

HOMESCHOOLERS AND PUBLIC SCHOOL FACILITIES: PROPOSALS FOR PROVIDING FAIRER ACCESS

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INTRODUCTION

Homeschooling, as an educational alternative to the public school system, is now legal in all fifty states, with varying degrees of state regulation of homeschooling programs in each state.¹ Homeschooling has been on the rise over the last fifteen years, with several key legal victories won by homeschoolers on both the state and federal level,² and there are now an estimated one to two million children being homeschooled in America.³

1. For a basic overview of state homeschooling laws, see Home School Legal Defense Association [hereinafter HSLDA], Home School Laws, <http://www.hslda.org/laws/default.asp> (last visited Feb. 6, 2006).

2. See CHRISTOPHER J. KLIKA, HOME SCHOOLING: THE RIGHT CHOICE 379–87 (Loyal Publishing, Inc. rev. ed., Broadman & Holman 2002) (1995); see also MICHAEL FARRIS, THE FUTURE OF HOME SCHOOLING: A NEW DIRECTION FOR CHRISTIAN HOME EDUCATION 29–31 (1997).

3. According to the National Center for Education Statistics, about 1.1 million students were being homeschooled in the United States in the spring of 2003. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., NCES 2004-115, 1.1 MILLION HOMESCHOOLED STUDENTS IN THE UNITED STATES IN 2003, at 1 (2003). Dr. Brian D. Ray, founder and president of the National Home Education Research Institute, however, puts the number at between 1.7 and 2.1 million homeschooled children. BRIAN D. RAY, WORLDWIDE GUIDE TO HOMESCHOOLING 2005-2006, at 7 (2005). The discrepancy in the estimate can perhaps be explained by the insularity of the homeschooling community or the difficulties inherent in logging educational trends in more rural areas. All researchers seem to agree, however, that the estimated homeschooling rate (the percentage of the school-age population being homeschooled) is on the rise.

One of the major legal battles remaining to homeschoolers is the question of access to public school facilities. Homeschooling, though a valid and legal alternative to public education, is fundamentally limited in certain ways, given the nature of the practice. For instance, students are generally in very small classes, thus precluding the possibility of forming an orchestra or band; home schools generally lack full experimental laboratory facilities; and homeschoolers have fewer opportunities to play in sports leagues.⁴ While many of these limitations have been addressed by the formation of homeschooling networks, both curricular and interscholastic,⁵ another logical solution to these difficulties would be to allow homeschooled students access to public school facilities.

As of yet, no court has upheld a constitutional right of access to public schools.⁶ Such access is considered a privilege rather than a right, and currently eighteen states have enacted legislation either mandating or permitting access for homeschoolers.⁷ There is no real consensus, however, among state courts or legislatures, on how to deal with this issue.

This article seeks to ground the right of access issue in both the history of the homeschooling movement and an empirical analysis of the specific issues raised by the question of public school access. While much has been written on the legal and policy arguments for

See, e.g., Home-Schooling: George Bush's Secret Army, THE ECONOMIST, Feb. 28, 2004, at 32.

4. *See, e.g., David W. Fuller, Note, Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599, 1599-1600 (1998).

5. *See, e.g., Home-Schooling: George Bush's Secret Army*, *supra* note 3. Two representative examples of homeschooling networks are the Westerly Learning Center in Princeton, New Jersey, and the Illinois Home Oriented Unique Schooling Experience (H.O.U.S.E.), a state umbrella organization for local homeschooling chapters. Westerly Road Church Learning Center, <http://www.westerlylearningcenter.org> (last visited Mar. 30, 2007); Illinois H.O.U.S.E., <http://www.illinoishouse.org> (last visited Mar. 30, 2007).

6. HSLDA, *Equal Access: Participation of Homeschooled Students in Public School Activities 2-3* [hereinafter HSLDA, *Equal Access*] (2003), <http://www.hsllda.org/docs/GetDoc.asp?DocID=49&FormatTypeID=PDF>; *see also* Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1958-69 (1996) (arguing that courts should not recognize a constitutional right to part-time access to public education).

7. *See* HSLDA, *Equal Access*, *supra* note 6, at 1 (listing fourteen states and their access laws); *see, e.g.,* NEV. REV. STAT. ANN. § 386.462 (2005) (mandating homeschooler access to interscholastic activities); PA. STAT. ANN. § 13-1327.1 (2006) (providing homeschoolers access to public education); *see also infra* Part II.

and against access,⁸ a more practical analysis of the issue is needed to better ground the debate. An honest examination of the actual costs of allowing homeschoolers to participate in public school classes and activities, as against the real costs to the state and to the students of *not* allowing homeschoolers access, must all be taken into account.

Although there is an ongoing debate as to the merits of homeschooling itself,⁹ one of the background assumptions of this article is that homeschooling is a good and viable alternative to traditional institutional schooling. While the deeper questions of appropriate socialization and adequate academic preparation are outside the scope of this article, a number of recent studies on the growing homeschooling movement¹⁰ have started to answer these questions, and will be discussed in brief, *infra* at Part IV.B. For the purposes of this article, the practice of homeschooling itself will not be questioned except insofar as the differing practices within the home may complicate a student's transition into the public school setting upon a grant of access.

Part I of this article begins with a brief summary of the history of the current homeschooling movement, grounded in the legal battles over compulsory education in the 1920s and peaking with the vindication of the right to homeschool in the 1980s and 1990s. The three general types of state statutes regulating homeschooling will then be explored. This section will also lay out the context of the school choice debate, identifying the main arguments and themes and showing how they frame the homeschooler access question. Part II will focus on the homeschooler access legislation currently in place in eighteen states, in order to contextualize the judicial and legislative issues involved. Part III will examine the judicial side of the question, focusing on the unsuccessful constitutional arguments for a right of access that have been brought in various courts, and proposing two new constitutional arguments in favor of this right that may enjoy

8. See, e.g., Fuller, *supra* note 4; Lukasik, *supra* note 6, at 1958–69.

9. For criticisms of the practice of homeschooling, see generally Chris Lubienski, *Whither the Common Good? A Critique of Home Schooling*, 75 PEABODY J. OF EDUC. 207 (2000); Michael W. Apple, *The Cultural Politics of Home Schooling*, 75 PEABODY J. OF EDUC. 256 (2000); NAT'L EDUC. ASS'N, 2006-2007 NEA RESOLUTIONS 36, available at <http://www.nea.org/annualmeeting/raaction/images/resolutions2006-2007.pdf>.

10. See, e.g., BRIAN D. RAY, HOME EDUCATED AND NOW ADULTS: THEIR COMMUNITY AND CIVIC INVOLVEMENT, VIEWS ABOUT HOMESCHOOLING, AND OTHER TRAITS (2004), summary available at http://www.nheri.org/index.php?option=com_content&task=view&id=171&Itemid=47 [hereinafter BRIAN D. RAY, HOME EDUCATED AND NOW ADULTS]; LAWRENCE M. RUDNER, THE SCHOLASTIC ACHIEVEMENT OF HOME SCHOOL STUDENTS 2–3, ERIC/AE DIGEST, No. ED435709, available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/2a/2f/2f.pdf.

more success. Part IV then turns to the legislative side of the question—given the triumphs of lobbying efforts in eighteen states, a legislative approach would likely be the most successful strategy. This Part will first present an empirical analysis of the situation, looking at the available statistics on the actual costs of allowing access and illustrating the need for more research to be done. The Part will then recommend a broader campaign for the passage of favorable statutes on the state legislature level.

I.

THE HISTORY OF THE HOMESCHOOLING MOVEMENT AND THE QUESTION OF SCHOOL CHOICE

A. *Legal Grounds for the Right to Homeschool*

Historically speaking, homeschooling is not an innovation in American education. If anything, universal public education is the newcomer—it was not until 1852 that Massachusetts enacted a compulsory school attendance statute, becoming the first state to do so.¹¹ Until then, the norm had been for children to be educated at home and apprenticed to the community—laws governing education in early American history focused upon the responsibility of parents and masters to teach children, but did not specifically provide for schools or teachers.¹² In the early nineteenth century, a movement began in favor of making public education widely available.¹³ Proponents hoped it would bring about unity and equality for students and “help sustain democracy by bringing everyone together to share values and learn a common history.”¹⁴ Compulsory education laws were not universally adopted until the end of the nineteenth century, but by the turn of the twentieth century, compulsory education was generally accepted and enforced.¹⁵ The major legal battles over education that arose in the 1920s were largely over the question of private schools and how they properly fit into the compulsory education metric.¹⁶

A trio of cases in the 1920s established the rights of private schools and schoolteachers in the face of compulsory education laws.

11. Kara T. Burgess, Comment, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69, 70 (1986).

12. Lukasuk, *supra* note 6, at 1917 (citing GEORGE R. CRESSMAN & HAROLD W. BENDA, PUBLIC EDUCATION IN AMERICA 21–23 (1956)).

13. See MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 13 (4th ed. 2002).

14. John Cloud & Jodie Morse, *Home Sweet School*, TIME, Aug. 27, 2001, at 48.

15. See YUDOF ET AL., *supra* note 13, at 13.

16. See *infra* notes 17–25 and accompanying text.

In *Meyer v. Nebraska*,¹⁷ the U.S. Supreme Court, while not questioning the power of the state to enact compulsory education laws and to make “reasonable regulations for all schools,”¹⁸ expressly recognized the Fourteenth Amendment liberty interest of parents to make the most basic decisions about their children’s upbringing and education.¹⁹ This principle was further developed in *Pierce v. Society of Sisters*,²⁰ which set out the proposition that parental choice is of ultimate importance in making educational decisions.²¹ In perhaps the most famous passage from this decision, the Court declared that

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²²

The last in this line of cases, *Farrington v. Tokushige*,²³ held that by imposing government control over the “intimate and essential details” of private schools, the state was denying parents their right to “reasonable choice and discretion in respect of teachers, curriculum and text-books.”²⁴ The parental interest in education was thus extended to protect the operating decisions of private schools against undue government interference.²⁵

The establishment of the parental right to direct the upbringing and education of their children was expanded specifically to homes-

17. 262 U.S. 390, 396–400 (1923) (reversing the conviction of an elementary schoolteacher who had violated a state statute prohibiting the teaching of a foreign language to anyone below the eighth grade, holding that the right of a private school teacher to teach German as part of his occupation, as well as the right of parents to hire him to do so, were within the liberty protected by the Fourteenth Amendment).

18. *Id.* at 402.

19. *Id.* at 399–400; Fuller, *supra* note 4, at 1607.

20. 268 U.S. 510, 529–35 (1925) (striking down an Oregon statute mandating public school attendance by all school-age children, holding that the statute unreasonably interfered with the liberty of parents “to direct the upbringing and education of children under their control”).

21. *Id.* at 535.

22. *Id.*

23. 273 U.S. 284 (1927) (extending the authority of parents over educational decisions concerning their children by invalidating state regulations that excessively interfered with the selection of teachers and curricula at private schools).

24. *Id.* at 298.

