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Homeschooling: Choosing Parental Rights Over Children's Interests

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**HOMESCHOOLING:
CHOOSING PARENTAL RIGHTS OVER CHILDREN'S
INTERESTS**

Martha Albertson Fineman & George Shepherd*

“[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together.” –Thurgood Marshall.¹

Homeschooling, the most extreme form of privatization of education, often eliminates the possibility of the child gaining the resources essential for success in adult life. It sacrifices the interests of the child to the interests of the parents, allowing them to control and isolate the child's development. In addition, homeschooling frustrates the state's legitimate interest in the child's receiving a sound, diverse education, so that the child can achieve her potential as a productive employee and as a constructive participant in civic life. This Article uses vulnerability theory as a heuristic frame both to reexamine the dominant rhetoric of parental choice and to underscore the importance of a robust sense of state responsibility for the nature and content of education. It discusses the harms to the individual child and the larger society that might result when that responsibility is ignored. Finally, because privatizing education is often framed in economic terms, the final section argues that homeschooling is inefficient because competition in the market for education leads to market failure. For all of these reasons, homeschooling should be prohibited, as it is in many other countries.

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1. Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

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I. INTRODUCTION

Schools have become a significant battleground in American culture (and elsewhere) as parental rights are entangled with religious freedom, and education is seen as having profitable private potential.² As with many other decisions affecting children and families, the rights and responsibilities of parents and the state must be components of that balance. However, without a strong child-centered focus, attention is easily diverted away from consideration of what is best for children and the role of law and policy in making that determination, and onto the rights of parents.

This Article considers both the public and private roles education serves and urges that the interests of children and society must be at least as relevant as those of parents when creating educational policy. An excessive focus on the interests of parents in controlling the influences on their children can produce both private and public harms. This paper focuses on homeschooling because it is the most extreme form of privatized education: the home-schooled child does not move to a different school—to a different local public school, to a private school, or to a school in another district. Instead, the student attends no school at all.³ As a result of this complete abandonment of public responsibility for primary education, homeschooling has the potential to significantly undermine the public role of education in maintaining a democratic society. In addition, it may harm the future prospects of individual children.

Our arguments are grounded in vulnerability theory, which can serve as a heuristic frame to reexamine the dominant conception of

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2. Jeff Faux, *Education Profiteering: Wall Street's Next Big Thing?*, HUFFINGTON POST (Sept. 28, 2012, 6:26 PM), http://www.huffingtonpost.com/jeff-faux/education-wall-street_b_1919727.html; see Rosemary Salomone, *Home Schooling and Religious Freedom*, EDUC. WEEK (Oct. 19, 2004), <http://www.edweek.org/ew/articles/2004/10/20/08salomone.h24.html>.
 3. In fact, a subset of the homeschool movement—known as unschooling—advocates pulling back from any formal curriculum and letting children follow their own interests, whatever those interests may be. Advocates emphasize that “[s]kills like learning vocabulary, spelling and math, while valuable for those who choose futures require [sic] such skills, like writer/journalist/editor or engineer/architect, for example, may wind up being distant, secondary needs for others.” *What if My Child Doesn't Want to Learn Spelling, Vocabulary or Math?*, UNSCHOOLING.COM, http://unschooling.com/questions-answers/child_doesnt_want_to_learn_spelling_vocabulary_math/ [https://web.archive.org/web/20151104232226/http://unschooling.com/questions-answers/child_doesnt_want_to_learn_spelling_vocabulary_math/] (last visited Aug. 17, 2016).

state and individual responsibility. Vulnerability theory is built on the realization that human beings are constantly susceptible to change, both positive and negative, in our bodily, social, and environmental circumstances.⁴ Thus, vulnerability is both biological, or developmental, and social in form. It is also universal—vulnerability is inherent within the human condition—and it is constant, present across the life course. Using vulnerability theory to answer the question of what it means to be human also allows us to reconsider the nature of the universal political/legal subject around which we define the contours and extent of individual versus collective responsibility. Thus reconceived, the vulnerable subject, who is perceived as dynamic rather than static, materially fragile, and socially interdependent, rather than autonomous and independent, is placed at the center of discussions about policy and law. This reconsideration of subjectivity brings the child out from under the coverture of the family and prompts discussions about what should be the nature and extent of state responsibility for the vulnerable subject in childhood. Recognizing the vulnerable subject mandates that we redefine state responsibility in a way that encompasses the entire life-course. State responsibility should not be limited by an unrepresentative, decontextualized, and ahistorical personification of what it means to be a human being.

The Article proceeds as follows. We first discuss vulnerability theory, followed by an introduction to the phenomenon of homeschooling.⁵ We consider the role for public education in both maintaining societal norms and values as well as providing individuals with the means to succeed in society. We also address how widespread and unregulated homeschooling can result in harm to both individual children and collective society.⁶ We finally conclude that homeschooling should be prohibited, conforming America's approach to state responsibility in regard to education to that of many of our peer nations.⁷ The final section is a condensed refutation of some of the contemporary economic arguments for privatizing education.⁸

4. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 10 (2008).

5. See *infra* Parts II–III.

6. See *infra* Part V.

7. See *infra* Part VII.

8. See *infra* Part VIII.

II. VULNERABILITY THEORY

Importantly, vulnerability theory ultimately is a theory of state responsibility—one that is built around the figure of the “vulnerable subject.” In contrast to the legal and political figure that dominates liberal theory, the vulnerable subject is not defined in terms of autonomy and independence, but by vulnerability and resilience. Human beings are embodied creatures. As such, we are also inevitably embedded in social relationships and institutions. Both our embodied and our embedded circumstances and situations are susceptible to change over time. Some changes or transformations are developmental, while others are circumstantial, institutional, environmental, or conditional.

The primary concern of vulnerability theory is not with understanding human vulnerability and the inevitability of change, although the theory begins there. Rather, it is on the role of the state and the state’s employment of the instruments of governmental power, such as the use of laws and policies to create institutions and relationships designed to respond to, mediate, and address vulnerability.

Even before the moment of birth, human beings are embedded in webs of economic, cultural, political, and social relationships and institutions. We are dependent on those relationships and institutions because they support and sustain us. They are the legitimate means through which we can gain the assets or resources necessary to mediate, negotiate, or cope with our human vulnerability. While there is no position of invulnerability, these relationships and institutions provide us with *resilience*. It is our reservoir of resilience that will determine whether we can not only persevere, but be confident enough to take risks or recognize and choose among options and opportunities as they arise over the life course.⁹ Therefore, individuals at various stages or in certain contexts should not be seen as more or less vulnerable (which is a shared and universal aspect of the human condition) and singled out for special or unique treatment. Rather, they should be assessed on their differing levels of resilience. Some individuals are more resilient

9. Resilience is found in the resources we build up over our lifetimes: physical resources in the form of goods or material things; human resources in the form of education, training, knowledge, and experience; social resources in the form of social networks and families; environmental resources in the form of both the man-made and natural environments we rely upon; and existential resources in the form of our systems of belief and aesthetics.

than others. The question, then, is how can society build resilience? To answer this question, we must turn our attention to the role and responsibility of society and social institutions as well as the situation of the individual.

When considering children in particular, it is important to understand that no one is born resilient. Rather, resilience is produced over time and within social and legal structures and is necessarily anchored in the developmental needs of the individual over the life course. The geography of childhood—that system made up of the family, community, and schools—is where children must begin to build resilience. How this system is structured in law and policy can have far-reaching consequences for both the individual child and the larger community. While there might be resistance to the idea of universal and constant vulnerability when it comes to adults, children historically are seen as occupying a place of dependence in our society.¹⁰ This early type of dependence is accepted as inevitable and unavoidable.¹¹ Society has historically dealt with childhood dependency by relegating the burden of caretaking to the family and considered it beyond the scope of state concern, absent extraordinary family failures, such as abuse.¹² The question raised by a vulnerability analysis is whether, when it comes to education, the state should allow parents such complete control over their children—that is, whether the state should continue to privilege parents' interests over those of the child and society.

Significantly, the child is located primarily within familial and educational institutions, structures, and relationships, and it is within that environment that essential resilience is first forged. The foundations established in childhood profoundly affect the ability and capacity of the vulnerable subject to accrue resources and resilience

10. Fineman, *supra* note 4, at 13. This resistance may come from a confusion about what the term vulnerability designates. Vulnerability does not necessarily indicate dependency. Our embodied vulnerability when it is realized in injury or harm may result in dependence, but this varies over the life course; one typically is more developmentally dependent on relationships of care-taking as a child than as an adult. Our dependence on social relationships and institutions also changes over the life course, although dependence on these structures as a social phenomenon should be understood as constant, if varied, throughout the life course. *See id.*

11. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 35 (2004). This type of dependence is generally viewed sympathetically, in contrast to derivative dependency—the dependency of caregivers on the resources necessary to accomplish that care—which is generally dismissed as individual choice and stigmatized. *Id.* at 34. *See id.* at 31–53, for a discussion on the development of the dependency theory.

12. The family is the way we privatize, and thus hide, dependency and its implications.

later in life. A strong education will facilitate professional training, which, in turn, will influence job prospects. Employment, in turn, affects family formation and security in old age, among many other things.

This sequential aspect of resilience means that it is vital for the state to assume some responsibility for the educational well-being of the vulnerable subject in childhood. What happens to the child at that stage of development will affect an individual's ability to move through and participate in institutions, activities, and relationships over the entire life course. It will also probably determine whether, as an adult, an individual will be able to act as a participating and productive citizen.

From a vulnerability perspective, homeschooling should be understood to be a failure of the state to be fully responsive to the need of vulnerable subject in childhood for a strong educational foundation. This failure presents the possibility of harm to both the child and society. Homeschooling is an inadequate mechanism to ensure access to an effective education that will provide opportunities for future citizens; in this way, it may directly harm individual children. Some homeschooled children may receive fine educations. However, others may endure a distorted, isolated experience that may not prepare them to be productive participants in a diverse, modern economy or to participate responsibly in the democratic process. Isolation may preclude exposure to demographic and ideological diversity. In addition, isolation increases the danger of transmission of incomplete or misleading information in areas of knowledge essential for future academic and career success.

The failure of the state to recognize that it has a compelling interest in assuming responsibility for directing the education of future citizens undermines the perceived value of publicly provided education and the significance of public schools that serve society. Privatization of education in this extreme form can erode a sense of community and societal purposefulness in regard to investment in the education of the next generation. Historically, public schools were understood to provide large public, as well as private, benefits.¹³ Facilitating easy abandonment of, and rejecting collective interest in, public education through acceptance and accommodation of

13. Our use of the term "public benefit" is used in its normal sense, in contrast to our use of the term "public good," which we use in the technical economic sense in our economic analysis, below. See discussion *infra* Part VIII.

homeschooling can also validate and encourage forces dismissive of the whole idea of universal public education.

III. HOMESCHOOLING

Homeschooling should be seen as radically separatist and individualistic. It can also be antisocial. Many of the proponents and practitioners of homeschooling have been publically critical of social or public values such as toleration and expanded notions of equality.¹⁴ At the same time, homeschooling appears to be one of the fastest growing sectors of K-12 schooling in the United States.¹⁵ Advocates glorify the idea of parental control, and they campaign for providing “choices,” not only over who does the educating, but also over what subjects are taught—or are not taught—and how students’ progress is to be evaluated and measured, and by whom.¹⁶

A. *History of Homeschooling*

Perhaps ironically, although it has always been around in some form, the homeschooling “movement” that emerged in the 1970s provided a political or ideological refuge for strange bedfellows—on the one hand, left-wing parents critical both of American policy and of patriotic civic education, and on the other, right-wing fundamentalists.¹⁷ These groups, while polar opposites in many ways, share the desire to withdraw from mainstream secular life.

Broad homeschooling has occurred in the United States only recently. In 1981, the majority of states prohibited homeschooling.¹⁸ Many of the other states regulated it heavily.¹⁹ However, in recent years, the homeschooling movement became effective both politically and by challenging state regulation in court.²⁰

14. See, e.g., Michael Farris, *Supreme Court Marriage Ruling*, HSLDA (June 26, 2015), <http://www.hsllda.org/elert/archive/elertarchive.aspx?7560>.

15. Brian D. Ray, *Research Facts on Homeschooling*, NHERI (Mar. 23, 2016), <http://www.nheri.org/research/research-facts-on-homeschooling.html>.

16. *Id.*

17. See J. Gary Knowles, Stacey E. Marlowe, & James A. Muchmore, *From Pedagogy to Ideology: Origins and Phases of Home Education in the United States, 1970–1990*, 100 AM. J. EDUC. 195, 197 (1992).

18. Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991, 994 (2010).

19. Roy Hanson, Jr., *HSLDA: The Homeschooler’s Preeminent Legal Resource*, PRIV. & HOME EDUCATORS CAL. (Jan. 2010), <http://www.pheofca.org/HSLDA.html>; *Homeschooled: How American Homeschoolers Measure Up*, TOPMASTERSINEDUCATION.COM, <http://www.topmastersineducation.com/homeschooled/> (last visited Oct. 31, 2016).

