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TOPSy-Turvy: The Taylor Opportunity Program for Students' Homeschool Discrimination Contradiction

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TOPSy-Turvy: The Taylor Opportunity Program for Students’ Homeschool Discrimination Contradiction

Chaz Morgan*

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INTRODUCTION: AN UNNECESSARY BURDEN?

What do General Douglas MacArthur, athletes Venus and Serena Williams, composer John Philip Sousa, and inventor Thomas Edison have in common? They were all homeschooled.¹ In fact, from the United States’

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founding to the present day, a host of highly accomplished Americans were homeschooled.² Homeschoolers have ranged from *The Federalist Papers* authors James Madison, Alexander Hamilton, and Chief Justice John Jay to Justice Sandra Day O'Connor; from eight of the first ten United States Presidents to Texas A&M University's President Frank Vandiver; from Abraham Lincoln to Grammy Award winner Christina Aguilera; and from Mark Twain to *New York Times* bestselling author Christopher Paolini.³ Homeschool students have excelled in American society by reaching the highest levels of achievement possible in every century and in a wide range of fields including law, education, politics, the military, literature, and music.

Yet in spite of this success, Louisiana law specially burdens—and even sometimes derails—homeschoolers' careers at their outset through differing requirements for Louisiana's publicly funded state educational scholarships.⁴ Louisiana Revised Statutes § 17:5029(B) requires Louisiana homeschool students to earn higher ACT scores than public and private school students to qualify for the same amount of state funding through the Taylor Opportunity Program for Students (TOPS) under the guise of equivalence.⁵ Specifically, the statute requires homeschool

1. Jessica Parnell, *Famous Homeschoolers*, BRIDGEWAY ACAD. (Feb. 28, 2019), <https://www.homeschoolacademy.com/blog/famous-homeschoolers/#:~:text=Some%20of%20the%20most%20famous,Theodore%20Roosevelt%2C%20and%20George%20Washington> [<https://perma.cc/WA57-TBRM>].

2. Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 77 (2002); see Christopher Paolini, *My Experience with Homeschooling*, PAOLINI (May 29, 2015), <https://www.paolini.net/2015/05/29/my-experience-with-homeschooling/> [<https://perma.cc/2TM3-NSY7>].

3. Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. CHI. L. REV. 836, 836–37 (1988); Parnell, *supra* note 1; Christina Yeager, *Homeschooling Hero: Christina Aguilera*, HOMESCHOOLING HEROES (Mar. 22, 2019), <https://www.homeschoolingheroes.com/how-to-teach-at-home/homeschooling-hero-christina-aguilera> [<https://perma.cc/B5MJ-2WPX>]; Christopher Paolini, PAOLINI, <https://www.paolini.net/biographies/christopher-paolini-full/> [<https://perma.cc/BAP6-GZE8>] (last visited Jan. 12, 2021).

4. See LA. REV. STAT. § 17:5029(B) (2021).

5. *Id.* The ACT is a standardized, multiple choice examination that tests high school students' aptitude in English, reading, mathematics, and science. *What Is the ACT?*, THE PRINCETON REV., <https://www.princetonreview.com/college/act-information> [<https://perma.cc/74KV-7MY4>] (last visited Oct. 6, 2021); see Telephone interview with Charles McDonald, former chair of the Louisiana House Education Committee and the primary author of the original TOPS legislation (Oct. 21, 2020).

students to score two or more points higher on the ACT for TOPS-Tech and Opportunity Awards and at least one point higher for Performance and Honors Awards.⁶ Further, the statute does not account for homeschool students' grade point averages or core curriculum when determining their TOPS eligibility,⁷ despite the fact that the Louisiana State Board of Elementary and Secondary Education's (BESE) certification of homeschools is contingent on whether the homeschool curriculum equals or exceeds the public school curriculum.⁸ In fact, this BESE certification effectively validates the homeschool educational process's legitimacy and thus its GPAs as well.⁹ In other words, while public and private school students' GPAs are a factor in the TOPS eligibility determination, a homeschool student's GPA carries no weight, regardless of whether BESE finds the homeschool curriculum to be equal to or more stringent than that of public and private schools.¹⁰

These differences in TOPS requirements create a serious financial obstacle for homeschool students planning to attend college which may even discourage parents from homeschooling and can prevent homeschoolers from attending college.¹¹ The failure of a homeschool student to score one to two points higher on a standardized examination can mean a difference in receiving hundreds to thousands of state dollars to assist in funding the student's college tuition—dollars that the state would have granted to a public or private school student with the same score.¹² For instance, if a homeschool student who scored a 21 on the ACT and a public or private school student who scored a 20 on the ACT both attend Louisiana State University, the public or private school student with

6. LA. REV. STAT. § 17:5029(B)(3)(b) (2021) (“[T]he student shall have a composite score . . . which is at least two points higher [T]he student shall have a composite score . . . which is at least one point higher”).