25. *Id.* The liberty interest defined in *Meyer* and *Pierce* was established in *Farrington* as the “general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendance upon schools.” *Farrington*, 273 U.S. at 298–99.

chooling in 1972, with the Supreme Court decision in *Wisconsin v. Yoder*.²⁶ There, the Court upheld on First Amendment grounds the fundamental interest of parents to guide the religious future and education of their children.²⁷ Because this interest was deemed fundamental, any statutory restriction of it is subject to a state showing of compelling interest justifying the regulation of education and that the regulations are the least restrictive means of achieving the regulations' objective.²⁸ *Yoder*, with its primary emphasis on the religious free exercise interest of parents, had the most consistent homeschool-supportive impact in cases where the homeschooling parents' motivation was religious.²⁹ The question of how far the parental interest in education extends past religiously-motivated homeschooling became moot before it was fully resolved, due to the success of legislative efforts by homeschoolers in legalizing the practice.³⁰

Many voices impacted the growth of the modern homeschooling movement, ranging from the writings of school reformer John Holt, founder of the "unschooling" movement in the 1970s and 1980s,³¹ to the founding of the Home School Legal Defense Association

26. 406 U.S. 205 (1972) (granting conduct exemption to Old Order Amish from compulsory attendance education statute).

27. *Id.* at 213–14.

28. *Id.* at 221–22.

29. *See, e.g.*, Michigan v. DeJonge, 501 N.W.2d 127 (Mich. 1993) (citing *Yoder*, overturned the state's compulsory education statute, which required students, attending school through the Church of Christian Liberty and Academy, to attend public or state-approved nonpublic schools, holding that it was an unconstitutional violation of the Free Exercise Clause).

30. *See Fuller, supra* note 4, at 1612 ("Courts have never had the chance to iron out all the wrinkles in the case law because by the late 1980s states stopped attempting to prevent parents from exercising their right to home-school.")

31. *See, e.g.*, Patrick Farenga, *John Holt and the Origins of Contemporary Homeschooling*, PATHS OF LEARNING, Spring 1999 (rev. Nov. 2003), available at <http://www.pathsoflearning.net/Paths01-Farenga.pdf>. Holt started as a fifth-grade teacher working in private schools, and strove to reform the school system from within, but grew to believe that the school establishment was not able to make the radical changes he believed were necessary in American education. In his 1972 book, *Freedom and Beyond*, Holt questioned the basic underlying presupposition of compulsory education, writing that

People, even children, are educated much more by the whole society around them and the general quality of life in it than they are by what happens in schools. The dream of many school people, that schools can be places where virtue is preserved and passed on in a world otherwise empty of it, now seems to me a sad and dangerous illusion [W]e must look beyond the question of reforming schools and at the larger question of schools and schooling itself. Can they do all the things we ask them to do? Are they the best means of doing it? What might be other or better ways?

JOHN HOLT, *FREEDOM AND BEYOND* 4–5 (1972).

(HSLDA) in 1983, a coalition of concerned parents and lawyers that successfully lobbied to carve out a space for parents to choose to legally educate their children at home.³² While the “unschooling” movement and the HSLDA platform can be characterized as representing the opposite ends of the political spectrum, one common ground is the emphasis on individual—student or parent—choice. Holt and his followers advocated nontraditional curricula, tailored to the child’s interests, observing that children, prior to attending school,

do not need to be made to learn, told what to learn, or shown how.

If we give them access to enough of the world, including our own lives and work in that world, they will see clearly enough what things are truly important to us and to others, and they will make for themselves a better path into that world than we could make for them.³³

The basic idea of “unschooling” was to break out of the failing public school system model and to find ways unique to each child to motivate that child to learn.³⁴

HSLDA, by contrast, is a more formal and conservative organization, designed to provide legal assistance and lobbying power to homeschooling parents. Its stated mission is to “preserve and advance the . . . constitutional right of parents and others legally responsible for their children to direct their education,” which it pursues by relying on the fundamental freedoms of parental rights and religious liberty.³⁵ Both groups, however, are staunch advocates of all types of homeschoolers—Holt himself recognized that the growth of homeschooling was leading to strange bedfellows amongst advocacy groups.³⁶ As a

32. FARRIS, *supra* note 2, at 29. HSLDA now functions as a member organization, offering legal support to its member families and advocating for continuing positive legal change. Their website showcases member support services, along with an issues library, bill-trackers covering state measures that might impact homeschoolers, news items of interest, and many other informational tools. HSLDA, <http://www.hslda.org> (last visited Apr. 11, 2007).

33. JOHN HOLT, *HOW CHILDREN LEARN* 157 (rev. ed., Delacorte Press/Seymour Lawrence 1983).

34. For applications of this “unschooling” model, see MITCHELL L. STEVENS, *KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT* 3–5 (2001); see also Illinois Home Oriented Unique Schooling Experience (H.O.U.S.E.), <http://www.illinoisohouse.org> (last visited Apr. 11, 2007).

35. HSLDA, Our Mission, <http://www.hslda.org/about/mission.asp> (last visited Apr. 18, 2007).

36. John Holt, *Mixed Allies*, *GROWING WITHOUT SCHOOLING*, No. 2, Nov. 1978, available at <http://www.holtgws.com/gwsarchives.html>. *Growing Without Schooling* (GWS) was the magazine founded and published by Holt in support of the then-nascent homeschooling movement. See Farenga, *supra* note 31.

result of such advocacy, all fifty states came to pass legislation legalizing homeschooling by the mid-1980s.

The theme of parent and student choice was echoed in some of the homeschooling statutes passed in the 1980s. For example, Colorado's general homeschooling statute is introduced by a declaration of legislative findings, which states:

The general assembly hereby declares that it is the primary right and obligation of the parent to choose the proper education and training for children under his care and supervision. It is recognized that home-based education is a legitimate alternative to classroom attendance for the instruction of children and that any regulation of nonpublic home-based educational programs should be sufficiently flexible to accommodate a variety of circumstances. The general assembly further declares that nonpublic home-based educational programs shall be subject only to minimum state controls which are currently applicable to other forms of nonpublic education.³⁷

Homeschooling is specifically recognized as a function of parental choice, to be conducted under the aegis of parental supervision. While other states have different formulations in their homeschooling statutes,³⁸ the very existence of legal homeschooling shows the extent to which the advocacy of the "unschoolers" and of the HSLDA have impacted the legal grounds of homeschooling in the United States today.

B. The Current State of Homeschooling Regulations

1. States Treating Home Schools as Private Schools

State homeschooling laws can be classified into three broad categories, based on how the statutory system treats a homeschool institution: private school laws, equivalency laws, and home education laws.³⁹

The first category of states, those with private school home education laws, considers home schools in the same general category as private schools, making no regulatory distinctions in dealing with home schools. These states tend to have broad qualification statutes and minimal interference in the school once it qualifies as a private

37. COLO. REV. STAT. § 22-33-104.5 (2006).

38. See *infra* Part I.B. for greater detail on state homeschooling statutes.

39. See Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S. C. L. REV. 75, 87 (2002) (citations omitted) (discussing the three categories).

school. For instance, Illinois treats home schools as private schools.⁴⁰ Under Illinois law, private school attendance satisfies the compulsory attendance law where instruction is in English and “children are taught the branches of education taught to children of corresponding age and grade in the public schools.”⁴¹ Alabama has a similar approach, which encompasses religiously-motivated homeschools. Alabama allows home schools to qualify as private parochial schools as long as they “are operated as a ministry of a local church, group of churches, denomination, and/or association of churches.”⁴² Every child attending such a church school is exempt from the state compulsory attendance requirements, provided that the parent or guardian reports the attendance at the church school upon the initial enrollment of the child; there are no annual reporting requirements attached.⁴³

2. *States Requiring Home Schools to be Equivalent to Public Schools*

The second category, equivalency laws, presents an additional layer of regulation, reaching the actual content of home school curricula by requiring that children receive instruction equivalent to that provided by the public school system in order to be exempted from the compulsory attendance statutes.⁴⁴ States with equivalency laws tend to require more paperwork from parents seeking to homeschool than do the states with private school laws. Massachusetts, for instance, allows exemption for “a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee.”⁴⁵ The leading Massachusetts homeschooling case, *In re Care and Protection of Charles*,⁴⁶ struck the balance between parental and state interests by holding that the school committee can examine the competency of the parents to teach their children, but not require teacher certification, and that the committee must have access to textbooks and lesson plans, but could not dictate the manner in which subjects may be taught.⁴⁷

40. *People v. Levisen*, 90 N.E.2d 213, 215 (Ill. 1950); *see also Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452, 461 (N.D. Ill. 1974) (finding the *Levisen* interpretation of the Illinois statute to be “reasonable and constitutional”).

41. 105 ILL. COMP. STAT. ANN. 5/26-1 (West 2006).

42. ALA. CODE § 16-28-1 (LexisNexis 2001).

43. ALA. CODE § 16-28-3, -7, -8 (LexisNexis 2001).

44. McMullen, *supra* note 39, at 88–89.

45. MASS. GEN. LAWS ch. 76, § 1 (LexisNexis 2005).

46. 504 N.E.2d 592 (1987).

47. *Id.* at 601–02.

3. States that Expressly Regulate Home Schools

Last are the states that have laws that apply expressly to home schools, singling out homeschoolers for specific regulation.⁴⁸ Such statutes vary from state to state, ranging from Wisconsin's homeschool law requiring that a statement of enrollment be submitted annually to the department of education but not imposing any other restrictions on homeschoolers,⁴⁹ to Pennsylvania's law setting out initial and annual reporting requirements, annual evaluations of the child's progress by a specifically qualified teacher or psychologist, and hearing procedures upon a superintendent determination of failure to adequately educate.⁵⁰ However, home education law states are unified in their express legal treatment of homeschooling and their recognition of the need to provide some regulation specifically tailored to the practice.

This wide range of regulations governing homeschooling in the fifty states provides the backdrop against which state courts and legislatures have to decide the question of whether to allow homeschooler access to public schools, and if so, how to regulate it within existing systems of regulation.

C. The Question of School Choice

In 1983, the National Commission on Excellence in Education released its landmark "A Nation at Risk" report, which warned that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."⁵¹ In response to this and other criticisms of the public school system, a movement in favor of school choice has risen all around the nation.⁵²

Proponents of choice make three general arguments in favor of such government-sponsored choice mechanisms as voucher programs and charter schools. First and foremost is a basic freedom argument: parents and children should have the ability, unencumbered by socio-economic status, to break away from the failing, monopolistic public

48. McMullen, *supra* note 39, at 89–91.

49. WIS. STAT. ANN. 115.30(3) (West 2006).

50. 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 2006).

51. NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (APR. 1983), available at <http://www.ed.gov/pubs/NatAtRisk/index.html>.