20. Ross, *supra* note 18, at 992.

Accordingly, effective organizing and lobbying led to the removal of most restrictions, resulting in a relatively lax system of oversight—or, in some states, no oversight at all. This change in policy was brought about largely through the activities of two major advocacy groups: the Home School Legal Defense Association (HSLDA), which is a Christian-based group, and the National Home Education Network, which is more secular in its orientation.²¹

Whatever differences exist between these organizations, both of these advocacy groups and homeschoolers in general share one article of faith: homeschooling must be unregulated and subject to parental control.²² Regulation is incompatible with the underlying philosophy of homeschooling, which is based on an absolutist sense of both parental rights and the sanctity of the home. As homeschooling thinking has evolved, parental rights are expressed as entailing absolute parental control over their child's education. Indeed, the phrase many homeschoolers use to describe their educational efforts is “parent-led home-based education,” in which parents direct all aspects of education: what, when, how, and with whom their children are taught.²³

The advocacy groups' ten year deregulation effort prevailed. By 1993, homeschooling was legal in all fifty states.²⁴ And any regulation of homeschooling has become relaxed, even nonexistent: “Homeschooling now exists in a virtual legal void; parents have near-total authority over what their children learn and how they are disciplined.”²⁵ Sixteen of the fifty states have no regulations governing homeschooling beyond a requirement that parents notify a

21. See Hanson, *supra* note 19.

22. See, e.g., Motoko Rich, *Home Schooling: More Pupils, Less Regulation*, N.Y. TIMES (Jan. 4, 2015), http://www.nytimes.com/2015/01/05/education/home-schooling-more-pupils-less-regulation.html?_r=0 (statement of Dewitt T. Black III, senior counsel for HSLDA) (“[B]ecause parents who make this commitment to teach their children at home are dedicated and self-motivated, there’s just not a real need for the state to be involved in overseeing education What we would like is for there to be a total hands-off policy.”).

23. Ray, *supra* note 15.

24. Scott W. Somerville, *The Politics of Survival: Home Schoolers and the Law*, HSLDA, <https://www.hslda.org/docs/nche/000010/PoliticsOfSurvival.asp> (last visited Oct. 31, 2016).

25. Kathryn Joyce, *The Homeschool Apostates*, AM. PROSPECT (Feb. 9, 2014), <http://www.prospect.org/article/homeschool-apostates>.

local public authority that they have set up a homeschool.²⁶ An additional eleven states do not even require that simple notification.²⁷ The states that require homeschoolers to register often offer religious exemptions.²⁸ Only nine states require that the homeschooling parent have a high school diploma or its equivalent.²⁹

The HSLDA fights attempts by state authorities to impose “even [the most] modest oversight” or regulation on homeschool parents.³⁰ “In 2013, HSLDA lobbied against a proposed Pennsylvania bill that would have required a short period of oversight for parents who decide to homeschool and already have substantiated abuse claims against them—in essence defending the right of abusive parents to homeschool without supervision.”³¹ The group is an advocate for a proposed “Parental Rights Amendment” to the United States Constitution that would provide parents the right to raise their children however they want, free of governmental interference.³²

The failure to require even basic information from homeschool parents is one of the reasons that the actual number of homeschooled children is unknown.³³ Given such lax or non-existent regulation, it certainly is unreasonable to think that many states can or will be able to ensure that homeschooling delivers an adequate education in the sense of children receiving sufficient instruction to satisfy either public or private needs.

One cannot help but ask how it was possible that homeschooling, which can fairly be characterized as a truly radical alternative to traditional public school education, took root so quickly and firmly, and flourished. This is especially puzzling because, in other countries, homeschooling is heavily regulated, even discouraged or

26. A map of states’ laws on homeschooling is provided by a national advocacy group for homeschoolers. *Homeschool Laws in Your State*, HSLDA, <http://www.hslda.org/laws/default.asp?> (last visited Oct. 31, 2016).

27. *Id.*

28. Joyce, *supra* note 25.

29. Rich, *supra* note 22.

30. *See, e.g.*, Joyce, *supra* note 25.

31. *Id.*

32. William A. Estrada & Joshua D. Denton, *Parental Rights Amendment Returns to U.S. Senate*, HSLDA (June 24, 2014), <http://www.hslda.org/docs/news/2014/201406240.asp>.

33. The U.S. Department of Education estimates 1.77 million children were homeschooled for the 2011–2012 school year. Office of Non-Pub. Educ., *Statistics About Nonpublic Education in the United States*, U.S. DEP’T EDUC. (June 9, 2015), <http://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html>. The National Home Education Research Institute estimates there are 2.3 million children currently being homeschooled. Ray, *supra* note 15.

prohibited, as it was in many states just a few decades ago.³⁴ The answer to the different American experience is partly structural. In the United States, education is a matter delegated to state and local governments.³⁵ These smaller entities are more susceptible both to interest-group political pressure and to the kinds of lobbying done by the advocacy organizations. However, also important is the way in which the ideology of homeschooling is compatible with and complementary to some excessive current expressions of American individualism and of our specifically negative-rights-based legal culture, which reflects a preference for liberty over equality.

Ironically, some of the impetus for the privatization of education came as the result of what many see as positive changes in the content and form of public education.³⁶ These changes were the recent efforts in public education to seek to develop in students a civic consciousness suitable for participation in an increasingly diverse and complex America.³⁷ Public schools are now mandated to be more egalitarian and inclusive in their operation than they were 100 years ago. Reflecting the integration aspirations of the Civil Rights Movement of the 1960s and 1970s, federal laws began outlawing some forms of discrimination in the education system.³⁸ Although beneficial when viewed from a civic perspective, many parents withdrew their children from public schools in response.³⁹

After *Brown v. Board of Education*,⁴⁰ many white parents and politicians in the southern states instituted what they called “Massive Resistance” to desegregation.⁴¹ Specifically, they used various mechanisms of choice to facilitate abandonment of the newly

34. However, the increasing prevalence of homeschooling in the U.S. may be setting an important precedent for the rest of the world. Robert Kunzman & Milton Gaither, *Homeschooling: A Comprehensive Survey of the Research*, 2 OTHER EDUC. 4, 31 (2013).

35. *The Federal Role in Education*, U.S. DEP'T EDUC., <http://www.ed.gov/about/overview/fed/role.html> (last modified July 21, 2016).

36. See, e.g., Katy June-Friesen, *Massive Resistance in a Small Town*, NEH (2013), <http://www.neh.gov/humanities/2013/septemberoctober/feature/massive-resistance-in-small-town>.

37. Michael A. Resnick, *An American Imperative: Public Education*, CTR. FOR PUB. EDUC. (Apr. 27, 2006), <http://www.centerforpubliceducation.org/Main-Menu/Public-education/An-American-imperative-Public-education->.

38. Office for Civil Rights, *Know Your Rights*, U.S. DEP'T EDUC., <http://www.ed.gov/about/offices/list/ocr/know.html> (last modified Oct. 16, 2015).

39. See, e.g., June-Friesen, *supra* note 36.

40. 347 U.S. 483 (1954).

41. June-Friesen, *supra* note 36.

desegregated urban public schools: vouchers, private schools, and geographical choice (where hundreds of thousands of white families abandoned integrated public schools in the cities, and moved to all-white schools in the suburbs).⁴² This resulted in social—instead of legal—segregation, and considerable racial and socioeconomic isolation for many black children today.⁴³ The Supreme Court reinforced this in the 1970s.⁴⁴ It held that education is not considered a fundamental right, and there is no guarantee of equally funded schools.⁴⁵ In addition, it held that the segregation in urban and suburban schools was caused by unknowable forces and not subject to state correction.⁴⁶

B. *The (Arguably) Changing Face of Homeschooling*

Homeschoolers and their organizations now boast that they attract what is billed as a “diverse population,” with children from different races, ethnic backgrounds, religions, and classes being homeschooled.⁴⁷ Increasing popularity means homeschooling families no longer fit into neat categories. Many homeschool for religious and moral reasons—the typical family that usually comes to mind is the evangelical Christian family homeschooling to avoid secular education—but as homeschooling increases in popularity, moral and religious reasons are no longer the top stated concern. A recent survey reveals that only 21% of parents listed moral or religious concerns as the most important reason they choose homeschooling, down from 36% in the 2006–2007 study.⁴⁸ Concern about the environment in public schools was chosen as most important by 25% of the parents, while academic instruction was listed by 19%.⁴⁹

42. *See, e.g., id.*

43. Daniel Denvir, *The Resegregation of America's Schools*, AL JAZEERA AM. (May 16, 2014, 2:30 AM), <http://america.aljazeera.com/opinions/2014/5/brown-v-board-of-education-schools-resegregation-inequality-civil-right.html>.

44. *See id.*

45. *Id.* (discussing the Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*).

46. *Id.* (discussing the Court's 1974 decision in *Milliken v. Bradley*).

47. Ray, *supra* note 15.

48. Religious and moral reasons were treated as separate categories for the first time in the 2011–2012 study: 21% combines 16% for religious reasons and 5% for moral reasons. Off. of Non-Pub. Educ., *supra* note 33.

49. *Id.* It is possible to interpret parental concern over school environment and academic instruction given what we know about the typical evangelical Christian family. Ross, *supra* note 18, at 997. It could also be indicative of the changing demographics of homeschooling families.

Although a majority of homeschooling families still are white,⁵⁰ an increasing number of minority families are choosing to homeschool due to concerns about a school environment fostering discrimination.⁵¹ The number of African American children being homeschooled has been rising.⁵² Many African American families report feeling frustrated, viewing the existing school system as Eurocentric, treating their children as second-class citizens, and encouraging a direct school to prison environment.⁵³ African American children tend to be overrepresented in the juvenile criminal system as well as in special education classes.⁵⁴

Overall, African Americans who homeschool their children tend to be more educated and more financially well-off than their public schooling peers.⁵⁵ Parents reported concern over the quality of education their children received or racism as the primary motivating factor behind deciding to homeschool.⁵⁶ Many parents reported

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50. See Ama Mazama & Garvey Lundy, *African American Homeschooling and the Quest for a Quality Education*, 47 EDUC. & URB. SOC'Y 160, 161 (2015) (stating 75% of homeschooled students are white). For the 2011–2012 school year, 83% of homeschooled children were white, 5% were black, 7% were Hispanic, and 2% were Asian/Pacific Islander. Nat'l Ctr. for Educ. Statistics, *Fast Facts: Homeschooling*, U.S. DEP'T EDUC., <https://nces.ed.gov/fastfacts/display.asp?id=91> (last visited Oct. 31, 2016).
 51. Kunzman & Gaither, *supra* note 34, at 11. Research shows that when minority youth—particularly African American and Hispanic youth—are bullied, their academic performance suffers more than that of their white peers. *Considerations for Specific Groups*, STOPBULLYING.GOV, <http://www.stopbullying.gov/atrisk/groups/index.html#youth> (last visited Oct. 31, 2016).
 52. Mazama & Lundy, *supra* note 50, at 161.
 53. *Id.* at 164–65.
 54. *Id.* at 164. The majority of public school teachers are white, and studies indicate that negative attitudes toward the educational experiences of black children may result in their over-referral to these systems. Ama Mazama, *Racism in Schools Is Pushing More Black Families to Homeschool Their Children*, WASH. POST (Apr. 10, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/04/10/racism-in-schools-is-pushing-more-black-families-to-homeschool-their-children/>.
 55. Mazama & Lundy, *supra* note 50, at 166–68. This corresponds to the overall trend in homeschooling families. See Nat'l Ctr. for Educ. Statistics, *Number and Percentage of Homeschooled Students Ages 5 Through 17 with a Grade Equivalent of Kindergarten Through 12th Grade, by Selected Child, Parent, and Household Characteristics: 2003, 2007, 2012*, U.S. DEP'T EDUC. (Nov. 2014), https://nces.ed.gov/programs/digest/d13/tables/dt13_206.10.asp?current=yes.
 56. Mazama & Lundy, *supra* note 50, at 169. Parents often mentioned either fear of possible racist action or prior incidents in their reasoning and even other motivations—such as religious or familial reasons—often contained racial context, with concern over the lack of cultural and historical inclusion. *Id.* at 169–71.

seeing homeschooling as their only option to ensure their children learned about African and African American history and culture.⁵⁷ It is more common today for racism, sexism, and homophobia to be seen as embodying inappropriate and false stereotypes that are not acceptable attitudes to embrace.⁵⁸ Some parents consider these lessons incompatible with their political, religious, or moral beliefs, feeling the lessons are immoral and harmful to their child, irredeemably corrupting the benefit of a public education.⁵⁹ Other parents see similar harms from institutional discrimination within the public school system.⁶⁰ Many parents now choose to homeschool because of concern about institutional support for LGBT children or children with disabilities, or because their children are being bullied.⁶¹

Whatever the motivations and inclination of parents, we argue that the state abdicates its responsibilities on multiple fronts when it tolerates homeschooling. The state fails when it does not effectively educate children about sexual, gender, and other forms of diversity or when it inadequately addresses bullying, harassment, and discrimination. It fails on an even more fundamental level, however, when it concedes an unregulated educational space in which children can be isolated, shielded from diversity, and, perhaps, conditioned to carry bias and discrimination into their future dealings as adult members of society. The answer to very real problems in public education cannot be the institutionalization of homeschooling.