7. *Id.* § 17:5029(B). This Comment uses the terms *core curriculum* and *core unit* interchangeably.

8. *Id.* § 17:236(A) (“[A] home study program shall be approved if it offers a sustained curriculum of a quality at least equal to that offered by public schools at the same grade level.”).

9. *See infra* Section II.C.

10. LA. REV. STAT. §§ 17:5024, 17:5029(B), 17:236(A).

11. *See generally* TOPS OPH Annual Award Amounts for 2019-20, LA. OFF. OF STUDENT FIN. ASSISTANCE 1, https://www.osfa.la.gov/MainSitePDFs/TOPS_Payment_Amounts.pdf [<https://perma.cc/R93A-8E69>] (revised Oct. 25, 2019); *see generally* TOPS, LA. STATE UNIV., https://www.lsu.edu/financialaid/types_of_scholarships/tops.php [<https://perma.cc/7KQY-FTE7>] (last visited Oct. 21, 2020).

12. *See* TOPS OPH Annual Award Amounts for 2019-20, *supra* note 11, at 1; TOPS, *supra* note 11; *see generally* LA. REV. STAT. § 17:5029(B).

the lower ACT score may be eligible to receive more than \$3,700 from the Opportunity Award each semester, while the homeschool student would receive nothing.¹³ Although the homeschool student scored higher on the ACT, in order to receive the TOPS Opportunity Award, the homeschool student must have scored “at least two points higher” on the ACT than the required score for non-homeschool students, which was a 20 for students graduating from high school in 2021.¹⁴

The different funding requirements and their financial burdens will affect more students than ever before in light of COVID-19 and the significant rise in traditional homeschooling originating in part with the initial in-person school closures.¹⁵ This rise has validated a recent estimate that approximately 40% of parents were more likely to homeschool than they were prior to the original school closures.¹⁶ Yet the current TOPS

13. *TOPS*, *supra* note 11; see *The TOPS Opportunity Award*, LA. OFF. OF STUDENT FIN. ASSISTANCE, <https://mylosfa.la.gov/students-parents/scholarships-grants/tops/the-tops-opportunity-award/> [<https://perma.cc/GAR6-9R53>] (last visited Oct. 13, 2021); see generally LA. REV. STAT. §§ 17:5024(B)(1)(a), 17:5029(B)(3)(b)(ii) (2021).

14. LA. REV. STAT. § 17:5029(B)(3)(b)(ii) (2021); *The TOPS Opportunity Award*, *supra* note 13. Students qualifying for the Performance Award receive a \$400 stipend each year in addition to their TOPS tuition award, while students qualifying for the Honors Award receive an additional \$800 stipend each year in addition to their TOPS tuition award. LA. REV. STAT. § 17:5002(B)–(C) (2021). Since homeschool students must score one point higher than public and private school students on the ACT for the Performance and Honors Awards, it is necessarily more difficult for them to earn the additional stipend accompanying those awards. See *id.* § 17:5029(B)(3)(b)(iii).

15. See Will Sentell, *Rise in Louisiana Homeschooling Is Part of a National Trend. Why Did Some Make the Switch?*, ADVOC. (Feb. 7, 2021), https://www.theadvocate.com/baton_rouge/news/education/article_fd555ec8-666e-11eb-811a-2718453ae042.html [<https://perma.cc/4MLG-AVY6>] (explaining that true homeschooling—not mere temporary schooling at home while still enrolled in a public or private school—has increased nationally by 50 to 100% since March 2020 and significantly in Louisiana). Likely reasons for this increase in homeschooling include parental concerns about the virus as well as parental concerns about public and private schools’ education quality now that parents are observing firsthand the curriculum and lessons taught through Zoom. Nathan Harden, *COVID-19’s Surprise Effect: More Parents Are Interested in Home Schooling*, REALCLEAR EDUCATION (May 29, 2020), https://www.realcleareducation.com/articles/2020/05/29/covid-19s_surprise_effect_more_parents_are_interested_in_home_schooling_110425.html [<https://perma.cc/J7XQ-VMCM>].

16. See Tommy Schultz, *National Poll: 40% of Families More Likely to Homeschool After Lockdowns End*, AM. FED’N FOR CHILD. (May 14, 2020),

standards, which allow public and private school students to receive more state funding than homeschool students despite having equal or lower ACT scores, place a significant financial strain upon homeschool students, whose only distinction from their peers is their status as homeschool students.¹⁷

This disparate treatment of homeschool students raises questions concerning equal protection under the Louisiana Constitution of 1974's Article 1, § 3 and the United States Constitution, as well as raising questions about the logic of such a policy. As applied to homeschool students, both the Louisiana and United States constitutions' equal protection provisions preclude the Louisiana Legislature from utilizing laws to discriminatorily require homeschoolers to score higher than other students on the standardized ACT for the same amount of state-provided TOPS funding.¹⁸ Accordingly, the Louisiana Legislature should amend Louisiana Revised Statutes § 17:5029(B) to require equal ACT scores and GPA requirements per TOPS award for public, private, and homeschool students, recognizing the adequacy of homeschool curriculum for TOPS eligibility.