52. For examples of this movement in favor of school choice, see *infra* notes 52–54 and accompanying text.

schools in their district, and to have real control over their education.⁵³ Second is a market-based argument that the school systems will thrive upon the introduction of competition among sources of education.⁵⁴ Last, some choice proponents argue that implementing school choice programs will actually be a more cost-effective way of approaching public school reform.⁵⁵

Opponents of school choice tend to “look at the same student data and reach opposite conclusions.”⁵⁶ Opponents argue that school choice programs siphon away valuable government funds from already-failing public schools, that the best students are lured away from public schools by the choice options, and that reform of public schools must come from within.⁵⁷

The question of homeschooler access to public schools adds an interesting dynamic to the raging school choice debate. Technically speaking, homeschooling in and of itself is another choice mechanism. Parents can choose to opt out of the public school system entirely and educate their own children at home. Indeed, as noted above, many states legally treat homeschools as private schools.⁵⁸ When a homeschooler requests access to public school facilities, however, he is essentially asking to opt back into what he chose to opt out of: a sort of bifurcated choice mechanism. Such a bifurcated choice highlights the parental control argument in the school choice debate—a strong parental control right is necessary to justify allowing parents to custom-

53. See, e.g., John Chubb & Terry Moe, *Politics, Markets, and the Organization of Schools*, 82 AMER. POL. SCI. REV. 1065, 1067 (1988) (arguing that the proper “constituency” of a public school is huge and heterogeneous, encompassing the broad base of U.S. citizens, meaning that parents and students are “but a small part of the legitimate constituency of ‘their own’ schools”).

54. See, e.g., Caroline M. Hoxby, *How School Choice Affects the Achievement of Public School Students* 8, prepared for Koret Task Force meeting, Sept. 20–21, 2001, available at http://www.economics.harvard.edu/faculty/hoxby/papers/choice_sep01.pdf (noting that the Milwaukee schools facing the most competition from the Milwaukee Parental Choice Program exhibited greater annual gain in percentile ranking in math achievement scores than the schools facing less or no competition).

55. See, e.g., DAVID SALISBURY, SAVING MONEY AND IMPROVING EDUCATION: HOW SCHOOL CHOICE CAN HELP STATES REDUCE EDUCATION COSTS, CATO INST. POLICY ANALYSIS No. 551 (2005), available at <http://www.cato.org/pubs/pas/pa551.pdf>.

56. Bob Davis, *Class Warfare: Dueling Professors Have Milwaukee Dazed Over School Vouchers*, WALL ST. J., Oct. 11, 1996, at A1.

57. See, e.g., Gregory Shafer, *The Myth of Competition and the Case Against School “Choice,”* 59 HUMANIST 15 (March 1999) (arguing that the business model is inapt for education, and that advocates of education reform should focus instead on improving the current academic model through better funding of teachers in public schools).

58. See *supra*, Part I.B.1.

tailor their children's educational upbringing, picking and choosing elements of public and home education as they see fit. The extent to which parents have the constitutional right to make educational decisions that represent the best interests of their children will be discussed in greater length below.⁵⁹

The homeschooler access question also presents a different sort of funding issue. The access itself would be the "state funding" at stake here; the question is whether allowing homeschoolers to participate in public school activities would be a financial burden to the public schools. Opponents claim that allowing an influx of homeschoolers into the public school classes and extracurricular activities that they pick and choose would impose an undue administrative burden on the schools, and would also be a drain on the limited funding available.⁶⁰ Proponents of access, however, argue that homeschooling in itself represents a significant savings to the public school district, since the parents are paying their property taxes and contributing to the education budget, but their children are not using school resources.⁶¹ This is a question that can only be settled by an honest examination of the costs at stake, which will be explored at greater length below, in Part IV.A.

The homeschooler access question raises the stakes of the general school choice debate, and emphasizes the issue of the extent of parental control over the education of their children. The legislature and judiciary have considered the access question to a certain extent, which must be understood before any proposals for the future can be made.

II.

CONTEXT: CURRENT LEGISLATION REGARDING HOMESCHOOLER ACCESS TO PUBLIC SCHOOLS

Currently, eighteen states have passed statutes granting the privilege of public school access to homeschool students, with varying levels of regulations attached to the grant.⁶² The state laws vary in the activities encompassed in the access mandate, running the gamut from merely allowing homeschooler participation in interscholastic sports,

59. See *infra*, Part III.B, for a discussion of *Troxel v. Granville* and the fit parent presumption.

60. See, e.g., Lukasik, *supra* note 6, at 1967–68; see *infra*, Part III, for greater exposition of this argument.

61. See, e.g., Fuller, *supra* note 4, at 1626–28.

62. These states are Arizona, Colorado, Florida, Idaho, Illinois, Iowa, Maine, Michigan, Minnesota, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Washington, and Wyoming.

to mandating access to classes, school facilities, and extracurricular and interscholastic activities.⁶³

A. Access to Interscholastic Sports

Three states, Arizona,⁶⁴ Nevada,⁶⁵ and Oregon,⁶⁶ mandate homeschooler access to interscholastic sports.⁶⁷ All three of these mandates include a qualification clause, stating that all homeschoolers who wish to be eligible for public school interscholastic activities will be subject to the same requirements that public school students must fulfill to participate in these activities.⁶⁸ Required qualifications include registration, age eligibility, fees, physical condition, standards of behavior, and passing grades.⁶⁹ Oregon's qualification clause also includes a requirement that the homeschooled student "comply with all public school requirements during the time of participation."⁷⁰ Arizona's statute specifically adds a stipulation that a homeschooler who was previously enrolled in a public school "shall be ineligible to participate in interscholastic activities for the remainder of the school year during which the child was enrolled in a school."⁷¹ This clause serves to prevent abuse of the access mandate—parents are thus discouraged from taking a failing student out of school for the sole purpose of being more lenient in passing him and keeping him on a sports team for the year. Parents seeking to take advantage of the homeschooler access mandate would have to wait at least a year after placing their failing children in a makeshift homeschool before these children will be able to return to the public school sports team.

63. See *infra* notes 62–92 and accompanying text.

64. ARIZ. REV. STAT. ANN. § 15-802.01 (2002).

65. NEV. REV. STAT. § 386.462 (2005).

66. OR. REV. STAT. § 339.460 (2005).

67. Note that Tennessee Secondary School Athletic Association (TSSAA) bylaws permit homeschoolers to participate in interscholastic athletics in grades nine and higher, provided that the homeschool is a member of the TSSAA. TSSAA Bylaws, Art. IV, § 1, available at <http://www.tssaa.org/Handbook/handbook.pdf>. Tennessee is not included in this list, however, because this permissive access to interscholastic sports was granted by the athletic association, rather than by the state legislature.

68. See *supra* notes 64–66 and accompanying text.

69. See, e.g., ARIZ. REV. STAT. ANN. § 15-802.01(A).

70. OR. REV. STAT. § 339.460(1)(e).

71. ARIZ. REV. STAT. § 15-802.01(B).

B. Access to Both Extracurricular and Interscholastic Activities

The next group of states mandates access to both extracurricular and interscholastic activities. These states include Colorado,⁷² Minnesota,⁷³ Pennsylvania,⁷⁴ and Wyoming;⁷⁵ North Dakota⁷⁶ mandates access to extracurricular activities only. Colorado's statutes are incredibly detailed—not only is access mandated for any nonpublic school student who wishes to participate,⁷⁷ but the specific situations determining which public schools shall be opened to homeschoolers are set out,⁷⁸ as are the eligibility requirements for participation,⁷⁹ disciplinary proceedings (including the appeals process),⁸⁰ and the fees that a school may charge a participating student.⁸¹ Minnesota's access mandate is embedded in its general extracurricular activities statute, with a provision allowing homeschool participation in the subdivision governing extracurriculars, including a list of what specifically constitutes an "extracurricular activity."⁸² Pennsylvania's statute, the most recently passed access mandate, is more general, stating that the school district in which an interested homeschooler resides shall permit that homeschooler to participate in "any activity that is subject to

72. COLO. REV. STAT. § 22-33-104.5(6) (2006); COLO. REV. STAT. § 22-32-116.5 (2006).

73. MINN. STAT. ANN. § 123B.49(4) (West 2000).

74. 24 PA. CONS. STAT. ANN. § 1327.1(f.1) (West 2006).

75. WYO. STAT. ANN. § 21-4-506 (2006) (permits students who are not enrolled to participate in any activities sanctioned by the Wyoming High School Activities Association offered by the district); *see also* Wyoming High School Activities Association (WHSAA), WHSAA Handbook, Rules 2.6.4, 3.1.3, 6.2.91, 6.2.92, 6.4 (allowing homeschoolers to play on participating schools' sports teams), <http://www.whsaa.org/handbook/handbook.asp>.

76. N.D. CENT. CODE § 15.1-23-16 (2003).

77. COLO. REV. STAT. § 22-33-104.5(6).

78. *Id.* § 22-32-116.5(2) (setting out clear instructions for when a homeschooler may be allowed to participate in activities in a public school district in which he does not reside).

79. *Id.* § 22-32-116.5(4).

80. *Id.* § 22-32-116.5(9.5).

81. *Id.* § 22-32-116.5(6). This specific treatment of the fees question is especially interesting in light of the questions about the costs and burdens imposed upon the schools by allowing access. Colorado has mooted this part of the school choice debate by shifting those costs onto the homeschoolers seeking access. *See infra*, notes 129–131, and accompanying text for more discussion on this fees provision.

82. MINN. STAT. ANN. § 123B.49(4), entitled "Board control of extracurricular activities," defines extracurricular activities as those having all of the following characteristics: "(1) they are not offered for school credit nor required for graduation; (2) they are generally conducted outside school hours, or if partly during school hours, at times agreed by the participants, and approved by school authorities; (3) the content of the activities is determined primarily by the pupil participants under the guidance of a staff member or other adult."

the provisions of section 511, including, but not limited to, clubs, musical ensembles, athletics and theatrical productions,” provided that the student complies with eligibility requirements, try-out criteria, and “all policies, rules and regulations or their equivalent of the governing organization of the activity.”⁸³ How Pennsylvania’s broad provisions will be interpreted by the school districts and the state courts remains to be seen.⁸⁴

C. *Access to Curricular, Extracurricular, and Interscholastic Activities*

The broadest category of access laws are essentially “dual enrollment” statutes, providing for homeschooler access to classes and school facilities as well as extracurricular and interscholastic activities. Such laws are in force in Florida,⁸⁵ Idaho,⁸⁶ Illinois,⁸⁷ Iowa,⁸⁸ Maine,⁸⁹ New Hampshire,⁹⁰ Utah,⁹¹ Vermont,⁹² and Washington.⁹³ The Maine statute is perhaps the most helpful example of this set of laws, with separate categories of regulations dealing with regular classes, academic credit, special education services, cocurricular activities, extracurricular activities, use of school facilities and equipment, use of school books, and reimbursement for students enrolled in equivalent instruction programs.⁹⁴ Each category has its own set of enumerated rights and regulations, with clear standards set out for homeschoolers, parents, and administrators.

83. 24 PA. STAT. ANN. § 1327.1(f.1) (West 2006).

84. Currently, there have been no cases decided in Pennsylvania courts construing these provisions. This lack of judicial action may be due to the newness of the amended access provisions, which were enacted in November 2005.

85. FLA. STAT. ANN. § 1006.15(3)(c) (West 2004) (governing homeschooler participation in “interscholastic extracurricular activities”). Section 1006.15(2) defines “extracurricular” as “any school-authorized or education-related activity occurring during or outside the regular instructional school day.” *Id.*

86. IDAHO CODE ANN. § 33-203 (2001).

87. 105 ILL. COMP. STAT. 5/10-20.24 (2005), available at <http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=17> (provides process for homeschoolers to request part-time attendance in the “regular educational program . . . if there is sufficient space in the public school desired to be attended”).