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57. *Id.* at 175. The majority of parents surveyed were adamant that this historical and cultural education was of primary importance. *Id.* at 176; Erika Slife, *African-Americans Choosing to Homeschool*, CHI. TRIB. (Jan. 2, 2011), http://articles.chicagotribune.com/2011-01-02/news/ct-met-african-american-homeschool-20110102_1_home-school-home-schooling-african-american-children.
58. *See, e.g.*, Susan Berry, *Homeschoolers Prepare to Defend Parental Rights Following Supreme Court Same-Sex Marriage Ruling*, BREITBART (July 3, 2015), <http://www.breitbart.com/big-government/2015/07/03/homeschoolers-prepare-to-defend-parental-rights-following-supreme-court-same-sex-marriage-ruling/>; Mark Schultz, *200 Fill Orange County School Meeting on Gay Fable*, NEWS & OBSERVER (May 15, 2015, 7:52 AM), <http://www.newsobserver.com/news/local/community/chapel-hill-news/article21135498.html>.
59. *See, e.g.*, sources cited *supra* note 58.
60. Mazama & Lundy, *supra* note 50, at 169.
61. Laura Brodie, *Bullying: A Reason to Homeschool?*, PSYCHOL. TODAY (Mar. 24, 2010), <https://www.psychologytoday.com/blog/love-in-time-homeschooling/201003/bullying-reason-homeschool>; Eve Müller, *Home Schooling Students with Disabilities – A Policy Analysis*, NASDSE 5 (July 2004), http://www.nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/147_30249799-cdfb-497a-aa48-8a631bc6a8d3.pdf.

IV. PUBLIC EDUCATION

Public education in the United States dates back to the colonial period.⁶² Initially, public education was deemed important for religious reasons,⁶³ although it also served the purpose of preparing people to be successful and productive workers.⁶⁴ Over the years, public education increasingly came to be seen as necessary for the production of citizens and the preservation of a free and functioning democratic government.⁶⁵ It was this civic or citizenship rationale that formed the conceptual basis for the eventual establishment of compulsory education requirements for all children beginning in the mid-nineteenth century.⁶⁶

A. *The Historic Role of Public Education: Creating Productive Citizens*

Reflecting the sensibilities of the “age of reason,” public education was reformed in the nineteenth century as an instrument of social, intellectual, and moral progress. Reformers called for a tax-supported, universal school system that would educate all children together—regardless of religion, socioeconomic status, or ethnicity—in a common social and political ideology.⁶⁷ Members of the reform movement believed that, by giving children a common basis in education and increasing school diversity, the children would exhibit fewer political and social conflicts as adult citizens.⁶⁸ Horace Mann, the father of this Common School Movement,⁶⁹ discussed public education as imperative because:

62. Marcus W. Jernegan, *Compulsory Education in the American Colonies: I. New England (Continued)*, 26 SCH. REV. 24, 24 (1919). Massachusetts enacted the first compulsory education laws in the American colonies in 1642 and 1647. Judy Gelbrich, *American Education: Colonial America*, OR. ST. U., <http://oregonstate.edu/instruct/ed416/ae1.html> (last visited Oct. 31, 2016).

63. Gelbrich, *supra* note 62.

64. Judy Gelbrich, *American Education: Education in the Revolutionary Era*, OR. ST. U., <http://oregonstate.edu/instruct/ed416/ae2.html> (last visited Oct. 31, 2015).

65. *Id.*

66. See Rosemary C. Salomone, *The Common School Before and After Brown: Democracy, Equality, and the Productivity Agenda*, 120 YALE L.J. 1454, 1457 (2011) (footnote omitted) (discussing the push for education to provide the necessary knowledge and principles for democratic citizenship in the wake of nationalization, industrialization, and immigration).

67. *Id.* at 1466–67.

68. *See id.*

69. The Common School Movement is regarded as the precursor to our modern system of public education, calling for universal schooling as the best way to transform children

Our advanced state of civilization has evolved many complicated questions respecting social duties. We want a generation of men capable of taking up these complex questions, and of turning all sides of them towards the sun, and of examining them by the white light of reason, and not under the false colors which sophistry may throw upon them.⁷⁰

This early citizenship argument for public education resonates with the fundamental premise of a vulnerability approach: individuals, as well as the collective society they inhabit, are created through and within social relationships and in public contexts, structures, and institutions. Children must learn how to live in and relate to the community to which they will belong as adults; this ability provides resilience, conferring a sense of belonging and purpose in making a commitment to a shared social vision. This social benefit accruing to the individual is complemented by the strengthening of the social fabric of the community. Developing and sustaining this form of individual and societal resilience requires each community member to encounter and understand the societal duties, responsibilities, and obligations of association and participation. In this way, public education is necessary for maintaining a functioning society and should be understood as integral to transmission of those norms and essential values that provide social cohesion in the next generation of citizens. This societal role for public education also suggests that it should remain flexible and dynamic enough to change in response to evolution in perceptions of what is essential for society.

From the Common School Movement of the 19th century to the mid-20th century struggle for racial desegregation, public schools were seen not only as valuable academic institutions, but also as a means to socialize diverse individuals to become part of a collective citizenry.⁷¹ Public schools promoted the socializing of good citizens by educating students of diverse backgrounds together to foster understanding and mutual respect: “A key idea of the common school movement . . . was to provide education to rich and poor students alike, equally and together in the same schools . . . in order to prepare them to live and work in a diverse society.”⁷² Without

into a productive, cohesive citizenry. See *Only a Teacher: Horace Mann*, PBS, <http://www.pbs.org/onlyateacher/horace.html> (last visited Oct. 31, 2016).

70. HORACE MANN, LECTURES AND ANNUAL REPORTS ON EDUCATION 80 (1867).

71. JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 12 (2010).

72. *Id.*

exposure to a diverse environment of background, race, and socioeconomic status, a student cannot fully obtain a comprehensive education. Instead, educated in isolated enclaves or exposed only to those who shared their family's demographics and ideologies, many adult individuals will be ill-prepared to fulfill their civic duties in society generally. In addition, they may also be disadvantaged in the diverse workplace and economy they inevitably encounter post-schooling.⁷³

The focus of traditional education combined academic achievement with an emphasis on fostering a demographically and ideologically rich environment. A fundamental principle of the Common School Movement—and public school policy until recently—was based on the idea that there were great benefits to be gained by teaching students of diverse races, socioeconomic backgrounds, and ideologies together. It was generally believed that racial, socioeconomic, and ideological isolation harmed students from every demographic group.⁷⁴ Academically-successful and diverse schools “provid[e] a more complete education than those that are socioeconomically and racially isolated.”⁷⁵

This form of integration has great social benefits also. Importantly, public schools occupy a unique position in our country to not only educate individuals, but also to bring them into close and continuous contact with individuals of diverse ethnic, religious, and socioeconomic backgrounds and foster social cohesion.⁷⁶ As Justice Thurgood Marshall stated in an important case involving integration of the public schools: “[U]nless our children begin to learn together,

73. Due to the widespread, fairly unregulated, and politically charged nature of homeschooling, studies looking at academic achievement and socialization of its students are often biased (such as those by the Home School Legal Defense Association (HSLDA), a conservative, religious organization dedicated to the preservation of unregulated homeschooling), unrepresentative, or based upon self-reported data from recruited families. See generally Kunzman & Gaither, *supra* note 34 (discussing the research, studies, and scholarship of homeschooling). However, even the most biased studies show the existence of a math gap placing homeschooled students behind their public schooled peers. *Id.* at 17. Many older homeschooled students report feelings of social isolation, and researchers have found that homeschooled families tend to rely on likeminded social networks. *Id.* at 15.

74. For example, the school systems in *Parents Involved in Community Schools v. Seattle School District No. 1* were attempting to resolve a lack of diversity. 551 U.S. 701, 701 (2007).

75. RYAN, *supra* note 71, at 17.

76. See *id.*

there is little hope that our people will ever learn to live together.”⁷⁷ This insight is important beyond issues of race, gender, and ethnicity to diversity of viewpoint and belief. Adult life does not occur in a vacuum; exposure to different political and religious perspectives within an educational setting can foster tolerance and respect for opposing views. Education that occurs in a diverse setting challenges students to confront personal biases. It can help prepare them for the encounters they will inevitably experience later in life, training them “for democratic participation and civic responsibility.”⁷⁸ Research shows that a well-educated society demonstrates greater levels of trust between different demographic groups, as well as trust in the government. Further, individuals educated in such institutions tend to be more involved in the community.⁷⁹ These greater levels of trust induce social cohesion across differences.⁸⁰ In contrast, educational inequality creates the opposite reaction—lower levels of trust among different groups and suspicion of the government and other individuals and groups.⁸¹

There continue to be debates about just what form education should take in order to maximize these citizenship benefits. These debates question which social values and norms should be considered essential⁸² and how far the public educator should intrude into personal or private areas of morality.⁸³ However, there is general

77. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

78. RYAN, *supra* note 71, at 249. In addition, experiences with diversity can challenge stereotypes. In one study, students at a predominantly white high school assumed students at a nearby black school were “‘ghetto,’ which is a slang term meant to describe a loud, obnoxious, poorly behaved, low-income African American.” *Id.* at 274. Many students at the black school assumed students at the white school were all rich. *Id.* In contrast, students in a special integrated program did not harbor the same false generalizations and stereotypes. *Id.*

79. Dana Mitra, *Pennsylvania’s Best Investment: The Social and Economic Benefits of Public Education*, EDUC. L. CTR. 24, http://www.elc-pa.org/wp-content/uploads/2011/06/BestInvestment_Full_Report_6.27.11.pdf (last visited Oct. 31, 2016).

80. *Id.*

81. *Id.* at 25.

82. See Paul Tough, *What if the Secret to Success Is Failure?*, N.Y. TIMES MAG. (Sept. 14, 2011), http://www.nytimes.com/2011/09/18/magazine/what-if-the-secret-to-success-is-failure.html?_r=0.

83. Compare Justin McBrayer, *Why Our Children Don’t Think There Are Moral Facts*, N.Y. TIMES: OPINIONATOR (Mar. 2, 2015, 3:25 AM), <http://opinionator.blogs.nytimes.com/2015/03/02/why-our-children-dont-think-there-are-moral-facts/> (arguing that schools should teach that some values and moral claims may be facts or opinions), with K.J. Dell’Antonia, *Why Schools Should Undermine Moral Teachings*, N.Y. TIMES: MOTHERLODE (Mar. 2, 2015, 1:29 PM),

agreement that the fundamental principles of civic understanding necessary for modern democratic societies include respect for diversity, recognition of the need for compromise, and inclusion of all who are to be governed in the social contract.⁸⁴ In addition, there is agreement that future citizens should be educated to understand the structures of government, some national and international history, and the rules and mechanisms of political participation.⁸⁵

B. *Public Education and Individual Benefit*

Much of the current discourse around education tends to focus on the needs and rights of individuals.⁸⁶ It is important, therefore, in this section on individual benefits, to initially note that an exclusive emphasis on private benefits when talking about education obscures the reality that even the most individualistic actions and achievements have public implications. Success and failure have a social dimension: individuals act within, and have an effect on, their family, community, and larger society. Individuals participate in societal institutions and create social relationships, which means that their status inevitably affects others. In other words, at least to some extent, the benefits that accrue to private individuals also benefit the public and vice versa.⁸⁷ We all will benefit if children learn those skills they will need to assume adult roles such as employee, parent, or consumer. By the same token, if children's education is impoverished and inadequate, it is likely to produce public or social costs.

However, it is also true that in addition to the social and civic benefits, there are more mundane individual and instrumental objectives advanced for a basic comprehensive education. In order to survive in our modern society, children must have a foundation of literacy and a grasp of the knowledge necessary to become

<http://parenting.blogs.nytimes.com/2015/03/02/why-schools-should-undermine-moral-teachings/> (emphasizing that schools should not teach children that morals are opinions).

84. See CIVIL SOCIETY AND GOVERNMENT 9 (Nancy L. Rosenblum & Robert C. Post eds., 2001). See generally Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 17–34, (2004) (discussing how diversity in education affects the process of becoming a democratic citizen).

85. Ross Wiener, *The Common Core's Unsung Benefit: It Teaches Kids to Be Good Citizens*, ATLANTIC (Mar. 5, 2014), <http://www.theatlantic.com/education/archive/2014/03/the-common-cores-unsung-benefit-it-teaches-kids-to-be-good-citizens/284209/>.

86. See, e.g., Mitra, *supra* note 79, at 6.

87. One form these public benefits can take is greater tax revenue, meaning that a well-educated society is in a better position to create a strong support network. *Id.* at 3.

productive and employed adults—this includes skills necessary to participate in the market. However, some of the arguments for diverse education in the context of civic responsibility also apply in the market context; a diverse education provides not only public benefits, but also benefits students privately. Today, we live within a globalized marketplace where diverse workplaces are increasingly common.⁸⁸ Children need to learn skills in addition to those necessary for entering the workforce. They must acquire the social skills essential for daily interactions within a diverse society and the diverse marketplace. They must be able to effectively process new information, make reasoned decisions, and reflect on and consider the possible consequences of their actions.⁸⁹ These skills are components of individual resilience necessary for expanding options and allowing individuals to take risks as they become adults. Studies show that well-educated individuals are more likely to be employed,⁹⁰ to be in better health,⁹¹ and are less likely to commit crimes⁹² or need to rely on government assistance programs.⁹³ But to obtain the best private benefits of education, it is necessary for children to be exposed during their education to the same diversity to which they will be exposed as adults in the workplace.

