) Finally, in the apportionment cases of the 1960’s the Supreme Court made clear that citizens had not only the right to vote without interference, but also the right to cast a vote that was effective.\(^{247}\) In *Reynolds v. Sims*\(^{248}\) and *Wesberry v. Sanders*,\(^{249}\) the

\[^{242}\] 92 U.S. at 543.

\[^{243}\] Id. at 556.

\[^{244}\] 110 U.S. at 655-56.

\[^{245}\] Id. at 666-67. The Supreme Court explained the necessity of this protection as follows:
In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.... If the government of the United States has within its constitutional domain no authority to provide against these evils,—if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint,—then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other.


Supreme Court required states to draw voting districts of substantially equal populations in order to ensure all citizens votes of roughly equal weight.

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

This right certainly bars states from prohibiting outright or unduly burdening a woman’s right to abortion. Yet the right also entitles women to state protection from at least some forms of private conduct aimed at interfering with the right. In *Operation Rescue v. Women’s Health Center*, for example, the Supreme Court of Florida upheld against First Amendment challenge a trial court injunction barring anti-abortion protesters from picketing and demonstrating in a buffer zone outside a Florida abortion clinic. In doing so, the court emphasized that the injunction served to protect women’s constitutional right to abortion. The court explained: “our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida’s citizens, including its women. A woman’s freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our state and federal constitutions.”

In *Madsen v. Women’s Health Center*, the Supreme Court affirmed that part of the injunction that created a buffer zone around clinic entrances and driveways, emphasizing that it “burden[ed] no more speech than necessary to accomplish the governmental interest at stake.” Similarly, in *Pro-Choice Network of Western New York v. Project Rescue Western New York*, the district court issued a preliminary injunction which among other things prohibited anti-

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248 377 U.S. 533 (1964) (requiring substantially equal populations in state and local election districts).
249 376 U.S. 1 (1964) (requiring substantially equal populations in congressional districts).
251 *Roe*, 410 U.S. at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).
252 See Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (“Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden”); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (striking down a state law requiring spousal consent before a woman could obtain an abortion and striking down a parental consent requirement for minors which did not involve a judicial bypass procedure).
254 626 So.2d at 672.
abortion protestors from entering a 15 foot buffer zone around clinic doorways and driveways.\footnote{See Pro-Choice Network of Western New York v. Project Rescue Western New York, 799 F. Supp. 1417, 1440-41 (W.D. N.Y. 1992) (issuing the preliminary injunction); Pro-Choice Network of Western New York v. Project Rescue Western New York, 828 F. Supp. 1018, 1032 (W.D. N.Y. 1993) (denying motion to vacate the preliminary injunction).} It did so, the court explained, because the case “involve[d] a significant federal interest in balancing what are in essence, conflicting rights guaranteed by the United States Constitution—the First Amendment right of free speech, and the Fourteenth Amendment right to an abortion.”\footnote{828 F. Supp. at 1031.} The Supreme Court in \textit{Schenck v. Pro-Choice Network of Western New York} affirmed part of an injunction that created the “fixed” 15 foot buffer zone around clinic doorways and driveways.\footnote{Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997).} The Court relied on its prior holding in \textit{Madsen} to conclude that the government interests underlying the injunction—“public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman’s freedom to seek pregnancy-related services”\footnote{Id. at 376.}—were “certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics.”\footnote{Id. at 376.}

The Supreme Court has rejected, however, any notion that the right to abortion entails a right to state funding for abortions in order to make the right meaningful and effective for poor women. In \textit{Harris v. McRae}, for example, the court held that the right to abortion did not include the right to state funding for even medically necessary abortions.\footnote{448 U.S. 297 (1980).} The Court explained: “regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in \textit{Roe v. Wade}, it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”\footnote{Id. at 316. The Court explained that the Hyde Amendment’s refusal to provide funding for almost all abortions while providing funding for medical services related to childbirth violated no constitutionally protected rights recognized in \textit{Roe v. Wade}. According to the Court: “The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.” Id. at 315. \textit{See also} Maher v. Roe, 432 U.S. 464 (1977) (holding that the right to abortion did not include the right to state funding for non medically necessary abortions even when the state provided funding for services incident to childbirth).}

Given their explicit enumeration in state constitutions, state obligations to ensure a basic minimum level of education should bear some resemblance to the
obligations states have to protect the right to vote and to abortion.\textsuperscript{263} Certainly states may not themselves take steps that block children’s access to education. Yet the voting and abortion contexts suggest that states must also, at a minimum, take steps to prevent private interference with children’s right to obtain an education, and may also be required to take affirmative steps to ensure that the right to a minimum education for children translates in educational reality.