88. IOWA CODE ANN. § 256.46 (West 2003); IOWA ADMIN. CODE r. 281-31.5(299A) (2005), available at <http://www.legis.state.ia.us/ACO/IACHtml/281.htm>.

89. ME. REV. STAT. ANN. tit. 20, § 5021 (2006).

90. N.H. REV. STAT. ANN. § 193:1-c (LexisNexis 2006).

91. UTAH CODE ANN. § 53A-11-102.5 (2006).

92. VT. STAT. ANN. tit. 16, § 563(24) (2005); 22-000-009 VT. CODE R. § 4400-4405 (2005).

93. WASH. REV. CODE ANN. § 28A.150.350 (West 2006).

94. ME. REV. STAT. ANN. tit. 20, § 5021 (2006).

Additionally, there was a bill pending in South Dakota during the 2006 legislative session that would have created a statutory right of access for homeschoolers.⁹⁵ The proposal was particularly interesting from a funding perspective, as it would have granted school districts extra state aid if they allow homeschoolers to participate in school activities and get other school services—for each homeschooled student in the district, the district would get twenty-five percent of the state aid provided for a public school student.⁹⁶

There is a wide variety of regulatory philosophies represented by these eighteen sets of access laws. Each law was passed as a result of homeschooling interests lobbying for a statutory right of access. The real question, however, is how much of the rhetoric and political jockeying surrounding these statutes⁹⁷ is actually true—a sound empirical grounding for these statutes must be found before any future legislative or judicial recommendations can be made.

III.

JUDICIAL MATTERS: CONSTITUTIONAL ARGUMENTS FOR A RIGHT OF ACCESS

Over the past thirty or so years, lawsuits have been brought by a wide variety of nonpublic school students seeking part-time public school participation.⁹⁸ Courts have routinely rejected the constitutional arguments put forward by these students, and it would seem that there is no constitutional *right* of access to public schools. This Part examines the unsuccessful arguments that have been brought in past cases and then proposes two new constitutional arguments in favor of a right of access, but ultimately concludes that the best answer for homeschool access advocates lies in the legislature.

A. *Court Cases Rejecting a Right of Access*

There are three general constitutional arguments that have been advanced on behalf of nonpublic school students seeking public school access: a Due Process Clause argument that nonpublic school students have a property interest in the free public education provided

95. H.B. 1160, 2006 Legis. Assemb., 81st Sess. (S.D. 2006), available at <http://legis.state.sd.us/sessions/2006/bills/HB1160HED.pdf>. The bill was approved in the South Dakota House Education Committee, but died in February of 2006. See HB 1160, <http://legis.state.sd.us/sessions/2006/DisplayBill.aspx> (South Dakota's bill tracking service) (last visited Apr. 22, 2007).

96. H.B. 1160, 2006 Legis. Assemb., 81st Sess. (S.D. 2006), available at <http://legis.state.sd.us/sessions/2006/bills/HB1160HED.pdf>.

97. See *infra*, Part IV.A., for examples of such rhetoric.

98. See *infra*, notes 98–102 and accompanying text.

for by state constitutions, an Equal Protection Clause argument that nonpublic students excluded from part-time activities are unjustifiably discriminated against, and a hybrid Equal Protection Clause and Free Exercise Clause argument that those who opt out of the public schools due to a sincerely held religious belief are unduly burdened by the prohibition of access to public school activities.⁹⁹ The courts have rejected all three of these constitutional arguments, ruling instead in favor of school districts' right to set the eligibility requirements for participation in school activities.¹⁰⁰

While the first case to specifically address public school access, *Commonwealth ex rel. Wehrle v. School District of Altoona*,¹⁰¹ was decided in favor of the private school student plaintiffs, that holding was based on a provision of the Pennsylvania School Code that specifically stated that attendance at a nonpublic school was not grounds for exclusion from the manual training program at issue in the case.¹⁰² The more modern lawsuits seeking public school access have not had the advantage of such statutory language, and as a result, courts have rejected the general constitutional arguments made in favor of mandating access.¹⁰³ Overwhelmingly, state courts have concluded that there is no vested constitutional right of access to public school programs.¹⁰⁴ The two modern cases granting a right of access have been based on state statutory schemes that granted the specific access sought, either explicitly or under traditional interpretation.¹⁰⁵

99. HSLDA, *Equal Access*, *supra* note 6, at 2.

100. *Id.* at 2–3.

101. 88 A. 481 (Pa. 1913) (affirming a writ of mandamus to compel the admission of plaintiff private school student to a public school in his district).

102. *Id.* at 228–29 (citing Section 401 of the Act of May 18, 1911, P.L. 309 (School Code)).

103. *See Swanson v. Guthrie Indep. Sch. Dist. No. I-1*, 942 F. Supp. 511, 514–16 (W.D. Okla. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1241–42 (2d Cir. 1986); *Denis J. O'Connell High Sch. v. Virginia High Sch. League*, 581 F.2d 81, 87–88 (4th Cir. 1978); *Valencia v. Blue Hen Conference*, 476 F. Supp. 809, 818–20, 822, 827 (1979); *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311, 1313, 1317 (Mont. 1997); *Bradstreet v. Sobol*, 630 N.Y.S. 2d 486, 487 (N.Y. Sup. Ct. 1995); *McNatt v. Frazier Sch. Dist.*, No. Civ. A. 95-0366, 1995 WL 568380, at *1, 5 (W.D. Pa. Mar. 10, 1995); *Thomas v. Allegany County Bd. of Educ.*, 443 A.2d 622, 626–27 (Md. App. 1982); *Cook v. Griffin*, 364 N.Y.S.2d 632, 637–38 (N.Y. App. Div. 1975); *Nebraska ex rel. Sch. Dist. of Harrington v. Nebraska State Bd. of Educ.*, 195 N.W.2d 161, 163–64 (Neb. 1972). Note that none of these cases were brought in any of the eighteen states with a statutory right of access after these statutes were enacted.

104. *See supra* note 103, and accompanying text.

105. Fuller, *supra* note 4, at 1615 (discussing *Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W.2d 151 (Mich. 1984) and *Davis v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 3 Mass L. Rptr. 375 (Mass. Super. 1995)).

The litigation over public school access has two major strands of analysis: the first concerning access to curricular activities (i.e., curricular and elective classes), and the second concerning access to interscholastic activities (i.e., athletics). Given the different institutional structures of curricular activities, which are governed by school boards and teachers, and interscholastic activities, which are generally overseen by private athletic associations, courts have treated these two types of cases differently, as will be discussed below.

1. Cases Involving Access to Curricular Activities

The basic reasoning employed by courts in rejecting a constitutional right of access to curricular activities is highlighted in two seminal cases, *Thomas v. Allegany County Board of Education*¹⁰⁶ and *Swanson v. Guthrie Independent School District No. 1-1*.¹⁰⁷

Thomas involved the exclusion of private school students from participation in the public school music program. The music program in question was a county-wide competitive program, restricted to students in the Allegany County Public School System. The plaintiff students had participated in the program when they were enrolled in the public school system, and had recently transferred to a parochial high school. The plaintiffs argued that their exclusion from the county music program violated their free exercise rights, and that the board must extend the benefits of offered programs equally to public and private school students.¹⁰⁸

The court ruled that since the plaintiffs had exercised their constitutional right to choose where they would receive their education, they could not now be heard to complain about the consequences of that choice.¹⁰⁹ The court also held that the de minimus burden on plaintiffs' free exercise rights was outweighed by the board's "legitimate interest in avoiding administrative inefficiency,"¹¹⁰ showcasing the idea of an unreasonable burden on the efficient administration of the public school system as one of the primary arguments against allowing access. The accuracy of this claim will be further explored below in Part IV.A.

106. 443 A.2d 622 (Md. Ct. Spec. App. 1982).

107. 942 F.Supp. 511 (W.D. Okla. 1996).

108. *Thomas*, 443 A.2d at 624–25.

109. *Id.* at 625.

110. *Id.* at 626. The court, in supporting its determination that allowing access would be an unreasonable burden on administrative efficiency, gave a hypothetical example of a private school without a chemistry teacher deciding to transport all of its students to the local public school for chemistry. If the court were to mandate access, it argued, there would be nothing stopping such a slippery slope from occurring. *Id.*

The *Swanson* ruling, by contrast, focused on the question of the existence of a broad constitutional right of access. There, homeschooled parents, who had previously been allowed to enroll their daughter in public school classes on a part-time basis, were denied access when a new school board adopted a policy requiring full-time attendance.¹¹¹ While the court agreed that the Oklahoma state constitution created a right to a free public education and protected the choice to homeschool, it held that there was no constitutional right to a free *part-time* public education.¹¹² The court also held that the plaintiff parents' federal constitutional right to direct the education of their child was not absolute.¹¹³ This case significantly limited the constitutional arguments available to homeschoolers who would like to sue for a right of access to public school curricular activities.¹¹⁴

2. Cases Involving Access to Interscholastic Sports

Access to interscholastic athletic activities is an entirely different question, given the structure of public school athletics. Generally, public school athletics are controlled by state athletic associations, which are private, often non-profit, associations with bylaws that participating schools must follow in order to remain in the league.¹¹⁵ Attempts to use the judicial system to force access to athletics, therefore, typically consist of lawsuits filed against these private organizations.

Most courts have ruled that eligibility for a public school sports team is a privilege rather than a right.¹¹⁶ In *Sanders v. Louisiana High School Athletic Association*,¹¹⁷ the Court of Appeals of Louisiana found that a private school student did not suffer the loss of a significant property right by being kept off the team.¹¹⁸ The court also ruled that the association's policy was not so arbitrary that it warranted judi-

111. *Swanson*, 942 F. Supp. at 513.

112. *Id.* at 514–15.

113. *Id.* “Nothing in the Constitution, federal or state, grants Plaintiffs the right to control public education on an individual basis. While Plaintiffs certainly have the right to direct Annie’s education by homeschooling her, nothing defendants have done infringes that right.” *Id.* (citation omitted).

114. While both *Thomas* and *Swanson* were state court cases, they have been cited by various other state courts in similarly negative rulings. See, e.g., *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311, 1313–15 (Mont. 1997).

115. HSLDA, *Equal Access*, *supra* note 6, at 4.

116. The only cases with holdings favorable to nonpublic school students seeking access to public school sports have dealt with racial discrimination, gender discrimination, or transfer rules, rather than pure private or homeschool discrimination. *Id.* at 4–5.

117. 242 So. 2d 19 (La. Ct. App. 1970).

118. *Id.* at 28.

cial interference in the matter, highlighting the deference that will normally be given to the policy decisions of such organizations.¹¹⁹ Similarly, the Supreme Court of Montana held in *Kaptein v. Conrad School District*¹²⁰ that participation in extracurricular activities is not a fundamental right, and that a middle-tier balancing test should therefore be applied.¹²¹ The court found for the school district, upholding its “policy decision that, in order to effectively integrate academics and extracurricular activities, it needs to restrict participation to those students who are enrolled in the public school system.”¹²²

As a result of these decisions denying access to both curricular and interscholastic activities, advocates of a homeschooler right of access have decided, by and large, that the issue “requires a political rather than legal solution,” and call for supporters to lobby for equal access laws or school district policies.¹²³ Part IV, below, will discuss legislative strategies. However, the judicial battle for a right of constitutional access may not be yet over. The next section will detail two as-yet untried constitutional arguments which may enjoy greater success in the courts.