In the personal realm, research also demonstrates the benefits of education.⁹⁴ Well-educated individuals tend to have lower divorce rates and healthier, more stable personal relationships.⁹⁵ This stability brings resilience to the entire family and can even have long-

88. See Selena Rezvani, *Five Trends Driving Workplace Diversity in 2015*, FORBES (Feb. 3, 2015, 12:27 PM), <http://www.forbes.com/sites/work-in-progress/2015/02/03/20768/>.

89. Mitra, *supra* note 79, at 6.

90. *Id.* at 10. In fact, universal high school education expansion in the twentieth century is considered to be the primary reason for the economic dominance of the U.S. during that time. *Id.*

91. Well-educated individuals tend to have more stable employment, resulting in increased access to health insurance, as well as decreased stress and other negative risk factors affecting health. *Id.* at 11. Increased education also tends to promote better overall health decisions and a sense of control over lifestyle choices. *Id.* at 17.

92. *Id.* at 13 (“Public education provides one of the best opportunities to reduce crime and its costs to society by helping children gain knowledge, skills, and character that help them avoid criminal activity.”). Well-educated individuals are less likely to commit crimes because their opportunity costs are higher; they are more likely to be able to get—and keep—a good job, and they feel they have more to lose if they are caught committing a crime. *See id.* at 14.

93. *Id.* at 5.

94. *Id.*

95. *Id.* at 19.

term positive impacts on the ability of future generations to gain resilience.

C. *Determining the Failures and Successes of Public Education*

The preceding sections indicate that student test scores should not be the only criterion by which we judge the quality of a school or an education. Students who have high test scores, but are learning in racial and socioeconomic isolation, may leave school with a serious deficit in terms of their civic intelligence when compared to those students emerging from a school with adequate scores, but a more diverse environment. Organized inclusively, public education can provide experiences with people, culture, and ideas that are different from those reflected within one's own family. It is not only the knowledge one acquires, but also the wisdom of how it is put to use in terms of socially productive endeavors that should concern society.⁹⁶

Nonetheless, no matter how persuasive the abstract arguments are for public education, faced with the reality of contemporary public schools, many parents feel that the private route is the best way forward for their child. American public education is routinely criticized today as failing to achieve either the public or the private goals. It is characterized as archaic, ineffective, and even corrupt.⁹⁷ We are constantly told that American students are falling far behind their international peers in comparative measurements and that

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96. Emotional intelligence can be more important to success than other measures. For example, in two recent studies teams were more successful regardless of IQ, extroverted nature, or motivation when members communicated frequently, contributed equally, and were skilled at reading emotions. Anita Woolley et al., *Why Some Teams Are Smarter than Others*, N.Y. TIMES: SUNDAY REV. (Jan. 16, 2015), http://www.nytimes.com/2015/01/18/opinion/sunday/why-some-teams-are-smarter-than-others.html?_r=0 (discussing Anita Williams Woolley et al., *Evidence for a Collective Intelligence Factor in the Performance of Human Groups*, 330 SCI. MAG. 686–87 (2010); David Engel et al., *Reading the Mind in the Eyes or Reading Between the Lines? Theory of Mind Predicts Collective Intelligence Equally Well Online and Face-to-Face*, PLOS ONE (2014)). For a discussion of the benefits of teaching emotional intelligence in schools, see Jessica Lahey, *Playing Nicely with Others: Why Schools Teach Social Emotional Learning*, N.Y. TIMES: MOTHERLODE, (Dec. 4, 2014, 11:26 AM), <http://parenting.blogs.nytimes.com/2014/12/04/playing-nicely-with-others-why-schools-teach-social-emotional-learning/> (discussing Joseph A. Durlak et al., *The Impact of Enhancing Students' Social and Emotional Learning: A Meta-Analysis of School-Based Universal Interventions*, 82 CHILD DEV. 405 (2011)).
97. See, e.g., Richard Fausset, *Trial Opens in Atlanta School Cheating Scandal*, N.Y. TIMES (Sept. 29, 2014), http://www.nytimes.com/2014/09/30/us/racketeering-trial-opens-in-altanta-schools-cheating-scandal.html?_r=0.

American high school graduates cannot perform as required in the workplace.⁹⁸

But existing failure in public schools, while it may explain individual choices, is not a sufficient argument for the public in general to abandon them. Quite the contrary; it should spur public contributions of funding, ideas, and energy. What is needed is a rigorous reassessment of the responsibility of the state and community for public education. This reassessment should begin by assessing whether and how public schools are actually failing.⁹⁹

It appears that much of the criticism of public schools in general is misplaced and misleading. A comparison of American students with their international peers shows that, in reading, mathematics, and science, American students typically perform at or above the international average: fourth and eighth grade students performed above average in all categories,¹⁰⁰ and fifteen-year-olds performed at the international average in reading and science and slightly below the international average in mathematics.¹⁰¹

Although schools generally perform well, this does not mean that there are no problems. The problems, however, are not with the idea of public education, but with the limitations imposed by poverty and inequality. Over the past several decades, the United States has generated increasingly high levels of economic inequity and social stress for families across the middle and working classes, which can negatively impact a child's educational experience.¹⁰² Over 50% of

98. Mikhail Zinshteyn, *The Skills Gap: America's Young Workers Are Lagging Behind*, ATLANTIC (Feb. 17, 2015), <http://www.theatlantic.com/education/archive/2015/02/the-skills-gap-americas-young-workers-are-lagging-behind/385560/>.

99. Research suggests that the perceived "failings" of public schools are more indicative of child poverty than actual failure of public education. Bill Raden, *What if Education Reform Got It All Wrong in the First Place?*, PAC. STANDARD (Mar. 18, 2015), <http://www.psmag.com/books-and-culture/what-if-education-reform-got-it-all-wrong-in-the-first-place>.

100. Reading is not assessed internationally for eighth grade. Nat'l Ctr. for Educ. Statistics, *Average Performance of U.S. Students Relative to International Peers on the Most Recent International Assessments in Reading, Mathematics, and Science*, U.S. DEP'T EDUC., <http://nces.ed.gov/surveys/international/reports/2012-mrs.asp#reading> (last visited Oct. 31, 2016).

101. Data compiled from the 2011 PIRLS (Progress in International Reading Literacy Study), the 2011 TIMSS (Trends in International Mathematics and Science Study), and the 2012 PISA (Program for International Student Assessment). *Id.*

102. Horace Mann League & Nat'l Superintendents Roundtable, *School Performance in Context: Indicators of School Inputs and Outputs in Nine Similar Nations*, HORACE MANN LEAGUE 18 (Jan. 2015), <http://www.hmleague.org/wp-content/uploads/2015/01/School-Performance-in-Context-full.pdf>.

students now attending public schools live in poverty,¹⁰³ and research shows that poor children are increasingly falling behind the more affluent.¹⁰⁴ Indeed, approximately 70% of American public schools are doing fine, with the performance of their students comparing favorably with their foreign peers.¹⁰⁵ These are the public schools that serve predominantly middle-class and affluent white students. The 30% of public schools that are not succeeding are the schools that serve predominantly low-income students, often schools in urban areas with high numbers of African-American students.¹⁰⁶

Certainly, the response to growing inequality cannot be the withdrawal of support for public education. Education is consistently urged as the way out of poverty and as foundational to the aspirations for a just and egalitarian state.¹⁰⁷ Those public schools that are struggling (and the struggling students and parents within those communities) need more, not less public support and commitment. Existing failure in public schools is not a sufficient argument for abandoning them. Instead, an examination of the public school system and its perceived and actual failures leads us to certain questions. What is to be counted as an educational failure? Is it the failure to ensure equality of access to a basic, quality education? Or is it the failure of a public system to continue to elevate those already operating from a place of privilege? Who is to judge whether our public schools are failing? Importantly, is abandonment of the public

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103. Lyndsey Layton, *Majority of U.S. Public School Students Are in Poverty*, WASH. POST (Jan. 16, 2015), http://www.washingtonpost.com/local/education/majority-of-us-public-school-students-are-in-poverty/2015/01/15/df7171d0-9ce9-11e4-a7ee-526210d665b4_story.html?wpisrc=nl_headlines&wpmm=1; Tim Walker, *Shameful Milestone: Majority of Public School Students Live in Poverty*, NEATODAY (Jan. 16, 2015, 2:31 PM), <http://neatoday.org/2015/01/16/shameful-milestone-majority-public-school-students-now-live-poverty/>.
104. Sarah Garland, *When Class Became More Important to a Child's Education than Race*, ATLANTIC (Aug. 28, 2013), <http://www.theatlantic.com/national/archive/2013/08/when-class-became-more-important-to-a-childs-education-than-race/279064/>.
105. See RYAN, *supra* note 71, at 278; Mathews, *Bad Rap on the Schools*, 32 WILSON Q., 15–20 (1976); Edward B. Fiske, *A Nation at a Loss*, N.Y. TIMES (Apr. 25, 2008), http://www.nytimes.com/2008/04/25/opinion/25fiske.html?_r=0.
106. RYAN, *supra* note 71, at 278 (“For those who look carefully at the performance of our schools, the real problem is not that the United States is falling behind, or that the entire system is failing. It is the sorry shape of the bottom 30 percent of U.S. schools, those in urban and rural communities full of low-income children.”); see also Mathews, *supra* note 105, at 15–20; Fiske, *supra* note 105.
107. Dan Haesler, *Is Education the Way Out of the Poverty Trap?*, HUFFINGTON POST (Feb. 23, 2012), http://www.huffingtonpost.co.uk/dan-haesler/is-education-the-way-out-_b_1295765.html.

school system the best remedy in a society premised on the ideals of equality and opportunity? How do we decide what types of innovations or reforms are appropriate?

For a variety of reasons, there have been widespread calls for changes in regard to education, calling for reforms in testing and for increased school choice and privatization.¹⁰⁸ Unfortunately, these “reforms” have abandoned the goal of education’s public citizenship benefits. The imposition of testing requirements, exemplified by the No Child Left Behind Act (NCLB),¹⁰⁹ shifted school focus from education to performance on standardized tests. If students perform poorly, then school staff and administrators can lose their jobs.¹¹⁰ Confronted with the relentless pressure to perform well on standardized tests, public education has lost sight of its other main purpose: the goal of bringing diverse students together to learn to understand each other and live well together. Forced to live or die by the results of standardized tests, public schools ignore the virtues of diversity.¹¹¹

For many parents, however, flight from public education, rather than its repair, seems to be the preferred course of action. They have developed an attractive discourse of privatization, built on the concept of parental entitlement or rights.¹¹² This rhetoric fits well within both the general mood of hostility towards government and the rapid privatization of public functions from libraries to prisons and

108. See Caroline Porter, *Push for Private Options in Education Gains Momentum*, WALL ST. J. (Mar. 27, 2015, 5:36 PM), <http://www.wsj.com/articles/push-for-private-options-in-education-gains-momentum-1427457602>.

109. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 2001, 115 Stat. 1425 (2002). On July 16, 2015, the Senate passed the Every Child Achieves Act to replace NCLB, allowing for more state control and flexibility. Every Child Achieves Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015); Rebecca Klein & Joy Resmovits, *Senate Votes Overwhelmingly for Bipartisan No Child Left Behind Rewrite*, HUFFINGTON POST (July 17, 2015, 4:24 PM), http://www.huffingtonpost.com/2015/07/16/no-child-left-behind-senate-overhaul_n_7812556.html.

110. See Klein & Resmovits, *supra* note 109.

111. RYAN, *supra* note 71, at 12 (“This socializing aspect of public education, along with the important tradition of preparing students to be responsible citizens, has faded from view. Today, the conversation is dominated by test scores and the predominant criterion of a school’s success is how well its students perform on standardized tests. In this environment, the idea that schools should also expose students to others from different backgrounds, in order to prepare them to live and work in a diverse society, is usually dismissed as softheaded.”).

112. See, e.g., *Our Mission*, HSLDA, <http://www.hslda.org/about/mission.asp> (last visited Oct. 31, 2016).

the military already well underway in the United States.¹¹³ Couched in terms of “choice,” the whole point of these programs is to facilitate student abandonment of publicly provided education in favor of privatized provision. Choice programs come in several varieties: voucher systems in which the government funds private school attendance; tax schemes and credits for families attending private schools; privately-run, government funded charter schools, which are sometimes run by for-profit corporations; and finally, homeschooling.¹¹⁴

The prevailing idea of parental entitlement to make educational choices for their children takes society and educational policy in the wrong direction. Choice in this context makes it difficult—if not impossible—to achieve the public schools’ traditional civic objectives, and it can result in discrimination. When entire demographic groups use choice to abandon public schools, it undermines the goals of diversity both for the students abandoning the public school system and for those left behind.¹¹⁵ This shift to private education should be seen as a significant cause of two current problems with the remains of the public school system: the erosion of governmental and taxpayer support for public schools and the public schools’ resegregation.