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

There are also a multitude of ways in which states could satisfy an affirmative obligation to ensure that homeschooled students receive a basic education. States could require attendance at state regulated schools, either public or private, until basic skill mastery is shown;\textsuperscript{264} states could require and provide tutoring for homeschooled students; or states could monitor homeschoolers through periodic home visits.\textsuperscript{265} All of these options are, however, highly costly to states and highly invasive to homeschooling families. The requirement for school attendance, moreover, would deny all children the real and substantial benefits of homeschooling in order to ensure that an endangered few are not denied basic competency. Such tradeoffs seem unjustified when competency may be guaranteed in other ways.

Probably the most efficient and least invasive way for a state to ensure a basic education is through some form of required testing. Young students might be required to take annual tests to ensure they are making progress toward the required skill level. Certainly many students will achieve such mastery well before majority, perhaps by the 8\textsuperscript{th} or 9\textsuperscript{th} grade, other students will not show

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\textsuperscript{263} The obligations imposed to ensure a basic minimum education should perhaps be less than those imposed to protect voting rights, given the explicit and repeated assertion of voting rights in the federal constitution, but more than those imposed to protect abortion rights, given that the right to abortion was found in the penumbras of the federal constitution while the right to a basic minimum education is provided for directly in the state constitutions.

\textsuperscript{264} Most states do impose curriculum requirements on private schools. See Eric A. DeGroff, \textit{State Regulation of Nonpublic Schools}, 2003 B.Y.U. EDUC. & L. J. 363, 393 (2003) (‘noting that 38 of 47 states that responded to a survey said they did impose curriculum requirements on private schools though some states also allowed for certain exemptions).

\textsuperscript{265} At least one state, however, has held required home visits to be illegal. See Brunelle v. Lynne Public Schools, 702 N.E. 2d 1182 (Mass. 1998) (holding that parents’ right to homeschool could not be conditioned on evaluative home visits by school officials).
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adequate progress. As children become older, the urgency of their educational predicament increases, and more interventionist state policies—such as tutoring or mandatory school attendance—may become justified and necessary.

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

To the extent that the equal protection clause prohibits extreme forms of sex-based educational disparity within homeschool families, this requirement too imposes affirmative duties on states in some circumstances. Just as this duty to remedy disparity creates affirmative obligations on states to oversee and monitor the distribution of educational resources within public schools, so too does it create obligations to monitor and remedy severe sex-based disparities within homeschools.

Even if the educational rights I assert in this paper exist and impose affirmative obligations on states with respect to homeschooled children, there remains the question of who in the homeschooling context is in a position to enforce these rights if states fall short. Generally, children’s rights are protected and enforced by their parents who bring lawsuits on their behalf. Homeschooling parents would be extremely unlikely, however, to bring actions designed to limit their own authority over their children.266 Parents who do not believe that their children should be educated would certainly not seek out state action requiring them to do so. Young children are unlikely to be able to initiate lawsuits on their own behalf, and older children might be unwilling or unable to express educational preferences that conflict with their parents’, even if states established judicial procedures on their behalf.

In some cases in which children’s rights are at stake, courts appoint a “next friend” or guardian ad litem to bring an action on behalf of a minor in federal court.267 This approach seems appropriate theoretically, but infeasible practically. It is precisely those states that are not satisfying their affirmative obligations to ensure homeschooled children’s education that will be least motivated to self-police through the appointment of guardians ad litem. They will also be least knowledgeable about which homeschooled children are most in

266 James Dwyer raises similar enforcement problems with respect to his argument that religious exemptions from state child welfare and education laws violate children’s Fourteenth Amendment right to equal protection. See Dwyer, supra note 43, at 1465. Dwyer notes that “an obvious procedural difficulty [in raising such a claim] arises from the fact that this would be a suit that enjoyed the support of none of the affected parties.” Id.

267 See id. at 1447 (finding a presumption that “such appointment will occur whenever a minor is not sufficiently mature to act on her own behalf and the minor’s general guardians—typically, her parents—have a conflict of interest with the minor in connection with the litigation”).
need of such protection. In other words, those states in which enforcement of
children’s rights is most necessary are the ones in which enforcement is likely to
be most difficult and ineffectual.