B. Judicial Recommendations: Two New Constitutional Arguments

This section will introduce two potential constitutional arguments that a homeschooling parent could raise in the effort to mandate homeschooler access to public school facilities. The first argument is based on a recent U.S. Supreme Court decision upholding the parental control right, while the second is based on the more long-standing legal doctrine of unconstitutional conditions. These two arguments may provide a new judicial line of attack for homeschooler access advocates seeking a constitutional right of access.

1. A Stronger Parental Control Right

The U.S. Supreme Court recently handed down an important opinion that strengthened parents’ fundamental liberty interest in controlling the upbringing of their children. The ruling in *Troxel v. Gran-*

119. *Id.* at 25.

120. 931 P.2d 1311 (Mont. 1997). Note that the structure of the school district involved in this case was such that it was in charge of the policy governing public school athletics. The activities implicated in this case were interscholastic athletic teams. *See id.* at 1312.

121. *Id.* at 1316.

122. *Id.* at 1317.

123. HSLDA, Equal Access, *supra* note 6, at 3–4.

*ville*¹²⁴ does not address education specifically, but it does provide valuable insight into the question of when it is appropriate for the state to interfere in the parental liberty interest in directing the upbringing of the child.¹²⁵ The Court emphasized the presumption that a fit parent acts in his child's best interests and upheld this presumption against a visitation petition made by the child's paternal grandparents.¹²⁶ In overturning the decision of the lower court, the Supreme Court declared that the problem was "not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughter's best interests."¹²⁷ This fit parent presumption has been cited approvingly in many subsequent cases, in both federal and state courts.¹²⁸ It is clear that the Supreme Court deems the right of parents to direct the care and upbringing of their children to be fundamental and worthy of strict protection.

An argument could be made that *Troxel*, in specifically laying out and upholding the fit parent presumption, has strengthened the legal position of homeschooling parents. *Troxel* "requires that appropriate weight be given to parental decisions."¹²⁹ A homeschooling parent who demonstrates his fitness would gain the benefit of the presumption of acting in his children's best interests. The *Troxel* presumption also implicitly addresses the questions raised by the conflicting social science evidence about homeschooling and ac-

124. 530 U.S. 57 (2000). *Troxel* involved a suit for visitation brought by the paternal grandparents, against the objections of the children's mother. A Washington statute provided for the granting of custody to "any person when visitation may serve the best interest of the child, whether or not there has been any change of circumstances." *Id.* at 60–61 (referring to WASH. REV. CODE § 26.10.160(3) (1994)). The Court ruled in favor of the mother, holding that as no court had made a finding of unfitness on the part of the mother, the Washington statute as applied here unconstitutionally interfered with the mother's fundamental right to rear her children. *Id.* at 68. The Washington Superior Court had erred in placing on the fit custodial parent the burden of "disproving that visitation would be in the best interest of her daughters." *Id.* at 69 (emphasis in original).

125. McMullen, *supra* note 39, at 97.

126. *Troxel*, 530 U.S. at 65 ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

127. *Id.* at 69.

128. See, e.g., *Doe v. Heck*, 327 F.3d 492, 517–20 (7th Cir. 2003) (in a child abuse investigation); *Hodgkins v. Peterson*, No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194, at *5 (S.D. Ind. July 23, 2004) (curfew law found unconstitutional); *Mark N. v. Runaway Homeless Shelter*, 189 Misc.2d 245 (N.Y. Misc., Sept. 21, 2001, decided) (statute placing a safehouse in a position superior to the father was unconstitutional and violated father's due process rights); *Suboh v. Dist. Attorney's Office of Suffolk*, 298 F.3d 81, 90–92 (1st Cir. 2002).

129. McMullen, *supra* note 39, at 98.

cess.¹³⁰ A fit parent is presumed to act in the best interests of his child. These “best interests” are at the heart of what the social science evidence tries to prove—the benefits of allowing access, and the costs to the homeschoolers and to society of denying it.

If the *Troxel* presumption is extended to the question of the sources of education, the burden of answering the individual questions of the best course of action for a particular child can be shifted to and presumed to be answered by the decisions of his fit parents. Given the application of the *Troxel* presumption to cases as disparate as curfew decisions and child abuse investigations,¹³¹ it is not inconceivable that a fit parent would gain the benefit of the presumption in determining the best educational program for his child, whether it be purely public, purely private, or a type of dual enrollment.

Without more than this, however, the *Troxel* presumption is probably not enough to sustain a constitutional right of access to public school activities. While the *Troxel* presumption has been applied in a variety of contexts, the fact remains that this presumption addresses only the factor of the best interests of the child in question. This best interests analysis, though perhaps important from a policy perspective in terms of providing a rationale for allowing homeschooled students an opportunity to access public school facilities, does nothing to answer concerns about the administrative costs incurred, or other issues raised by state courts in denying such access.

2. *The Doctrine of Unconstitutional Conditions*

A stronger argument in favor of a constitutional right of access may lie in the doctrine of unconstitutional conditions, which states that “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”¹³² The general doctrine can be traced back to *Frost v. Railroad Commission*,¹³³ a U.S. Supreme Court ruling from 1926, in which the Court addressed the question of whether the state of California could condition a private transportation company’s use of the public highways on the company’s obtaining a license as a common carrier.¹³⁴ The Court ruled that imposing such a

130. This social science evidence is discussed more in-depth in Part IV.B., *infra*.

131. See cases cited *supra* note 128.

132. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1988).

133. 271 U.S. 583 (1926).

134. *Id.* at 589.

condition would be unconstitutional.¹³⁵ Noting that the state did possess the power to prohibit the use of public highways in proper cases, but that it did not possess the power to compel a private carrier to assume the duties and burdens of a common carrier, the Court declared that if the state were allowed to exert this condition,

constitutional guaranties, so carefully safeguarded against direct assault, [would be] open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.¹³⁶

This doctrine was cited approvingly in a number of U.S. Supreme Court cases throughout the twentieth century,¹³⁷ and applied to a wide variety of circumstances—for instance, an exemption from state property tax conditioned upon an oath foreswearing any violent overthrow of the government;¹³⁸ denial of unemployment benefits to a person who refused to work on a Saturday for religious reasons;¹³⁹ state statutes requiring welfare recipients to have been a resident of the state for at least one year before applying for welfare benefits;¹⁴⁰ a requirement that all Detroit public school teachers belong to a labor union;¹⁴¹ removal from office in a political party because of the official's use of

135. *Id.* at 593.

136. *Id.* at 593–94.

137. Constitutional scholar Kathleen Sullivan notes that the doctrine “survived major divisions and shifts of temperament on the Court,” having been initially formulated during the *Lochner* era, untouched through the New Deal’s reconstructions of constitutional liberties, and reemerging under the Warren Court “to protect personal liberties of speech, association, religion, and privacy just as it once had protected the economic liberties of foreign corporations and private truckers.” Sullivan, *supra* note 132, at 1416.

138. *Speiser v. Randall*, 357 U.S. 513, 529 (1958) (holding it an unconstitutional restriction of freedom of political speech).

139. *Sherbert v. Verner*, 374 U.S. 398, 404–05 (1963) (holding it an unconstitutional restriction on applicant’s Free Exercise rights).

140. *Shapiro v. Thompson*, 394 U.S. 618, 641–42 (1969) (holding it an unconstitutional restriction on the right to travel).

141. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) (holding that while unions may properly require payment of fees for purposes of collective bargaining, it

his Fifth Amendment right against self-incrimination in a grand jury proceeding;¹⁴² patronage in the promotion, transfer, recall after layoff, or hiring of low-level government employees,¹⁴³ and conditioning liquor licenses on an agreement not to advertise liquor prices.¹⁴⁴ The basic essence of the doctrine, that once the state has created a generally available public benefit, it may not condition enjoyment of that benefit in such a way as to impinge upon the ability of citizens to exercise a constitutional right, has generally been upheld and adopted by the courts.

Application of the doctrine, however, has been somewhat inconsistent—the basic doctrine does not provide set parameters for determining when a constitutional right has been infringed or guidelines for which constitutional rights or state-provided benefits merit the application of this doctrine. This confusion has caused divisions among the lower courts in, for instance, the issue of conditioning federal family planning subsidies on recipients' restraint from speech encouraging or counseling abortion.¹⁴⁵ Federal district courts have reached opposite conclusions on this issue, depending on whether they characterize the regulations as a permissible refusal to subsidize speech advocating abortion,¹⁴⁶ or an unconstitutional penalty on the use of nonfederal funds to advocate, counsel, or encourage abortion.¹⁴⁷ Characterization of the condition as either a penalty or a non-subsidy thus seems to be part of the key to understanding how courts apply the doctrine of unconstitutional conditions.¹⁴⁸

This distinction between penalties and non-subsidies is a product of one of three major rationales offered for the doctrine, found in case law and scholarly literature.¹⁴⁹ The first rationale is rooted in concerns about government coercion—the harm caused by the imposition of the unconstitutional condition is that of putting negative pressure on the constitutional rights of the person hoping to receive the state benefit.¹⁵⁰ The second rationale, developed more implicitly in the case law, frames the harm in terms of government corruption, examining

was unconstitutional for employment as a school teacher to be conditioned upon the demand that all teachers contribute to the political activities of the union).

142. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806–07 (1977).

143. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990).

144. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996).

145. *See, e.g., New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988).

146. *New York v. Bowen*, 690 F. Supp. at 1273–74.

147. *Massachusetts v. Bowen*, 679 F. Supp. at 145.

148. *See Sullivan, supra* note 132, at 1466–68.

149. *See id.* at 1419–21 for an introductory discussion of these three rationales.

150. *Id.* at 1419–20.

the legislative processes that impose the conditions for manipulation or subterfuge.¹⁵¹ The less germane a condition is to the benefit to which it is attached, the more likely it is that the legislative process was in some way corrupt, and should be prevented from having its unconstitutional conditions enforced.¹⁵² The last rationale put forward in the scholarly literature suggests that the doctrine should be understood as “imposing an inalienability rule upon constitutional rights.”¹⁵³ Under this approach, the harm imposed by conditioning benefits lies in the treatment of constitutional rights as alienable objects that may be traded for government benefits.¹⁵⁴ All three of these rationales play a legitimate role in the consideration of how best to apply the doctrine of unconstitutional conditions to new fact patterns.

Essentially, the doctrine of unconstitutional conditions makes a constitutional strict scrutiny argument available to the plaintiffs, by shifting the analysis away from the state’s power to place conditions on public benefits it chooses to grant, to the constitutional rights being infringed by the conditions placed. The state must thus raise compelling reasons for imposing such conditions on the benefits it offers. In *Sherbert v. Verner*,¹⁵⁵ for instance, the Supreme Court noted that the state had not raised any sufficiently compelling reasons for conditioning the receipt of unemployment benefits on the beneficiary’s willingness to forsake her religious convictions—such an infringement upon her constitutional right to free exercise of her Saturday Sabbatarian convictions was held to be unjustified by any of the proffered state interests.¹⁵⁶ Applying strict scrutiny to conditioned benefits that impact constitutional rights forces states to apply a constitutional cost-benefit analysis to the benefits it offers. In analyzing the application of this doctrine, some scholars have argued that conditions may be unduly burdensome if they are so severe that they prevent altogether the exercise of the constitutional right, or if they are gratuitous, that is, “where it would be virtually costless for the government to waive them and they impose high replacement costs on the citizens they burden.”¹⁵⁷

151. *Id.* at 1420.