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113. Perhaps privatization of education is inevitable—just part of this larger trend. But it is important to emphasize that education is not like running a post office or prison. The public function (civic education) it must perform is vital not only to the present function of society, but also to its future. *See supra* Part IV. The undermining of, and withdrawal from, public education is of concern to those who, first, want to see a vigorous public educational system reestablished and, second, believe that the social or public benefits a public education can deliver are far greater than the sum of its private benefits. *See infra* notes 118–19 and accompanying text.
114. *See Types of School Choice*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/> (last visited Oct. 31, 2016). In addition, many states are considering Education Savings Accounts (ESAs) to give parents direct control over bank accounts of funds the state would have spent educating their children in public schools. Stephanie Simon, *States Weigh Turning Education Funds over to Parents*, POLITICO (Feb. 6, 2015, 12:31 PM), <http://www.politico.com/story/2015/02/state-education-savings-accounts-taxpayers-114966.html>.
115. Allowing parental choice in schools does not appear to be related to any performance advantage, but is strongly related to increased socio-economic segregation among students. Organisation for Econ. Co-operation and Dev., *When Is Competition Between Schools Beneficial?*, 42 PISA IN FOCUS 1–2 (2014), [http://www.oecd.org/pisa/pisaproducts/pisainfocus/PISA-in-Focus-N42-\(eng\)-FINAL.pdf](http://www.oecd.org/pisa/pisaproducts/pisainfocus/PISA-in-Focus-N42-(eng)-FINAL.pdf).

D. *Sowing Civic Virtue or Civic Discord*

In order for public education to produce effective public benefits or social values, there must be widespread participation in a shared core curriculum. This is analogous to vaccination,¹¹⁶ while the refusal of a small minority to participate can be tolerated, for a vaccination program to be effective in providing general societal protection, the large majority of the population must be vaccinated.¹¹⁷ Similarly, if the transmission of civic virtue and tolerance is ignored or provided in an idiosyncratic manner, resulting in twisted distortions of civic ideals for too large a group within the population, it can foster or reinforce irreconcilable political and ideological factions within a society. In an increasingly privatized market for education, factions are inevitable as private schools compete for students by offering selective and specialized programs crafted around specific religious, political, ethnic, and cultural distinctions—distinctions that can develop into differences pitted against each other in the larger society.

E. *Decline in the Resources for Public Education*

Perhaps one of the most damaging consequences of privatization is the loss of resources for public education: both parental (or citizen) and material resources. The exodus of families from public school systems not only means that those children will be invested in private institutions, but so will the political, social, and financial resources their parents command. As the private alternatives are facilitated by innovations in public funding, whether through vouchers, charter schools, or suspect taxing schemes, resources for the public system are further diminished.

Privatization imposes a disastrous cycle of damage on public schools. Predictably, as the public schools lose students, parents, and funding to private alternatives, the public schools are more susceptible to further attacks and undermining. The public system begins to look less supportable to politicians, who soon start to raise questions about just who and what are to blame for the failures of

116. Interestingly, this is another area where some of the same parents are opting out.

117. Herd immunity varies according to the infection level of the disease, but generally 80–95% of the population must be vaccinated for it to be effective. *Herd Immunity: Successful Herd Immunity*, HIST. VACCINES, <http://www.historyofvaccines.org/content/herd-immunity-0> (last visited Oct. 31, 2016).

public schools.¹¹⁸ Privatization in this discourse is seen as a safety valve or idealized alternative to the troubled public system. Instead, it is better seen as having played a significant part in creating and perpetuating its problems. Some politicians and pundits go so far as to propose there should be an end to public education.¹¹⁹

V. THE POSSIBILITY OF HARM

Allowing families to abandon the public education system for homeschooling undermines both the individual and social goals and benefits of education and should be seen as an abdication of the state's responsibility. By upholding parental rights and family privacy, we ignore state protective responsibility and obscure the nature of the educational responsibility a state should bear. In this way, we fail all children, the adults they will become, and the larger society. We now explore in turn the harms of homeschooling to homeschooled students and to society.

A. Harms to the Individual Student

Most studies of people who have been homeschooled focus on the collegiate experiences of former homeschoolers. The studies are frequently based on convenient samples of homeschooled students and public schooled students attending the same university. The studies usually show little to no difference between the two groups.¹²⁰ Other qualitative studies focus on the individual experiences of homeschooled students and suggest that they may have more difficulty writing research papers, and they are far less inclined to change their religious or political viewpoints and values than their public school peers.¹²¹

A more inclusive look at the wider adult experience is rare: one study was designed to support the homeschool experience in the

118. See Mary Turck, *Stop the Blame Game over Achievement Gap*, AL JAZEERA AM. (May 13, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/5/stop-the-blame-game-over-achievement-gap.html>.

119. See Steve Benen, *The Debate over the Existence of Public Schools*, MSNBC: MADDOW BLOG (Feb. 20, 2015, 11:31 AM), <http://www.msnbc.com/rachel-maddow-show/the-debate-over-the-existence-public-schools>.

120. Kunzman & Gaither, *supra* note 34, at 29. These narrow quantitative studies seem to ignore the experiences of those students who either choose—or are unable—to attend college. Those homeschool students attending college may be unrepresentative; it may be that the students not attending college received an inferior education precluding college as an option or were otherwise encouraged not to attend college.

121. *Id.* at 30.

public view and unsurprisingly found former homeschoolers to be “better educated than national averages, to vote at high rates, to have a positive view of their homeschooling experiences, and to be generally well adjusted, productive members of society.”¹²² A more recent, and likely more representative, study compared the lives of religious, formerly-homeschooled adults to religious adults educated in parochial and public schools.¹²³ The formerly-homeschooled adults typically married younger, divorced more frequently, reported lower SAT scores, attended less selective colleges, and reported more feelings of helplessness and less direction for their lives.¹²⁴ Otherwise, the impacts of homeschooling on adult lives remain largely unstudied.¹²⁵

1. Denying diverse experiences and education necessary for future success

We have seen that to succeed in life, students must be exposed to demographic and ideological diversity; such exposure allows the students to succeed in diverse workplaces that are becoming increasingly common, become more effective employees, and earn higher salaries.¹²⁶ Homeschooling denies children exposure to this diversity.

For a substantial number of children, homeschooling means no schooling at all.¹²⁷ In the many states where homeschooling is unregulated and unmonitored, some homeschooled children receive either no education at all or educations that are severely lacking.¹²⁸ In such states, nothing forces parents who homeschool to teach their children anything. For such students, homeschooling may mean sitting in front of daytime television. For example, one homeschooler indicates, “[S]he didn’t have a teacher after she was 11; her parents handed her textbooks at the start of a semester and checked her work a few months later. She graded herself, she says, and rarely wrote

122. *Id.* at 31.

123. *Id.*

124. *Id.*

125. *See id.*

126. Marguerite Rigoglioso, *Diverse Backgrounds and Personalities Can Strengthen Groups*, STAN. GRADUATE SCH. BUS. (Aug. 1, 2006), <http://www.gsb.stanford.edu/insights/diverse-backgrounds-personalities-can-strengthen-groups>.

127. *See, e.g., What Is Unschooling?*, UNSCHOOLING.COM, <http://unschooling.com/what-is-unschooling/> (last visited Oct. 31, 2016).

128. *Homeschooling & Educational Neglect*, COALITION FOR RESPONSIBLE HOME EDUC., <http://www.responsiblehomeschooling.org/policy-issues/abuse-and-neglect/educational-neglect/> (last visited Oct. 31, 2016).

papers.”¹²⁹ Another was locked in a room for two years with no human contact.¹³⁰ Even parents with the best intentions can find themselves overwhelmed, and their children quickly falling behind.¹³¹

2. Misinformation

Homeschool parents often have major disagreements with the public-school curriculum; most would not expend the expense, time, and effort if they were going to teach their children the same material as in public schools. Instead, many homeschool parents are unhappy with the public school curriculum and intend to teach their children something far different.¹³²

Often, the alternate material homeschooled students learn does not prepare them as well for participation in the modern economy and civic life as would the more mainstream material taught in public schools. Although no textbook is perfect, there is a substantial level of factual misstatement in the standard textbooks¹³³ used by homeschooling evangelical Christians. The “science” presented in these textbooks is often factually wrong, with many of the false statements springing from the assertion that everything in the Bible is literally true.¹³⁴ This insistence that Biblical statements are literal truth leads to instruction that can be sharply out of touch with the rest of the modern world. These books teach, among many others, that:

129. Joyce, *supra* note 25.

130. Steve Visser, *Gwinnett PD Await Arrest of Georgia Tech Standout for Child Cruelty*, ATL. J. CONST. (June 27, 2014, 12:20 PM), <http://www.ajc.com/news/news/crime-law/former-georgia-tech-standout-and-wife-charged-with/ngS6G/>.

131. *Homeschooling & Educational Neglect*, *supra* note 128.

132. See *Reasons Parents Homeschool*, COALITION FOR RESPONSIBLE HOME EDUC., <http://www.responsiblehomeschooling.org/homeschooling-101/reasons-parents-homeschool/> (last visited Oct. 31, 2016).

133. The “For Christian Schools” series—published by Bob Jones University Press, and two others like it, from A Beka Books and Accelerated Christian Education—are standard texts for thousands of evangelical schools across the country and for many thousands of home-schooled children. FRANCES R.A. PATERSON, *DEMOCRACY AND INTOLERANCE: CHRISTIAN SCHOOL CURRICULA, SCHOOL CHOICE, AND PUBLIC POLICY* (2003); Rachel Tabachnick, *Vouchers/Tax Credits Funding Creationism, Revisionist History, Hostility Toward Other Religions*, TALK TO ACTION (May 25, 2011, 8:41 AM), <http://www.talk2action.org/story/2011/5/25/84149/9275>.

134. WILLIAM S. PINKSTON, JR. & DAVID R. ANDERSON, *LIFE SCIENCE FOR CHRISTIAN SCHOOLS* 14 (2d ed. 1997).

Evolution is false.¹³⁵

Noah's ark was real.¹³⁶

People's lifespans are shorter than they were 5000 years ago.¹³⁷

The earth is 15,000 years old.¹³⁸

Dinosaurs existed at the same time as people.¹³⁹

These books might be harmless when used as the basis of a purely religious education and complemented by thorough grounding in actual science and history during the week. But a homeschooled student—learning only falsehoods from this type of book and isolated from other views—would not be well prepared for economic or civic life outside that isolated enclave.

B. *Harms to Society*

Although many parents undoubtedly homeschool their children for benign reasons, it is undeniable that some parents homeschool their children in order to indoctrinate them with extreme views while isolating them from moderate, competing views.¹⁴⁰ This type of indoctrination reinforces the falsehoods sometimes taught to homeschooled children, leading to conflict with the scientific truth taught at more inclusive public schools. This not only harms the individual student, it harms the greater cohesion of society, creating discord and strife that prevent our country from working toward common goals.¹⁴¹

135. *Id.* at 132, 143, 146.

136. *Id.* at 136–37.

137. *Id.* at 116.

138. *Id.* at 139.

139. *Id.* at 143.

140. *E.g.*, Katherine Stewart, *The Dark Side of Home Schooling: Creating Soldiers for the Culture War*, *GUARDIAN* (May 8, 2013, 7:00 AM), <http://www.theguardian.com/commentisfree/2013/may/08/christian-home-schooling-dark-side>.

141. For example, despite the general scientific consensus about global warming, the debate still drove a Senate vote to decide whether it is a hoax. Ron Elving, *Senate Says Climate Change Real, but Not Really Our Fault*, *NPR* (Jan. 23, 2015, 10:06 AM), <http://www.npr.org/sections/itsallpolitics/2015/01/23/379242432/senate-says-climate-change-real-but-not-really-our-fault> (discussing the Senate's 98-1 vote that climate change is not a hoax).

What societal response is appropriate when the parental values and morals that homeschoolers teach conflict with contemporary secular standards? What if parents adhere to the value and morality of white supremacy or teach the necessity of armed resistance to the “jack-booted” officials of a federal or international government poised to take over and enslave free people? What deference should be given to the value choices of parents who believe that women should be sequestered and confined, that they are actually a form of “property” to be passed from father to husband according to God’s will? These examples highlight the reality that parental expressive interests can also reflect oppressive and hierarchical belief systems. Homeschooling by parents who have such beliefs may instill hatred, bias, ignorance, and fear in their children, which may well affect the children’s ability to function as adult members of the community. If significant numbers of alienated and maladjusted citizens reject widely held societal norms and values, it may represent a threat to the well-being of society.¹⁴²

Although the argument that parental interests in teaching morals and values should trump all other interests may seem facially acceptable, a closer examination of the reality of homeschooling may shift opinions. It is important to remember that the failure of parental education on technical or scientific matters can be equally isolating and damaging to a child’s ability to flourish as an adult. Because of the harms that defective homeschooling, on any basis, can produce, it may be appropriate to think of it as providing the potential for constituting educational abuse by parents and actual educational neglect by the state.