Enforcement measures may, however, be brought by adults who were
homeschooled as children in a way that violated their state or federal
constitutional rights. For example, individuals who reach adulthood deprived
of basic skills as a result of decisions made by their parents and condoned by the
state would be able to challenge the state’s delegation of educational authority
and would be in a realistic position to bring such claims. Although such
enforcement actions may effectively be too late to change the lives of the grown-
up plaintiffs who were denied education as children, the threat of enforcement
alone may be enough to prompt a higher level of state oversight.

CONCLUSION

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

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

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

269 See Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925) (“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.”). See also Dwyer, supra note 43, at 1350 (explaining that “courts
have consistently held that parents, other than the Amish and similar groups, have no
constitutional right to home school”).

270 Prince v. Massachusetts, 321 U.S.158, 171 (1944). Sarah Prince was convicted of violating
Massachusetts’ child labor laws by allowing her nine year old niece to sell religious magazines
with her on the street. Id. at 159-60. The Supreme Court upheld the conviction noting that “the
family itself is not beyond regulation in the public interest, as against a claim of religious liberty.
And neither rights of religion nor rights of parenthood are beyond limitation.” Id. at 166-67. See
also Yoder, 406 U.S. at 233-34 (explaining that “[i]f be sure, the power of the parent, even when
linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental
The extent to which the basic minimum actually infringes on parental autonomy depends to some degree, of course, on how states interpret their own required minima. If states conceive of the basic minimum as requiring only those skills necessary for the barest conception of citizenship—namely the ability to vote—then the minimum probably requires no more than basic literacy. Conceived in this way, the minimum would impose truly negligible limitations on parental autonomy. Parents would be required to teach their children to read, but beyond this they would be free to educate, miseducate and indoctrinate their children as they saw fit.

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

This scenario is more likely in light of the range of interpretations states have given thus far of their education clauses. See supra note 236. In Rose v. Council for Better Education, 790 S.W. 2d at 212, for example, the Kentucky Supreme court held that a constitutionally efficient system of education had to have as its goal provision of at least the following seven capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue lifework intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job markets.” See also McDuffy v. Secr. Of Executive Office of Educ., 415 Mass. 545, 618-19 (1993) (explaining that the Rose “guidelines accord with our Constitution’s emphasis on educating our children to become free citizens on whom the Commonwealth may rely to meet its needs and to further its interests”); Opinion of the Justices, 624 So. 2d 107, 166 (Ala. 1993) (holding that legislature was required to comply with circuit court order to provide children with an adequate education and which listed nine capabilities necessary for such education including oral and written communication skills, math and science skills, knowledge of economic, social and political systems, self-knowledge and self-worth).
such. In other words, the minimum may require that if parents want to teach against the enlightenment they have to label what they are doing as such.

Illegible homeschoolers may, then, be correct in their contention that even minimal education requirements impair their ability to effectively direct their children’s education and socialization. This contention, however, seems to do no more than reveal the lie of liberalism generally. A liberal society cannot in fact be wholly neutral toward competing conceptions of the good. Liberalism does involve at least minimal commitments to rationality and autonomy.\(^{272}\) It is not surprising then that both federal and state constitutions are themselves not wholly neutral with respect to competing conceptions of the good, particularly when it comes to children.

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

Indeed, despite the positive law focus of this paper, it seems very possible that the legal arguments I have made will have their greatest impact in a political rather than traditionally legal forum. States have a social and economic interest in ensuring that all children receive an adequate education. Their political health and economic prosperity depend on it. The primary importance of the legal arguments I have offered may then lie not in their ability to coerce states with threatened judicial sanctions into doing something they do not want to do, but in their ability to support and reinforce states’ efforts to do that which they already want to do. Arguments about constitutional mandates bolster states’ ability to withstand pressure from an increasingly powerful homeschool lobby seeking to gain parents unfettered control over their children’s education.\(^{273}\) While a great deal remains open for debate about appropriate limitations on parental control over children’s education, the arguments I have made here may help ensure that the most extreme forms of illiberal homeschooling are simply, and appropriately, taken off the table and out of the political debate.


\(^{273}\) In some sense my goal is similar to that of Goodwin Liu who aimed to describe the duties the Fourteenth Amendment imposed on “conscientious legislator[s]” without regard to the threat of external judicial enforcement. See Liu, supra note 67, at 339-40.