152. *Id.*

153. *Id.* at 1421.

154. *Id.*

155. 374 U.S. 398 (1963).

156. *Id.* at 406–08 (rejecting as non-compelling the state’s asserted interests in preventing the filing of fraudulent claims by those feigning religious objections to Saturday work, given the lack of evidence of any such fraudulent claims, and also given that the imposition of this unconstitutional condition was not narrowly tailored to achieve this asserted interest).

157. *See, e.g., Fuller, supra* note 4, at 1617.

Application of the doctrine of unconstitutional conditions to the question of homeschooler access to public school facilities would view access to public school education as the benefit in question. A homeschooler could argue that in states without access provisions, the receipt of this benefit is conditioned upon the decision to be a full-time public school student, which places an unconstitutional burden on the right to homeschool. Under the balancing analysis of the doctrine of unconstitutional conditions, the burden is upon the state to show that the costs involved are such that denials of the benefit of public education to homeschoolers can be justified.

Again, this issue of costs is dependent upon an honest empirical assessment of the actual costs incurred by public schools upon admitting homeschoolers to their curricular, extracurricular and interscholastic activities. In framing the balancing of costs question, opponents to a right of access tend to measure the potential costs of allowing access as against the complete lack of costs represented by the total absence of the homeschooler from the school.¹⁵⁸

A more appropriate balance, however, and one that has been adopted by at least one federal court, would be to consider the costs of access as against the cost of having those same students attend on a full-time basis.¹⁵⁹ Although some administrative costs¹⁶⁰ may arise with allowing homeschoolers access, “the costs of accommodating opt-in requests would usually fall far short of the costs of providing full-time education—which home-schoolers, like all other citizens, are already free to demand at any time if they decide to quit home education.”¹⁶¹ A key element to this analysis is the understanding that homeschoolers are citizens as well—not only do they pay the property taxes that make up the school financing base, but they are always entitled to choose to enroll their children back into the public school system full-time. Funding decisions for part-time enrollment programs¹⁶² should be made against this background consideration of the costs and

158. See, e.g., Lukasik, *supra* note 6, at 1966–69.

159. See, e.g., *Pub. Funds for Pub. Sch. of N.J. v. Byrne*, 590 F.2d 514, 521 (3d Cir. 1979) (Weis, J., concurring) (“[P]arents who send their sons and daughters to nonpublic schools spare the state and its taxpayers the not inconsiderable expense of educating these children, a cost that would otherwise be incurred in fulfilling the state’s obligation to provide a free primary and secondary education.”).

160. Some potential administrative costs mentioned by access opponents include financial costs of adding new pupils to classes and additional teacher’s aides for classes that are pushed beyond the maximum number of students upon the inclusion of the homeschooler. See, e.g., Lukasik, *supra* note 6, at 1967–68.

161. Fuller, *supra* note 4, at 1628.

162. See *infra*, Part IV.C.2 for a discussion of various funding proposals embedded in the eighteen state access statutes.

benefits accruing to the public school systems upon the decision to enroll previously homeschooled children in public schools full-time.

No homeschooler has yet made an argument based on unconstitutional conditions in a suit for access to public schools.¹⁶³ Given the greater relative strength of the legal position of parents after *Troxel*, it is possible that this kind of constitutional argument may win favor in the courts. However, given the inconsistencies among the courts in the application of the doctrine of unconstitutional conditions, it is unclear whether an argument under the doctrine would be a convincing one. It is unclear whether the right to homeschool—or, more broadly, the right to enroll in a private school—will be one to which the courts will apply the doctrine in the first place. It is even less clear that the application of the balancing of costs and burdens will result in a finding of an unconstitutional burden on the right, given that the benefit at stake is arguably less essential in this situation—having to forego access to a public school chemistry laboratory is arguably less of a burden than having to forego unemployment benefits, for instance. The homeschooler in question here, rather than being denied all access to education, is simply denied access to a good chemistry laboratory. The homeschooler could argue that the benefit being denied is the very specific one of a good chemistry education, but then faces the difficulty of showing that the benefit denial is a direct result of the school's lack of access policy, rather than resulting from the parents' decision to homeschool.¹⁶⁴

While the unconstitutional conditions argument is an interesting one, and certainly one worth making in the courts, it is by no means the strongest. Since advocates of homeschooler access have already enjoyed success via campaigns for favorable state legislation, the best option available to homeschoolers seeking access is the hope of getting a statutory right recognized in all fifty states.

163. No unconstitutional conditions argument was raised by the homeschoolers in the cases petitioning for access cited above, *supra* note 103.

164. See Lukasik, *supra* note 6, at 1961 (“[W]hen a home educator seeks alternative sources of education for her child because she does not possess the requisite training to teach or because she does not have the requisite materials to teach, that home educator cannot suggest that public schools have *caused* her to suffer a violation of her constitutional rights.”).

IV.

LEGISLATIVE MATTERS: FUTURE LOBBYING STRATEGIES
FOR A STATUTORY RIGHT OF ACCESS

Given the fact that eighteen states have already passed legislation creating a statutory right of homeschooler access to public school facilities, and given the little judicial success as described above,¹⁶⁵ lobbying efforts would be the most successful strategy in creating such a right across the board in the nation. This Part will make recommendations as to the research and analysis necessary to make appropriate legislation and will finish with an analysis of the interests to be balanced in future access legislation.

A. *The Need for a Statistical Analysis of the Costs Involved*

One of the difficulties of analysis in the issue of homeschooler access mandates is the lack of statistical studies on the actual cost of such programs. On one side of the issue, opponents make conclusory statements about the supposed undue burden on administrative efficiency created by allowing homeschoolers to pick and choose their public school involvement.¹⁶⁶ One article argued that a finding of a constitutional right to access could force public schools to “use their limited resources inefficiently, spending money against the interests of the public school population at large and disserving the states’ interest in assuring that all of its children receive the best education the schools may provide.”¹⁶⁷ There was no empirical evidence supporting that statement, but, rather, the article continued by stating, “A requirement that public schools spend money to satisfy the part-time attendance needs of home-schooled students (for whom the public schools do not receive funding) provides a specific educational advantage to home-schooled students at the expense of the general school-aged population attending public schools in the state.”¹⁶⁸

On the other side, advocates use rhetoric about the “gratuitous burdens” being placed on homeschoolers who are denied access by anti-homeschooling school administrators.¹⁶⁹ Access advocates argue

165. *See supra*, Part III.A.

166. *See, e.g.*, Lukasik, *supra* note 6, at 1966–67.

167. *Id.* at 1967.

168. *Id.* at 1967 n.349.

169. *See Fuller, supra* note 4, at 1626 (“Full-time attendance policies often impose purely gratuitous burdens on the right to home-school. The policies are gratuitous if full-time attendance policies place a burden on home-schoolers that is entirely out of proportion to the government’s need to retain the policies.”). Fuller goes on to argue that the claim of administrative inconvenience is in fact unsupported (“homeschoolers requesting public school access are simply asking for a subset of an existing

that homeschoolers are simply asking to participate in “an existing benefit in the context of a society with functioning institutions well suited to grant it”;¹⁷⁰ that they would be merely taking, on a limited basis, the spots in the public school system that they could very well choose to take up, since these complaints about the additional administrative burden do not prevent parents from choosing to enroll their children back in the public schools full-time; that homeschooling actually represents a windfall to the public schools, since these parents pay property taxes but do not send their children to school to use up the resources; and that school funding could be calibrated to take part-time attendance into account.¹⁷¹

Many of these conclusory statements are made in the course of the debate on allowing homeschooler access. But there are currently no statistical analyses to back up either side of the debate. No broad studies on homeschooler participation in public schools have yet been conducted. The departments of education in the eighteen states with access regulations do not maintain statistics on the numbers of homeschooling students involved, or on the cost incurred by the public schools.

The fact that law review articles, lobbying speeches, and state legislation have all been written without some readily available national statistical study on the practice is troubling. While most of the access laws are relatively new, one wonders why such laws were passed in the first place without a statistical study of potential costs involved. One possible explanation for the lack of a systematic empirical study could be that too few homeschoolers actually take advantage of the permissive or mandated access available in their states. However, a researcher for the Colorado Department of Education hypothesized that most of the homeschoolers that report to a school district, and are therefore included in the general statistics on homeschooling in the state, are probably involved with the schools in some form.¹⁷² If indeed most homeschoolers who are on record with the state departments of education are involved in the public schools, it would seem then that there is a large enough sample set to study the impact of homeschooler access on the public school system.

benefit in the context of a society with functioning institutions well suited to grant it”). *Id.* at 1627.

170. *Id.*

171. *Id.* at 1627–28.

172. Email from Tilak Mandal, Data and Research Unit, Colorado Department of Education to author (Feb. 14, 2006, 10:22 EST) (on file with the New York University Law School Journal of Legislation and Public Policy).

What is most needed now in this debate is a systematic empirical analysis of the data. Numbers should be available from individual school districts, but it is unfortunately outside the scope of this article to conduct such intensive statistical research. Armed with hard numbers on the costs of and the level of participation in homeschooler access to public schools, a better analysis of the policy questions can be made.

B. The Utility of Social Science Evidence in this Debate

This empirical analysis of the homeschooler access question should be considered alongside an honest examination of the real costs incurred by the state, borne by its homeschooling citizens, in choosing *not* to allow homeschooler access. Such an examination is necessarily sociological in nature and does not readily lend itself to number-crunching. The basic question to be answered is what benefits homeschooled children seek to receive from access to public school activities, and whether those benefits present a sufficiently compelling interest for the state to allow or mandate access.

There are general studies on the benefits of homeschooling useful to this analysis. Dr. Brian Ray, president of the National Home Education Research Institute, has conducted a series of studies on adults who were homeschooled in childhood, and found, among other things, that homeschoolers are more civically-engaged than the general public,¹⁷³ are much more involved in community activities,¹⁷⁴ and are equally committed to abstract values of tolerance and freedom of expression.¹⁷⁵

There are similarly positive results from studies of homeschooler academic achievement. Lawrence M. Rudner, Director of the ERIC Clearinghouse on Assessment and Evaluation, conducted a study of over twenty thousand homeschooling families, compiling data from the standardized achievement tests taken by the homeschooled children and connected with questionnaires filled out by their parents.¹⁷⁶

173. "For all civic activities (e.g., working for candidate/political party/political cause, voting in national/state elections) and at all age groups, the home-educated adults in this study were more civically involved than the general population." BRIAN D. RAY, HOME EDUCATED AND NOW ADULTS, *supra* note 10.

174. *Id.* ("71% of subjects were participating in any ongoing community service activity (e.g., coaching a sports team, volunteering at a school, or working with a church or neighborhood association), while 37% of similarly aged U.S. adults and 39% of all U.S. adults did so.")