Even with the best intentions, homeschooling can easily lead to educational abuse.¹⁴³ Generally, there is little parental accountability to ensure that children are learning anything in homeschooling situations.¹⁴⁴ Thus, even in the best situations, with well-intentioned

142. Such threats can come in the form of aggressive antisocial actions directed at others or result when large numbers of citizens are disengaged and refuse to participate in democratic processes or reject the validity of law and government. *See, e.g.*, Ashley Feinberg, *The Creepy Fundamentalist Homeschool Cult that Trained the Duggars*, GAWKER (May 26, 2015, 4:15 PM), <http://gawker.com/the-creepy-fundamentalist-homeschool-cult-that-trained-1706969994>; Jenna Tracy, *My Childhood in a Cult Is Hard to Imagine - But My Survival Is Truly Unbelievable*, GUARDIAN (June 1, 2015, 7:25 AM), <https://www.theguardian.com/commentisfree/2015/jun/01/childhood-in-cult-hard-imagine-survival-truly-unbelievable>.

143. *Homeschooling & Educational Neglect*, *supra* note 128.

144. *Id.* Realistically, it would be far too expensive and time-consuming for the state to do so. *See also supra* note 22 and accompanying text.

parents, it would be easy to let the demands of life push education to the side.¹⁴⁵ Other families may take advantage of that lack of accountability to pass on educational falsehoods or to enforce religious patriarchal ideals—such as restricting their daughters’ educations to ensure they can only be homemakers and not pursue any outside employment, or expecting children to work rather than learn.¹⁴⁶ Other parents believe in unschooling—an option that encourages natural life-long learning over formal academics—and allow their children to follow their interests, even if that leads to educational neglect.¹⁴⁷

Like physical abuse, educational abuse by a parent can cause severe harms to a child, with repercussions in the larger society. How should the possibility of such harm be addressed? One way is to have the state become involved after the fact in the form of abuse or neglect proceedings. However, given the nature of the harm and the difficulty of effective remedial education for children deprived of an effective education, it makes more policy sense for the state to mandate education occur within an institutional setting where democratically determined content, quality, and professional standards can be adequately monitored.

VI. LEGAL BARRIERS TO EFFECTIVE SOCIETAL RESPONSE

The concept of “parental rights,” which was founded in Supreme Court cases decided in the early part of the twentieth century, stands in the way of state curtailment of homeschooling. However, our contemporary understanding of parental rights ignores the common law history of parental responsibility.

A. *Liberty*

The Court first indicated that parents have a Fourteenth-Amendment “liberty interest” in raising their children in *Meyer v. Nebraska*, a 1923 case which struck down a state law forbidding instruction in certain foreign languages as interfering with the right of parents to provide such instruction for their children.¹⁴⁸ Two years later, *Pierce v. Society of Sisters* invalidated a law requiring public school attendance.¹⁴⁹ The Court struck down the law as “unreasonably interfer[ing] with the liberty of parents . . . to direct

145. *Homeschooling & Educational Neglect*, *supra* note 128.

146. *Id.*

147. *Id.* See also *supra* note 3 and accompanying text.

148. 262 U.S. 390, 399–400 (1923).

149. 268 U.S. 510, 534–35 (1925).

the upbringing and education of children under their control.”¹⁵⁰ *Meyer* and *Pierce* have been treated as sacred texts by homeschooling advocates, as *definitively* resolving for subsequent generations the supremacy of parental control and severely limiting the state’s ability to interfere.¹⁵¹ They are particularly fond of this quote:¹⁵² “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁵³

Not surprisingly, they tend to gloss over *Pierce*’s recognition that the state has some valid interest in assuring that students receive an adequate education—which is, after all, recognition of the validity of the public-benefit argument. The Court explicitly acknowledges that the state’s interest in the child and the child’s education included the provision of “studies plainly essential to good citizenship.”¹⁵⁴ While it is also true that the Court included the admonition that this public-benefit interest did not justify “standardiz[ing] its children by forcing them to accept instruction from public teachers only,” it is important that the alternative education in *Pierce* took place within a formal school setting and was provided by professional teachers: the children attended a private Catholic school.¹⁵⁵ Unlike homeschooling, this institutional setting allowed for some relevant assumptions about this alternative to the public school setting involving both the competency and supervision of the instructors and the ability of the state to oversee or regulate the nature of the education.

Although *Pierce* was a due-process, liberty-interest case, there is an additional case relevant to the discussion of homeschooling and deference to parental wishes—one based on religion and the Free Exercise clause of the First Amendment. *Wisconsin v. Yoder*,¹⁵⁶ from 1972, granted Amish children an exemption from the last two years of the state’s compulsory education attendance laws because the Court found that “compulsory school attendance to age sixteen for Amish children carries with it a very real threat of undermining the

150. *Id.*

151. *E.g.*, Christopher J. Klicka, *Decisions of the United States Supreme Court Upholding Parental Rights as “Fundamental,”* HSLDA (Oct. 27, 2003), <http://www.hslda.org/docs/nche/000000/00000075.asp>.

152. *Id.*

153. *Pierce*, 268 U.S. at 535.

154. *Id.* at 534.

155. *Id.* at 532, 534–35.

156. 406 U.S. 205 (1972).

Amish community and religious practices as they exist today.”¹⁵⁷ In this case, the children attended public school for many years, presumably gaining some necessary civic instruction.¹⁵⁸ The Court went to great lengths to describe the unique religiously-based separateness of the Amish community and its various well-documented virtues of hard work and self-sufficiency:

[A]s a successful and self-sufficient segment of American society, the Amish have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State’s enforcement of a statute generally valid as to others.¹⁵⁹

Significantly, the court considered interests beyond the parent/state rights or interests, engaging in a discussion of the community’s well-being. The Court was concerned with how the very future of the community as a distinct entity could be affected by the decisions made about mandatory public education.¹⁶⁰

Swirling beneath the surface of contemporary discussions about *Meyer*, *Pierce*, and *Yoder* are important, but often suppressed, questions about the status of children and the state’s obligation to them in regard to education. Concerns about public education have become increasingly pressing in American society as schools have been re-segregated along race and class lines, the gap between poor and rich widens, and more affluent parents retreat to private alternatives.¹⁶¹ These early Supreme Court cases, reflecting a traditional approach to parental rights, do not actually resolve some important constitutional questions about homeschooling as they are presented today.

One pressing set of questions was foreshadowed in Justice Douglas’s concurring and dissenting opinion in *Yoder*:

157. *Id.* at 218.

158. *Id.* at 207.

159. *Id.* at 235.

160. *Id.* at 218.

161. Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, ECON. POL’Y INST. (Nov. 12, 2014), <http://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/>.

While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision.¹⁶²

Justice Douglas's statement suggests the glaring flaw in the Yoder Court's analysis. In effect, the Court indicated that it was acceptable, in order to preserve the Amish community and religion, for the Amish to harm their children—by reducing the length of their education.¹⁶³ This is immoral and wrong. Children should be treated as independent people with independent rights. As philosopher Nicholas Humphrey notes:

The relationship of parent to child is of course a special one in all sorts of ways. But it is not so special as to deny the child her individual personhood. It is not a relationship of co-extension, nor one of ownership. Children are not a part of their parents, nor except figuratively do they “belong” to them. Children are in no sense their parents' private property.¹⁶⁴

B. *Rediscovering Parental Responsibility*

The focus on parental rights—with the belief they are rooted in natural law and reaffirmed by both common law and the United States Constitution¹⁶⁵—reflects our cultural obsession with autonomy. Any state interference with those rights, such as state control over education, is considered a gross overreach and violation of the natural order.¹⁶⁶ Starting in ancient documents such as the Bible and continuing for much of our history, the concept of parental rights assumed ownership rights of children as property.¹⁶⁷ The

162. 406 U.S. at 244–45 (Douglas, J., dissenting).

163. *Id.* at 219 (majority opinion).

164. NICHOLAS HUMPHREY, *THE MIND MADE FLESH: FRONTIERS OF PSYCHOLOGY AND EVOLUTION* 308 (2002).

165. Jeffrey Shulman, Meyer, Pierce, and the History of the Entire Human Race: Barbarism, Social Progress, and (the Fall and Rise of) Parental Rights, 43 *HASTINGS CONST. L.Q.* 337, 340–44 (2016).

166. *Id.* at 341–42.

167. *Id.* at 343–44.

Meyer court, claiming to draw on the long tradition of parental rights, was instead moving into a novel area of American law,¹⁶⁸ and this absolutism of parental rights is not as pervasive and deeply entrenched in our legal tradition as commonly believed.¹⁶⁹

Prior to *Meyer* and *Pierce*, American law explored the “premise that parents are *only* entrusted with custody of the child, and then *only* as long as they meet their fiduciary duty to take proper care of the child.”¹⁷⁰ This caregiving entails the power to direct, not control, children.¹⁷¹ It certainly should not be considered a directive of ownership. Even the *Pierce* quotation that homeschooling advocates rely on reflects this understanding of responsibility, discussing that a child’s caregivers have not only the right, they have the “high duty, to recognize and prepare [the child] for additional obligations.”¹⁷² Focusing on parental responsibility allows us to see that parental rights are really children’s rights held in trust.¹⁷³

Sadly, our contemporary conversations about education focus less on parental responsibility and the rights of the child, instead arguing for a more limited and authoritarian view of parental rights.¹⁷⁴ A contemporary child-centered inquiry would raise a series of inquiries and concerns for both legislatures and courts. How might contemporary attitudes about children as individuals with certain “rights” in regard to the state’s responsibility to ensure resilience affect how we view their relationships within the family? Would contemporary attitudes alter what we think are appropriate limits to be placed on parents’ rights? What is a twenty-first century perspective on the obligation of the state in regard to children’s education? What is the significance of the fact that the nature and quality of the challenges citizens face in the twenty-first century are very different from those of a century ago? Shouldn’t children be educated in a manner reflecting that they will face a different reality than their parents faced?

The very substantial changes that have occurred and continue to be underway in society, and significant shifts in attitudes about myriad social and institutional arrangements, should provide the basis for reconsideration of parental-rights ideology at both the constitutional

168. *Id.* at 350.

169. *Id.* at 344–45.

170. *Id.* at 345 (emphasis added).

171. *See id.* at 356.

172. *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

173. *See Shulman, supra* note 165, at 352.

174. *See id.* at 375–77.

and policy level. Constitutional interpretations do change over time as attitudes and circumstances change, as illustrated by cases such as *Brown v. Board of Education* (banning segregation in schools) and *Loving v. Virginia* (overthrowing miscegenation laws), which reflected changing views about race and racial segregation.¹⁷⁵

Perhaps most significant for the educational context are evolving attitudes about children. In 1923, when *Meyer* was decided, children were widely believed to be “owned” by their parents, or more specifically, by their father who also controlled their labor, wages, and person.¹⁷⁶ Child abuse was “discovered” (in that legislation punishing it was enacted) only in the 1960s and then only after extensive organization by social reformers and the medical profession.¹⁷⁷ And even then, abuse was defined narrowly and as an extreme deviation from a parental right to discipline.¹⁷⁸

Today in the United States, state laws continue to confirm the right of parents to inflict physical punishment on their children. Legal provisions against violence and abuse are not interpreted as prohibiting all corporal punishment in childrearing.¹⁷⁹ But the line of what is acceptable has clearly been moved, and parents’ rights have given way to children’s interests and state protection. In fact, in 2012, Delaware enacted a law criminalizing punishment of children that caused physical injury or pain.¹⁸⁰ In regards to the legislation, “[t]he ambiguity of the definition of ‘physical injury’ has prompted some to unofficially dub the law a ‘spanking ban.’”¹⁸¹ Minnesota

175. *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

176. See generally Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992) (stating that *Meyer* and *Pierce* constitutionalized the child as private property, with a child’s parents owning the child’s labor).

177. John E. B. Meyers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 454–56 (2008).

178. Woodhouse, *supra* note 176, at 1044.

179. E.g., Peter Schworm, *SJC Affirms Parental Right to Discipline Their Children*, BOS. GLOBE (June 25, 2015), <http://www.bostonglobe.com/metro/2015/06/25/mass-high-court-outlines-legal-rules-spanking/AA75Y9oVRkEBGWIXCoY2fO/story.html?event=event25> (“[P]arents may not be held criminally liable for the use of ‘reasonable’ force in disciplining their children . . . the punishment ‘remains firmly woven into our nation’s social fabric.’”).

180. Julia Glum, *Spanking Children in America: Corporal Punishment Forbidden in Many Countries, but US Ban Is Unlikely*, INT’L BUS. TIMES (Mar. 6, 2015, 2:06 PM), <http://www.ibtimes.com/spanking-children-america-corporal-punishment-forbidden-many-countries-us-ban-1837856>.

181. Piper Weiss, *Spanking Ban in Delaware? First State to Pass Law Expanding Child Abuse Definition Sparks Debate*, YAHOO! STYLE (Sept. 28, 2012),

also has laws discouraging the use of corporeal punishment even by parents.¹⁸²

C. Politics

Parental rights advocates in the United States have successfully argued against ratification of the Convention on the Rights of the Child (CRC) since it was first drafted.¹⁸³ The United States is out of step with the rest of the world on this. The United States is currently the only country not to officially accept the premise that children have rights as individuals, independent of their families.¹⁸⁴ As a result, the United States is free to ignore the CRC's determination that "the best interests of the child" should be the principal standard that governs all decision-making affecting children.¹⁸⁵

Parental rights advocates continue to fear that ratification would dramatically usurp the fundamental rights of parents to make decisions regarding the appropriate school curriculum for their children, the communities in which they associate, the religion that they follow, and whether they attend a public or private school.¹⁸⁶

<https://ca.style.yahoo.com/blogs/parenting/spanking-ban-delaware-first-state-pass-law-expanding-181200724.html>.

182. This increasingly protective stance toward children on the part of the state is also evident in schools, where corporal punishment used to be universal. The right of schools to use corporal punishment was considered a right derived from the parental right to use corporal punishment; schools were seen as acting *in loco parentis*. Corporal punishment in schools is now permitted or practiced in only nineteen states, mostly in states located in the south, and in rural areas. Interestingly, advocates of homeschooling, like other adherents to a strong version of parental control over children, recognize the danger that changing attitudes about children's rights might present. The HSLDA has opposed the prohibition of corporal punishment.
183. E.g., Peter Kamakawiwoole, *Why We Oppose It*, PARENTALRIGHTS.ORG (Nov. 11, 2008), http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC={55EE90CC-F282-48CF-A7BD-C326F6524FCC}.
184. The other two holdouts, Somalia—a country in anarchy for much of the twenty-five years following the CRC drafting—and South Sudan—a country formed only four years ago—ratified the CRC in 2015. See *Hailing Somalia's Ratification, UN Renews Call for Universalization of Child Rights Treaty*, UN NEWS CTR. (Oct. 2, 2015), <http://www.un.org/apps/news/story.asp?NewsID=52129#.V8b8jZgrLDc> (announcing Somalia's ratification of the CRC); *UN Lauds South Sudan as Country Ratifies Landmark Child Rights Treaty*, UN NEWS CTR. (May 4, 2015), <http://www.un.org/apps/news/story.asp?NewsID=50759#.V8b-UJgrLDc> (announcing South Sudan's ratification of the same).
185. See G.A. Res. 44/25, at 1450 (Nov. 20, 1989) ("Implementation of the entire Convention is to be governed by the theory of 'the best interests of the child.'").
186. See, e.g., Michael P. Farris, *Nannies in Blue Berets: Understanding the U.N. Convention on the Rights of the Child*, HSLDA (Jan. 2009),

This advocacy reflects a more general and growing mistrust of government. Tea Party politics have gone mainstream through colonization of the Republican Party, and American politics are polarized and paralyzed on the national level.¹⁸⁷ Conservative, anti-establishment candidates have captured many state and local governing bodies, producing some strange legislative proposals and a simplistic and unrealistic rejection of government involvement in ensuring citizens' welfare.¹⁸⁸

The first election of President Obama was met with a fear that he would push the CRC through the Senate.¹⁸⁹ The election generated a movement for a "parental rights amendment" to the United States Constitution.¹⁹⁰ It was reintroduced in June of 2014,¹⁹¹ and its provisions include:

The liberty of parents to direct the upbringing, education, and care of their children is a fundamental right Neither the United States nor any state shall infringe this right without demonstrating that its governmental interest as applied to the person is of the highest order and not otherwise served No treaty may be adopted nor shall any source of international law be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article.¹⁹²

<https://www.hslda.org/docs/news/20091120.asp>; *Twenty Things You Need to Know About the UN Convention on the Rights of the Child*, PARENTALRIGHTS.ORG, <http://www.parentalrights.org/20things> (last visited Oct. 31, 2016).

187. Bill Schneider, *The Extreme Becomes Mainstream*, HUFFINGTON POST (Mar. 2, 2015, 2:15 PM), http://www.huffingtonpost.com/bill-schneider/the-extreme-becomes-mains_b_6785920.html; *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.
188. See Paul Steinhauer, *Fewer Wins This Time, but Tea Party Has Changed the GOP*, CNN (Sept. 15, 2014, 3:16 PM), <http://www.cnn.com/2014/07/01/politics/midterm-elections-halftime/>.
189. Michael Farris, *Obama Administration Pushes CRC Ratification*, PARENTALRIGHTS.ORG (June 24, 2009), <http://www.parentalrights.org/index.asp?SEC=%7B1F86E588-AA4A-43A1-998D-D9BF4FBE4D09%7D>.
190. *New Milestones in Congress*, PARENTALRIGHTS.ORG (July 28, 2009), http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC={B487F1A4-B227-4723-A292-9E4797251F1D}.
191. Estrada & Denton, *supra* note 32.
192. *The Parental Rights Amendment*, PARENTALRIGHTS.ORG, http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC={4771B53E-D345-4753-BEF4-68C1CA71CE13} (last visited Oct. 31, 2016).

It is doubtful that this proposed amendment will make it through the notoriously difficult ratification process; only twenty-seven amendments to the United States Constitution have been successfully ratified since its adoption over two hundred years ago. But even if it were to be successful, it would not mean that parental rights would be absolute. No rights are, and under certain circumstances a balancing must take place.

Fears of intruding on parental rights and destroying American individualism linger in our continuing embrace of the autonomous ideal. While some reasons for homeschooling are understandable—parents want the best start for their children and parents seek an education that is responsive to their children's needs—the answer is not to withdraw into isolation and attempt to do it alone.¹⁹³ The social goals behind raising well-educated citizens cannot be achieved in isolation. Parents have a responsibility not only to usher their children into adulthood, they have a responsibility to the adults their children will become and to the greater society those children are joining. Rather than withdrawing, parents should be calling for a state responsive to the individual vulnerability of their children. The harm a defective education inflicts on both children and society is too great to relegate it to the private sector in the name of parental rights.

VII. PROHIBITING HOMESCHOOLING

Because of the harms homeschooling causes to children and society, it should be prohibited. We reach this conclusion recognizing that even if homeschooling is prohibited, parents would still be the primary influences on children.

A. *Prohibiting Homeschooling to Protect Children and Society*

One strong reason for prohibiting homeschooling is the harm it causes the child and society. It is an unreliable way to ensure children gain the necessary resilience they need to take advantage of future opportunities in both education and the workplace. It also may impair their sense of solidarity and citizenship by eliminating empathy-building encounters with people who are different demographically or ideologically.

Although these arguments for prohibiting homeschooling are not often heard in the United States, where homeschooling has unusual support, they are mainstream in the many countries were

193. This is even more unrealistic in light of the increasingly complex nature of our society. A quality education can no longer be comprised merely of reading, writing, and arithmetic.

homeschooling is prohibited. For example, the European Court of Human Rights used similar reasoning when it held that the CRC made homeschooling illegal in Germany.¹⁹⁴ Germany is not alone in prohibiting homeschooling. Many other countries similarly prohibit or do not legally recognize homeschooling, including Argentina, Brazil, Bulgaria, Croatia, Greece, Kenya, Malta, Netherlands, Romania, South Korea, Spain, Sweden, and Turkey.¹⁹⁵ In many other countries, homeschooling is legal but heavily regulated, often requiring home inspections and yearly exams. Such countries include Aruba, Czech Republic, Estonia, France, Hungary, Iceland, Malaysia, Norway, Portugal, and Slovakia.¹⁹⁶ Even in the countries that do permit homeschooling, the number of children who are homeschooled is much smaller than in the United States, both as a fraction of total students and in total numbers.¹⁹⁷

B. Parents Would Still Be Children's Primary Influences

Note what we are *not* saying. We are not arguing that parents should have no influence over their children's views and development. We are not saying that the government should usurp the parents' role and completely take over their children's education. Parents can legitimately attempt to shape the views of their children, but children should also be exposed to other views. Regardless of whether parents homeschool, parents are a major influence on their children's development; they generally have more access to their children during their formative years than anyone else. Even parents with a child in public school still have the opportunity to influence the child's development hugely. The child may attend school for thirty-five hours a week, but for the remaining seventy waking hours each week, plus vacations and fifty-two weekends each year, the child is subject to the parents' influence. Children attend public school only a total of approximately 1260 hours per year, out a total of 5475 waking hours.¹⁹⁸ That is, a child who attends public school is there for only 23% of her waking hours. The parent controls the

194. Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 355, 364–65.

195. See *HSLDA International*, HSLDA, <http://www.hslda.org/hs/international/> (select from list below "Homeschooling Status & Contact Information" for individual country statistics) (last visited Oct. 31, 2016).

196. *Id.*

197. *Homeschooling Research*, HSLDA, <http://www.hslda.org/research/faq.asp> (last visited Oct. 31, 2016).

198. This assumes that public school lasts seven hours per day for 180 days a year and that a child will sleep for nine hours per night.

remaining 77%. The European Court of Human Rights made this point in its decision to prohibit religious-based homeschooling in Germany.¹⁹⁹

A prohibition of homeschooling and other means of intellectual isolation of children will appropriately balance the interests of parents with the responsibility of the state to ensure access to resilience-building institutions. Such a prohibition allows parents the opportunity to be a primary influence on their children's development, while also permitting children modest exposure to alternate views, particularly democratic values of tolerance and inclusion. This exposure helps provide children with the ability as adults to assess and eventually choose for themselves among competing values.

Even this balance heavily favors the parents' influence on value formation. Even if a child attends public school, the parents still control more than three-quarters of the child's time. This is why, in adulthood, even children who have attended public school often share their parents' values. But the exposure to influences other than their parents, even for a small time each week, offers the child at least a chance to choose independent values.

C. Regulating Homeschooling Would Be Ineffective

Some might argue that, instead of prohibiting homeschooling, it could be regulated and monitored heavily to prevent homeschooling's harms. Parents could be monitored to ensure that they exposed their children to a diverse group of people. The curricula that homeschooling parents taught could be watched and controlled so that the parents neither taught falsehoods nor neglected the child's education.

1. Regulating homeschooling would not protect children

Regulation of homeschooling would be ineffective and expensive. For example, sending public officials into homeschooling environments would be prohibitively expensive and time-consuming, both for public officials and families. Such a regulatory approach also would not be politically feasible because it would widely be seen as too intrusive.

One can imagine that attempts to control the content of the materials parents used in homeschooling would raise serious objections from its advocates. There might even be some First

199. *Konrad*, 2006-XIII Eur. Ct. H.R. at 355, 357.

Amendment concerns: the government would be telling parents what they could, and could not, tell their children, and the government would punish parents who violated the requirements. At a minimum, content regulation is inconsistent with the ideas of parental privacy and rights espoused by many homeschooling advocates.

An example from Canada is instructive. In 2012, the province of Alberta enacted a new Education Act designed to address hate crimes. Section 16²⁰⁰ reinforces the Albert School Act, which makes schools “reflect the diverse nature” of the province in their curriculum and provides that schools must “honour and respect” the Alberta Human Rights Act—a law amended to add as an explicit purpose the protection of the LGBT community from discrimination.²⁰¹ The Education Ministry interpreted the School Act to prohibit homeschools, private schools, and Catholic schools from teaching students that being gay is a sin.²⁰² As Donna McColl, Assistant Director of Communications for the Education Minister put it, “Whatever the nature of schooling—homeschool, private school, Catholic school—we do not tolerate disrespect for differences.”²⁰³

The response by Paul Faris of the homeschooling group HSLDA about the message the Ministry of Education sent is instructive: “[The government] is clearly signaling that they are in fact planning to violate the private conversations families have in their own homes. A government that seeks that sort of control over our personal lives should be feared and opposed.”²⁰⁴

Homeschoolers’ outrage over the possible effects of minimal government regulation of homeschooling within the home is a strong argument as to why homeschooling should not be permitted to displace public education. If a homeschooling parent can be compelled neither to teach civic virtue and respect for law nor to submit to the most basic monitoring and regulation, then the only alternative is to prohibit homeschooling, so that the child will be exposed to those lessons in a school setting.

200. Education Act, S.A. 2012, E-0.3 (Can.).

201. Patrick Craine, *Homeschooling Families Can’t Teach Homosexual Acts Sinful in Class Says Alberta GVMT*, LIFESITE: NEWS (Feb. 23, 2012, 3:29 PM), <https://www.lifesitenews.com/news/exclusive-homeschooling-families-cant-teach-homosexuality-a-sin-in-class-sa>.

202. *Id.*

203. *Id.*

204. *Canadian Province Imposing “Diversity Training” on Homeschools*, HSLDA (Feb. 27, 2012), <http://www.hslda.org/docs/news/2012/201202270.asp>; *Homeschoolers Can’t Be Taught ‘Gay’ Sex Sinful*, WND (Feb. 27, 2012, 9:00 PM), <http://www.wnd.com/2012/02/homeschoolers-cant-be-taught-gay-sex-sinful/>.

2. Regulating homeschooling would not protect society

There should be some concern about whether a privatized educational system—including homeschooling—as it is loosely and relatively unregulated today, can adequately meet the *public* need. Specifically, there is serious doubt that a privatized system can ensure the public or social benefit that was a main justification for public education initially.