175. *Id.*

176. Rudner, *supra* note 10, at 2. The ERIC Clearinghouse on Assessment and Evaluation is a broad electronic database of materials in the education and social science

Among his findings were that almost twenty-five percent of homeschooled students were enrolled one or more grade levels above their age-level peers,¹⁷⁷ and that students who had been homeschooled their entire academic lives had higher test scores than those who had also attended other educational programs.¹⁷⁸ Critics might argue that these positive findings are causally linked not to the approach of homeschooling itself, but to the fact that children who are homeschooled generally live in home situations with well-educated parents who are highly involved in the education of their children. While this may be true, this situational aspect is itself an intrinsic part of the causal analysis. The fact that homeschooling parents tend to be of the type of parent who would encourage their children to do well in any educational setting is an integral part of the decision to homeschool in the first place and is therefore part of any general comparison of homeschooling to public schooling.

One of the central concerns raised about homeschooling as a general proposition is the fear that homeschooled children would not be properly socialized.¹⁷⁹ The questions of actual rates of socialization, what constitutes “proper socialization,” or whether homeschooling networks are effective in providing social interaction amongst homeschoolers are all outside the scope of this article.¹⁸⁰ Regardless of what answers to these very interesting questions may be found, it seems self-evident that allowing homeschoolers access to public school facil-

fields, and, according to its website, has become “widely recognized” as the “central source for assessment and evaluation information.” Erica.net, About Us, <http://ericae.net/nav-au.htm> (last visited Apr. 16, 2007).

177. Rudner, *supra* note 10, at 2.

178. *Id.* at 3.

179. *See, e.g.*, Apple, *supra* note 9, at 262 (noting that public schools “at least . . . provide a ‘kind of social glue, a common cultural reference point’”) (citation omitted).

180. For further information, *see generally* MITCHELL L. STEVENS, KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT (2001); SUSAN A. McDOWELL, “BUT WHAT ABOUT SOCIALIZATION?” ANSWERING THE PERPETUAL HOME SCHOOLING QUESTION: A REVIEW OF THE LITERATURE (2004). In email interviews with homeschooling parents, one constant theme was the argument that the homeschool setting actually provides *broader* socialization than the public schools can—one set of parents chose to have their children interact with people regardless of age, gender, or race. Email from Anne Porr, homeschooling parent and participant in the Westerly Learning Center, Princeton, New Jersey (Oct. 19, 2006, 09:39 EST) (on file with the New York University Law School Journal of Legislation and Public Policy). *See also* Westerly Road Church Learning Center, *Code of Conduct at Westerly Road Church Learning Center*, <http://www.westerlylearningcenter.org/conduct.htm> (emphasizing community and social interaction among students involved in this homeschooling network).

ities would provide them more opportunities for socialization and greater interaction with a wider variety of their peers.

These general findings regarding homeschooling certainly help to fill in the background of the homeschooler access question. The social science evidence specifically on homeschooler access, however, is as yet nonexistent—this, too, along with the questions of empirical and statistical analysis of costs, is an area of research in need of growth.

Along with the sociological questions is another basic uncertainty: whether homeschooled children are adequately prepared for the transition into public school facilities. Opponents of access could legitimately argue that schools would have to shoulder the additional cost of assessing a homeschooler's previous classwork preparation (or musical ability, or athletic prowess) before being able to incorporate that student into the activity in question. This situation can, however, be analogized to that of a new student transferring into the school (for example, after his family has moved into the school district from another state). Curricular and extracurricular focuses vary among school districts, and each school must surely have some protocol in place for handling transfer students.¹⁸¹ Once student records are transferred to the new school district, transfer students likely go through an established system of placement tests, or are included in the class or activity without question and expected to catch up. Either way, this issue of preparedness is a question that also comes up in the context of homeschooled children deciding to enroll in public schools full-time, and does not bar parents from making that decision. While empirical evidence concerning the administrative burden of providing transition help for dual-access homeschool students might be useful in this analysis, the question of transition costs is not a dispositive one.

C. Legislative Recommendations

Eighteen states have already made the judgment that the costs of mandating homeschooler access to public schools are not sufficient to prevent the granting of this choice to parents and students.¹⁸² While no exhaustive statistical analysis has yet been performed on the numbers involved,¹⁸³ the fact that these states have such systems already in place does show something as to the workability of allowing access. Many other interests are involved, however, beyond the bare facts of

181. See, e.g., NAT'L EDUC. ASS'N, *supra* note 9, at 35–36, for proposed national guidelines dealing with the transfer of students between schools and districts.

182. See *supra* Part II.

183. See *supra* Part IV.A.

costs and burdens. Any new legislative initiatives should consider the following interests in striking the appropriate balance.

1. *Homeschooler Interest: Avoiding Additional Government Regulation*

One interest in particular is that of homeschoolers in avoiding additional governmental regulation of their educational programs. Many homeschool advocacy groups, including HSLDA, remain ambivalent about campaigns for access legislation, because they fear that the privilege of access will carry with it the burden of state regulation of homeschoolers generally.¹⁸⁴ HSLDA cites its aim of “maintaining and advancing the freedom of homeschoolers from public school oversight” as the reason for its decision not to use its resources to advocate for homeschooler access.¹⁸⁵ Moreover, “HSLDA takes a neutral position when legislation of this kind is introduced, unless the legislation would impose additional regulations on all homeschool students not participating in the public schools.”¹⁸⁶

This position is an unfortunate blow to access advocates. As a large and efficiently organized homeschool advocacy organization,¹⁸⁷ HSLDA’s access to resources and statistics would be most helpful in the effort to pass favorable legislation. The organization is already positioned to be able to conduct the nationwide statistical analyses necessary to better understand the actual costs of access and to better model future legislation.¹⁸⁸ HSLDA could also continue to meet its goal to protect its member families and the homeschooling community

184. The HSLDA website notes the fear that creating access to public schools will result in greater governmental notice and regulation of homeschooling in general. HSLDA, About HSLDA, Frequently Asked Questions, <http://www.hsllda.org/about/default.asp> (last visited Apr. 16, 2007).

185. *Id.*

186. *Id.*

187. HSLDA is comprised of tens of thousands of member families. *See id.* In addition, HSLDA has extensive relationships with other homeschooling organizations, media outlets, and state departments of education. *See* Klicka, *supra* note 2, at 431–32.

188. HSLDA is structured with regional oversight—member families are assigned to a specific set of staff who deal on a daily basis with homeschool-related activity in that region. HSLDA, Homeschooling-State, <http://www.hsllda.org/hs/state/default.asp> (displaying each state and the state’s staff, legislation, and current cases regarding homeschooling). The organization as a whole also already has developed relationships with state legislators, and with state homeschooling organizations—as noted on its mission statement, HSLDA “advocates in state legislatures, at the invitation of state homeschool organizations, by assisting individual states in drafting language to improve their homeschool legal environment and to fight harmful legislation.” HSLDA, About HSLDA, <http://www.hsllda.org/about/default.asp>.

as a whole from additional burdensome regulation by taking a more active role in the discussion concerning access regulations. Its concern about the best utilization of resources would also be protected by a more active lobbying role in this debate—it is surely less costly to advocate for a favorable access regulation than to fight against an unfavorable one passed by a state legislature without HSLDA input.

Whether or not HSLDA changes its position on the homeschooler access question, a nationwide collaborative effort among homeschooling advocates is needed in order to obtain uniform regulations that best balance all of the interests at stake. The fear of heavier regulation of homeschooling in general as a result of the passage of access mandates is an understandable one, but it can be prevented by smart and active lobbying.

Fear of additional general regulation on homeschooling would seem to logically lead to the conclusion that the less expansive the access mandate, the better. The idea would be that if the grant of access is a small one, perhaps in the first category of statutes simply mandating access to interscholastic athletics, then there would be less scope for state regulation of homeschooling. This conclusion does not necessarily hold true, however. Of the eighteen states that mandate or permit access, nine of them fall into the category of “dual enrollment” statutes, enabling homeschoolers to access any and all public school activities.¹⁸⁹ All nine of these statutes are limited in their application to those nonpublic school students who specifically seek access to and are enrolled in public schools on a part-time basis, and contain no additional regulation of homeschooling students who do not seek to take advantage of public school access.¹⁹⁰

As yet, there is little case law construing these access statutes, but under standard rules of statutory construction, a school district would be hard pressed to use these statutes, specifically tailored to those homeschoolers who seek access to the public schools, to impose additional regulations on homeschoolers at large. Given the lack of room for state abuse of access statutes, any slippery slope argument—for instance, that school districts will “get used to” imposing regulations on homeschooler curricula—is groundless. Future access statutes should therefore follow these nine models, in granting a broad statutory right of access, with regulations specifically linked to the actual act of access, blocking off the possibility of general homeschooling regulations from being passed under the access statutes.

189. *See supra*, notes 85–93 and accompanying text.

190. *Id.*

2. *State Interest: Funding Options and Minimizing Costs*

The issue of cost is undoubtedly important, and the state interest in keeping costs down must also be considered in the passage of future access legislation. One argument made by access advocates in particular could potentially shed light on this issue of costs—that school funding could easily be calibrated to take part-time attendance into account.¹⁹¹ While it would be difficult to put an actual price tag on an individual component of public education, a proportionate sum calculation could perhaps be created by the state legislature. South Dakota's failed homeschooler access bill was interesting in this regard. Its proposal for funding homeschooler access was to grant each district twenty-five percent of the per-pupil funding for each student residing in the district receiving alternative instruction (i.e. homeschooling), regardless of the number of homeschoolers who actually wish to take advantage of the access mandate.¹⁹² Such a funding proposal is not narrowly tailored to meet the costs of allowing homeschooler access, but it does show one of a variety of funding provisions that could be included to defray the costs of access.

Idaho's dual enrollment statute provides a more narrowly tailored alternative to the access funding question. The broad grant of access to "any program in the public school available to other students" includes a provision that the school district "shall be allowed to include dual-enrolled nonpublic school and public charter school students for the purposes of state funding only to the extent of the student's participation in the public school programs."¹⁹³ In their calculations of per-pupil funding requests, school districts are given the authority to calculate the extent of the nonpublic school student's participation and adjust their funding requests accordingly.¹⁹⁴ This calculation decision is at the discretion of the district—no specific state guidance is given as to how the percentage of participation is to be calculated.¹⁹⁵

The Colorado access statute also sheds some light on the difficult question of funding.¹⁹⁶ Instead of looking to state funding to support

191. Fuller, *supra* note 4, at 1627 (noting that existing public school funding mechanisms often already take part-time attendance into account).

192. H.B. 1160, 2006 Legis. Assemb., 81st Sess. (S.D. 2006), available at <http://legis.state.sd.us/sessions/2006/bills/HB1160HED.pdf>.