This line of questioning involves not only concern with the specific substance of instruction—whether it includes lessons on the virtues of toleration of difference and the wisdom of political compromise—but also the informal messages delivered through institutional culture, diversity, and operation. If the concern is merely with formal content, perhaps the development of state requirements and regulations can provide a means for the public need to be incorporated into private education.

This raises an additional, more fundamental question: Is it possible to separate out the nature or qualities of the good that an education provides from the method and location of that education? Traditionally, private education is conceptually distinguished from public education. Indeed, private education is often organized around perceived differences; it is “elite,” “religious,” “ethnically-based/values-oriented” education, or is directed to the special needs of differentiated students, such as those who are bullied or disabled.²⁰⁵ The nature of the modifications to education certainly communicates a sense of specialness, exclusivity, and superiority in these alternatives that distinguishes them from inclusive, non-distinction-drawing public school.

Regulation of private content would probably be insufficient to eliminate the problems that abandonment creates. When entire demographic groups abandon a public school, the benefits of diversity decline in the public school, regardless of what the abandoning groups study in their new enclaves. Moreover, as we discuss elsewhere,²⁰⁶ the abandonment sets in motion economic forces that may destroy the public school because of the loss of the resources—in money, time, and influence—that the abandoning groups control.

205. Stephen P. Broughman & Kathleen W. Pugh, *Characteristics of Private Schools in the United States: Results from the 2001-2002 Private School Universe Survey*, NAT'L CTR. FOR EDUC. STAT. (Oct. 2004), <https://nces.ed.gov/pubs2005/2005305.pdf>.

206. See George Shepherd, *Homeschooling's Harms: Lessons from Economics*, 49 AKRON L. REV. 339, 340 (2015).

VIII. ECONOMICS PROVIDES SUPPORT FOR PROHIBITING HOMESCHOOLING

A stable and democratic society is possible only with widespread acceptance of some common set of values and a minimum degree of literacy and knowledge on the part of most citizens. Public education contributes to both. In consequence, the gain from the public education of a child accrues not only to the child or to his parents but to other members of the society; the public education of my child contributes to other people's welfare by promoting a stable and democratic society. Conversely, when families abandon public education by homeschooling or other forms of choice, they harm everyone else. This simple insight underlies what economic analysis shows: in the market for education, choice and competition are harmful, not helpful.

Contrary to the arguments of conservative economists, allowing homeschooling and private schools to compete with public schools does not improve public schools. Instead, the competition inevitably causes public schools to deteriorate. While in the free market this competition might be expected to produce a stronger system, public education occupies a particular niche in our market economy where the opposite occurs. Students did not originally move from inner-city schools to suburban schools and private schools primarily because the inner-city schools were defective: "Before *Brown* [*v. Board of Education*],²⁰⁷ many white urban public schools were excellent, among the best in the country."²⁰⁸

Instead, choice and competition with public schools caused the urban public schools to decline. After *Brown*, the availability of choice allowed white families to abandon newly-integrated urban public schools. For example, during the "Massive Resistance" following *Brown*, many white families, to avoid keeping their children in public-school classrooms with African-American classmates, moved their children to private-school competitors; many new private schools had opened to offer whites a haven from blacks.²⁰⁹ Others exercised geographic choice, moving to schools in all-white suburbs.²¹⁰ Some others homeschooled.²¹¹ The end result was that urban public schools declined. The cause of the decline was

207. 347 U.S. 483 (1954).

208. Shepherd, *supra* note 206, at 360.

209. *Id.* at 344.

210. *Id.* at 361.

211. *Id.* at 345.

the availability of educational choice. That is, competition harms public schools, not helps them.

Public schools do not benefit from the competition created by homeschooling and other forms of choice because of special characteristics of the market for education that create so-called “market failure.” In normal markets, such as the market for groceries, competition can usually be expected to improve products by disciplining the producers and forcing them to strive to meet consumers’ needs. However, schools are not tomatoes. As shown in greater detail elsewhere by this Article’s authors,²¹² special characteristics of the market for education create conditions that guarantee that competition will harm public schools, not help them. In such markets where market failure exists, standard economics suggests that government intervention is appropriate—such as through prohibition of competition.

Market failure exists in the market for education for three reasons. First, education is a “public good.” In economic terms, a public good is one that is non-rivalrous—meaning that the use of the good by one individual does not diminish the value of that good for others—and it is non-excludable—meaning that an individual cannot be excluded from use without excluding everyone.²¹³ Public education is such a public good. Good public education generates societal benefits everyone can enjoy.²¹⁴ And individuals cannot be excluded from the societal benefits of education; as we have seen, everyone benefits when anyone is well-educated. Conservative economist Milton Friedman recognized this special characteristic of education, calling

212. *See id.* at 358–60, 370.

213. *Id.* at 347 (explaining that a classic example is national defense—the government cannot exclude a single person from enjoying the protection of the military and a single individual’s use of that protection does not diminish its value for the rest of the country).

214. Zachary P. Neal & Jennifer Watling Neal, *The Public School as a Public Good: Direct and Indirect Pathways to Community Satisfaction*, 34 J. URB. AFF. 469, 471 (2012) (explaining that community-based schools can provide “residents with direct amenities, key social services, and opportunities for social interaction” and “have the potential to revitalize communities and strengthen interpersonal relationships, leading to more community satisfaction”) (citation omitted). Schools can directly benefit their communities through physical resources, such as the use of the buildings and facilities; educational or social services, such as GED or ESL classes, job training, citizen preparation, and fitness programs; or cultural amenities, such as art and cultural programs. *Id.* at 473. They also increase social capital by serving as a community focal point for interpersonal interaction, helping to create a shared identity, and creating a “feedback loop” to further improve the school system. *Id.* at 473–74.

it the “neighborhood effect[.]”²¹⁵ We account for this effect—somewhat, but not completely—by sharing the cost of supporting public education through mandatory taxation.

However, if families are free to abandon public education, then they tend to consider only their own children’s interests; they ignore the benefits that they would provide both to the public school and to society by remaining in the public schools. If they remain in the public schools, they provide positive externalities that benefit the public schools, the other children enrolled in them, and society. If they are permitted to abandon the public schools, then negative externalities exist: the schools, other children, and society are harmed. Moreover, as competition increases in the educational market, this taxed support is undermined.²¹⁶ Individuals—such as homeschooling parents—tend to ignore the societal benefit of public education, focusing instead on their own personal benefit, and begin to question why their tax dollars are being used to support a system they no longer use.

Because public education is a public good, it is more efficient to mandate participation. This would tie personal and societal benefits together; parents would no longer be able to impose harm with impunity on public schools, their students, and society. If they found fault with the public schools, they could work to improve them; they would no longer be permitted to abandon them.

Homeschooling and other forms of choice create harmful incentives that can ruin public schools. The availability of homeschooling and other choice permits parents to take into account only their own personal interests and not to consider how pulling one child from the public system can harm all children—and the larger society when followed by an exponential abandonment of public

215. MILTON FRIEDMAN, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955).

216. In economics, externalities are the external costs and benefits to others of an individual’s conduct. The existence of externalities may cause an individual to do an amount of an activity that is above or below the social optimum. An example of a negative externality would be pollution: a polluting factory may not account for the costs of pollution to others in its own cost-benefit analysis, resulting in the inefficient solution of producing too much pollution. An example of a positive externality is vaccination: a parent may not account for the social benefits of vaccinating a child, looking only to the personal cost-benefit analysis, resulting in the inefficient solution of choosing not to vaccinate. Government actions, such as fines, taxes, and subsidies, can cure distortions from externalities. These cures cause individuals to internalize all the costs and benefits of their conduct. This in turn causes the individual to engage in the optimum amount of the activity.

education. Once sufficient numbers abandon the schools, and the schools predictably begin to fail, the parents apply political pressure to cut funding for “failing” public schools, moving those tax dollars to the private sector in the name of choice and reducing the ability of public schools to effectively “compete.”

The second reason why competition in education through homeschooling and other means is inappropriate is because of what economists call “adverse selection.”²¹⁷ This is the tendency of some markets to fail because the best customers will abandon the market. In such markets, such as certain insurance markets, the government steps in to require that all people participate; for example, in the Affordable Care Act, the government created incentives to induce all people to purchase insurance, not just sick people.²¹⁸

Similarly, often the families with the greatest resources in time and money will be the first to leave public schools and homeschool; this is certainly seen in the patterns of attendance at expensive private schools. Homeschooling is a mode of education that, in today’s increasingly complex world and unequal society, is limited to relatively privileged families who can afford to pull away from the public school system. It is a mark of privilege, in that a low-income or single-parent family is unlikely to be able to homeschool. This creates a vicious cycle of abandonment until only those with no choice are left. The most vulnerable families, who have not been able to build up enough resilience to leave the public school system, will be the families left behind. These are the families who must rely on the public education system because they cannot afford costly private schools or cannot leave work to homeschool.

The third reason why it is more efficient for the educational competition to be eliminated is because the education market enjoys network externalities. In a market with network externalities, the benefit of a public education for any student increases the greater the number of other students who attend public school.²¹⁹ Intuitively, for

217. The standard example is an insurance market in which the insurer cannot determine who is sick and requires much care. The price for the insurance is high because it must cover the costs of care for the high-cost people. But because the market is voluntary, the healthiest individuals will choose to forgo insurance rather than pay the high fee. If the healthy people do not purchase, the insurer will have to increase the premiums it charges, causing more individuals to abandon coverage. This process will continue until only the sickest people remain.

218. See 26 U.S.C. § 5000A (2012).

219. In precise economic terms, a market for a service enjoys network externalities when the benefits to each purchaser of the service increase the greater the number of other subscribers. For example, when most people use the same word processing program, they can be assured of near-universal compatibility. Similarly, when more people

example, a state monopoly in education can help create a more cohesive citizenry by ensuring that everyone has access to a universal knowledge base; we may not agree on all issues, but we will be able to converse on a more equal footing and with greater understanding of our differences, especially when compared to those educated in isolated enclaves.

Empirical studies confirm what the theory has shown. In practice, competition and choice harm public schools. The most important demonstration of this is the destruction of urban public schools after *Brown*.²²⁰ The availability of choice permitted white families to abandon the urban public schools, devastating them. Other studies of specific choice programs confirm this.²²¹

Our society has changed greatly from the time of the Common School Movement and it is no longer possible to participate without a basic education. Although it is understandable that parents want the best educational benefits for their children and to give them the best chances of success,²²² different parents have different access to resources. While some parents have adequate resources to homeschool, many others do not. And any family's decision to homeschool harms all of the other children at the public school that the family abandons. Because a quality education is fundamental to an individual's ability to build resources and to participate in our political process, the state has a responsibility to ensure that all children have access; the state has a responsibility to the vulnerable subject as a child to ensure that all children can begin to build resilience and have access to the tools of democracy. Education is not something that should be left to chance or decided by the social status or resource accrual of an individual's parents. The only way to ensure that all children have access to the best education possible is to prohibit homeschooling.

receive a quality education, we can experience a more universal level of understanding in society.

220. See *supra* notes 207–12 and accompanying text.

221. See Shepherd, *supra* note 206, at 340–41.

222. See, e.g., Michael Godsey, *Why I'm a Public-School Teacher but a Private School Parent*, ATLANTIC (Mar. 4, 2015), <http://www.theatlantic.com/education/archive/2015/03/why-im-a-public-school-teacher-but-a-private-school-parent/386797/> (discussing how even though his work commitment to public schools is enough, he puts his daughter in private school to get the best for her—and public schools shouldn't worry about the loss of one child).

IX. CONCLUSION

Homeschooling is the only educational environment that affords parents the highest level of control over the information that their children receive. To be clear, the question is not whether the state must recognize parents' expressive interest in their children's education. Of course it must. Instead, the question is where we draw the line separating that expressive interest from both the *child's* interest in the ability to exercise freedom as an adult and the state's interest in having citizens educated to understand and accept differences and diversity. The child's interest in a diverse education aligns with the interest of the state. It is in the interest of both children and the state that children are educated to become citizens who realize that, although the values they have may not be shared by everyone, political compromises must be made in a democratic manner.

The community or civil society has an independent interest in the education of the children who will join it as adults. *Yoder* is not limited to the Amish community. Just as *Yoder* allowed the Amish community to structure educational policy to nurture the Amish community, the state has an interest in ensuring that children's education nurtures both the children and the broader community as a whole.²²³

Civil society is an arena outside the trinity of family, state, and market, a civic space where people associate to advance common interests. It is sometimes referred to as the "third sector" of society, distinct from the traditional public/private dichotomy. As such, its preservation and the public values it incorporates are important. The balancing of interests that should guide consideration of homeschooling and educational policy must begin with the best interests of the child and include not only parental and state interests, but also the social interests of the larger community. Any additional interests brought into balance can have only a secondary status and the interests of the state and civil society must be included along with the interests of the parents. Children will grow into adult members of our shared society and, for that reason alone, their education is of shared general concern.

Finally, we should recognize the flaws in the economic arguments for school choice and competition. Instead, both the rights of children and economic analysis support mandatory public education.

223. See *supra* notes 155–61 and accompanying text.