193. IDAHO CODE ANN. § 33-203(3) (2001).

194. *Id.*

195. The statutory provision in question merely states: "Any school district shall be allowed to include dual-enrolled nonpublic school and public charter school students for the purposes of state funding only to the extent of the student's participation in the public school programs." *Id.*

196. COLO. REV. STAT. § 22-32-116.5(6) (2006).

its access mandate, Colorado chose to shift the costs to the homeschoolers seeking access.¹⁹⁷ The statute mandates access to extracurricular and interscholastic activities “on an equal basis” with public school students in the homeschooler’s district of residence.¹⁹⁸ This grant of access may be funded by fees assessed against the homeschooler—the statute expressly states that a school may charge “any student participating in an activity” a participation fee, and that the amount a school charges a “non-enrolled student” must not exceed “one hundred fifty percent of the fee amount the school . . . would charge an enrolled student.”¹⁹⁹ This fee is to be specifically earmarked for the particular activity for which it is charged.²⁰⁰ Colorado struck its balance by shifting the cost burden onto those homeschoolers (and other non-enrolled students) who wish to participate in public school activities. Regulations and costs alike are tailored specifically to those who wish to both opt out of the public schools generally and opt back into certain public school activities.

This variety of funding clauses shows that provision can be made for the costs of allowing homeschooler access, whatever those costs are determined to be. Whether the state decides to grant blanket funding per aggregate number of homeschoolers, or to allow the school district to make the calculation on the basis of actual number of homeschoolers participating in public school activities, or to shift the costs back onto the homeschoolers seeking access, money will not be siphoned away from the public schools. The fact that all three of these models are already in place in working access systems shows that homeschooler access can work without resulting in the decimation of public school funds.

These three models begin to point the way to an appropriate funding solution. Each model would serve various interests—for instance, the South Dakota blanket funding provision would likely be the easiest to administer, and the Colorado fees-shifting provision would most clearly respond to concerns about shifting funds away from the public schools. Given general budget concerns for a well-tailored state budget, and given the argument that homeschoolers are already paying for the public schools via their property taxes, the Idaho proportional calibration model seems to be the best balancing of interests involved in the cost question. This balancing of interests will have to be performed by each state as it considers the type of access

197. *Id.*

198. COLO. REV. STAT. § 22-32-116.5(1)(a).

199. COLO. REV. STAT. § 22-32-116.5(6)(a).

200. COLO. REV. STAT. § 22-32-116.5(6)(b).

provisions that would best serve the interests of its citizens. The bottom line, however, is that several workable options are available.

3. *Dual Enrollment Statutes: The Best Model for Future Legislation*

The eighteen access statutes at work in the United States can be good models for future legislation. Advocates for homeschooler access must take all of the above interests into consideration—homeschoolers' desire to avoid additional regulation, homeschooled children's interest in a rich educational experience, and the state interest in properly budgeting for such programs and keeping administrative costs down. Full access, or "dual enrollment" statutes, can be specifically tailored to properly balance all of these interests. A closer examination of the dual enrollment statutes currently in place in nine states can provide guidance for future legislation in this area.

One basic question is the possible breadth of access granted. While all nine statutes are "dual enrollment," in the sense that all provide a general grant of access to interscholastic, extracurricular, and curricular activities in the public school system, there is a range of access possibilities within this general grant.²⁰¹ Idaho, for instance, mandates the creation of discrete dual enrollment programs, through which nonpublic school students may participate in "any program in the public school available to other students."²⁰² Iowa permits children who are receiving "competent private instruction" to enroll in the public schools directly under "dual enrollment," under which these students may participate in academic or extracurricular programs on the same basis as any regularly-enrolled student.²⁰³ Such students can participate in interscholastic activities, however, only if they are enrolled in a nonpublic school that is an "associate member" of one of the Iowa high school athletic associations.²⁰⁴ Maine, in what is perhaps the broadest grant of access, permits nonpublic school students to participate in regular classes, special education classes, and cocurricular and extracurricular activities, and to use school facilities, equipment, textbooks, and library books.²⁰⁵

201. See, e.g., IDAHO CODE ANN. § 33-203(2) (2001); IOWA ADMIN. CODE r. 281-31.5 (299A) (2005), available at <http://www.legis.state.ia.us/ACO/IAChtml/281.htm>; ME. REV. STAT. ANN. tit. 20-A, § 5021 (2006).

202. IDAHO CODE ANN. § 33-203(2) (2001).

203. IOWA ADMIN. CODE r. 281-31.5 (299A) (2005), available at <http://www.legis.state.ia.us/ACO/IAChtml/281.htm>.

204. *Id.*

205. ME. REV. STAT. ANN. tit. 20-A, § 5021 (2006).

The question of breadth of the access grant is one that state legislatures will have to decide for themselves, after a thorough examination of actual costs involved and a greater understanding of how such access would work out in practice. However, the current access statutes do provide models for advocates of homeschooler access in other states. Advocates can look to Maine, for example, to see whether and how the broad grant of access has helped homeschoolers or hurt local school districts in framing better and more statistically-grounded arguments for statutory grants of access elsewhere.

Another basic question is that of the optimum level of specificity of the statute itself. The nine current dual enrollment statutes range from Maine's very specific itemization of standards and regulations,²⁰⁶ to Illinois's simple paragraph granting broad permissive access to the public school system.²⁰⁷ This question of specificity raises the issue of administrative and judicial interpretation of the statutory grants of access—the less specific the statute, the more likely it is that the arbitrator in any given situation will have leeway to interpret the statute as he sees fit. On the other hand, the more specific the enumerations within the statute itself, the less likely a homeschooler will be successful in petitioning for access to things not expressly enumerated in the grant of access. Advocates of homeschooler access must therefore be highly involved in the process of enacting such legislation, so as to voice their concerns and make their interests count in the creation of access statutes.

A final consideration is the issue of the requirements imposed upon homeschoolers seeking access. This question is arguably related to the concern about unconstitutional conditions being placed on the

206. *Id.*

207. 105 ILL. COMP. STAT. 5/10-20.24 (2005), available at <http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=17>. The whole of this provision reads:

[The school board has the power to] accept in part-time attendance in the regular education program of the district pupils enrolled in nonpublic schools if there is sufficient space in the public school desired to be attended. Request for attendance in the following school year must be submitted by the nonpublic school principal to the public school before May 1. Request may be made only to those public schools located in the district where the child attending the nonpublic school resides.

To accept, pursuant to the provisions of Section 14-6.01, in part-time attendance resident pupils of the types described in Sections 14-1.02 through 14-1.07 who are enrolled in nonpublic schools.

Note that this second paragraph refers solely to children with disabilities. 105 ILL. COMP. STAT. 5/14-6.01 (2005) available at <http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=17> (powers and duties of school boards); 105 ILL. COMP. STAT. 5/14-1.02 (2005), available at <http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=17> (providing for children with disabilities).

benefit of public school programs. At root, however, schools have the authority to place academic, behavioral, and other conditions on those of its own regularly-enrolled students who wish to participate in public school activities, and it stands to reason that part-time students seeking access to these activities should be held to the same standards. The question then becomes how to apply these standards to students whose primary education takes place in a setting outside the control of the schools themselves.

Different approaches to this question are taken among the nine existing dual enrollment statutes. Most start from a baseline residency requirement—in order to approach the local public school in the first place, the homeschooler must be a resident in the district in which the public school is located.²⁰⁸ The next layer of conditions consists of equivalent rules of participation—nonpublic school students participating in any public school activity are bound by the same academic, attendance, behavioral, physical, and other standards as those regularly-enrolled public students participating in those activities.²⁰⁹

Some states go beyond such equivalency of participation, however, and add additional layers of regulation on nonpublic school students seeking access.²¹⁰ Florida, for instance, requires homeschoolers to “demonstrate educational progress” as required for participation in extracurricular or interscholastic activities through a “method of evaluation agreed upon by the parent and the school principal.”²¹¹ Maine tacks on further conditions to its broad grant of access, requiring a demonstration of academic proficiency and affirmative provisions of evidence that academic standards and rules of participation in extracurricular and interscholastic activities are being met, and a showing that the use of public school facilities and equipment is not disruptive to regular school activities.²¹²

Perhaps the best balance is struck by states like Iowa and Utah, which provide for nonpublic school student access to public school activities on the same basis as regularly-enrolled students.²¹³ It is understandable for states like Florida and Maine to add on other condi-

208. *See, e.g.*, UTAH CODE ANN. § 53A-11-102.5(4) (2006).

209. *See, e.g.*, IOWA ADMIN. CODE r. 281-31.5(299A) (2005), available at <http://www.legis.state.ia.us/ACO/IAChtml/281.htm>; UTAH CODE ANN. § 53A-11-102.5(2) (2006).

210. *See, e.g.*, FLA. STAT. ANN. § 1006.15(3)(c)(2) (West 2004); ME. REV. STAT. ANN. 20, § 5021 (2006).

211. FLA. STAT. ANN. § 1006.15(3)(c)(2) (West 2004).

212. ME. REV. STAT. ANN. 20, § 5021 (2006).

213. IOWA ADMIN. CODE r. 281-31.5(299A) (2005), available at <http://www.legis.state.ia.us/ACO/IAChtml/281.htm>; UTAH CODE ANN. § 53A-11-102.5(4) (2006).

tions, in an attempt to account for the school district's lack of control of the homeschool academic program, and perhaps also to counter the additional costs imposed by granting part-time access to the public schools. Given, however, that the question of actual costs is as yet unresolved and that many states successfully provide access with fewer conditions imposed on the homeschoolers who choose to take advantage of public school access, it would seem that such additional conditions are unnecessary. The states that simply require homeschoolers to abide by equivalent rules of participation already cover the basic conditions of participating in the public school activities in question, and provide more flexibility for individual school administrators to work with a variety of types of homeschoolers and other nonpublic school students to ensure that the academic, physical, behavioral, and other standards are being met, thus ensuring fair access to participation to all students involved in the public school activities.

CONCLUSION

Homeschooler access mandates present an interesting twist on the general debate surrounding school choice. The question of the extent of the choice presented to parents—and whether such a choice can be bifurcated, with both an opt-out and a limited opt-in option regarding public schools—as well as the issue of state funding of private education are both pressed in the homeschooler access question. The as-yet successful experiences of the eighteen states providing some form of access for homeschoolers show that this form of school choice is a workable one, which enriches the educational experience of homeschoolers and does not unduly burden the public school system. Time will tell how these systems hold up, under both the administrative burden of continued maintenance, as well as the burden of potential adverse litigation. As yet, there have been no lawsuits challenging an access mandate.

While this article proposes two constitutional arguments for a general right of access to public schools, a *Troxel*-based argument for a stronger parental right of control over the education of their children and an unconstitutional conditions argument, the most successful strategy for homeschool access advocates would undoubtedly be lobbying in the state legislatures, pointing to the models created by the eighteen already-existing access mandates. Future legislation following the example of the nine states with broad dual enrollment statutes in place and incorporating specific funding provisions to defray the costs of access would best strike the balance of interests at play in this debate. Such statutes grant the broadest right of access to public

schools to homeschoolers who wish such access, while avoiding both the fear of greater general regulation of homeschooling and the fear of unduly burdening the efficient administration of the public schools.

The homeschooler access issue forces states and school districts to confront the parental control component of the question of school choice. The extent of the control a parent enjoys over the specifics of his child's education has not yet been fully defined as a legal constitutional matter. In eighteen states, however, lobbying has created greater statutory privileges for homeschooling parents in determining where and how their children will be educated; such lobbying can and should be replicated across the nation to create a unified statutory right of homeschooler access to public schools.