Part I of this Comment will provide background about homeschooling in the United States; available statistics concerning public, private, and homeschool students; information about the passage and intentions of the original Tuition Opportunity Program for Students and the current Taylor Opportunity Program for Students; and the constitutional standards for analyzing the TOPS homeschool criteria's discrepancy. Part II will analyze the problems that Louisiana's homeschool TOPS requirements create and will consider how these requirements contradict state equal protection, federal equal protection, and policy-based logical reasoning provisions and principles. Part III will provide a solution to constitutionally determining homeschoolers' TOPS eligibility and will explain how this new standard reflects a logical policy while not violating equal protection.

I. BACKGROUND—HOMESCHOOLING, TOPS, AND CONSTITUTIONAL STANDARDS

The rich tradition of homeschooling in the United States gave rise to its present-day success as an educational method. With the institution of

<https://www.federationforchildren.org/national-poll-40-of-families-more-likely-to-homeschool-after-lockdowns-end/> [https://perma.cc/95GT-GHA8].

17. See LA. REV. STAT. § 17:5029(B)(3)(b) (2021); see generally *TOPS OPH Annual Award Amounts for 2019-20*, *supra* note 11, at 1.

18. See *infra* Part II.

TOPS in Louisiana, a tension has arisen regarding TOPS's different requirements for public, private, and homeschool students which can be resolved via the standards used to assess whether a legislature has complied with the United States Constitution's Fourteenth Amendment.

A. Homeschooling in General

Homeschooling was a very common educational method in the original thirteen colonies during the Colonial Era and in the United States until the 1900s.¹⁹ After public schools and compulsory-education laws became mainstream in the early 1900s, homeschooling became less commonplace.²⁰ In the last few decades of the 1900s, however, homeschooling had a rebirth, once again rising to national prominence.²¹ Now, it is growing faster than any other method of education in the United States and is expanding worldwide throughout Asia, Africa, and Europe.²²

A mere two years after the 1997 Louisiana Legislature instituted the TOPS program, the United States alone had approximately 850,000 homeschoolers.²³ Homeschooling was expanding at an estimated 11% per year nationally at the turn of the millennium.²⁴ From 1997 to 2012, the total number of homeschool students nationwide more than doubled to approximately 1.8 million students.²⁵ By spring 2019, approximately 2.5 million students—3% to 4% of United States primary and secondary education students—were homeschooled, and that number is still growing.²⁶ This number of homeschool students is roughly equal to the

19. McMullen, *supra* note 2, at 76.

20. *Id.*

21. *Id.*

22. See Brian D. Ray, *Homeschooling: The Research—Research Facts on Homeschooling, Homeschool Fast Facts*, NAT'L HOME EDUC. RSCH. INST. (Jan. 15, 2021), <https://www.nheri.org/research-facts-on-homeschooling/> [<https://perma.cc/8X3T-5832>] [hereinafter Ray, *Homeschooling: The Research*].

23. *TOPS Report: Analysis of the TOPS Program from 2009-2018*, LA. BD. OF REGENTS 3 (2019), <https://regents.la.gov/wp-content/uploads/2019/11/2019-TOPS-Report-October.pdf> [<https://perma.cc/W4SF-YJ5D>]; *Statistics About Nonpublic Education in the United States*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html#homeschl> [<https://perma.cc/JLF8-RFX7>] (last modified Dec. 2, 2016).

24. John Cloud & Jodie Morse, *Home Sweet School*, TIME (Aug. 27, 2001), <http://content.time.com/time/subscriber/article/0,33009,1000631-3,00.html> [<https://perma.cc/M3UC-9R2W>].

25. *Statistics About Nonpublic Education in the United States*, *supra* note 23.

26. Ray, *Homeschooling: The Research*, *supra* note 22; see generally Brian D. Ray, *A Systematic Review of the Empirical Research on Selected Aspects of*

number of students attending parochial schools and also to the number of students attending public charter schools.²⁷ As of October 2020, Louisiana had a total of 33,001 homeschool students, composing 5% of Louisiana's pre-college students.²⁸ This number represents a 76% increase in Louisiana homeschool students over the past ten years.²⁹ In 2019, a total of 13,672 Louisiana students were homeschooled under BESE authorization, one of two methods authorizing homeschooling in Louisiana and the method by which students can be eligible for TOPS.³⁰ That number grew to 15,107 students in 2020.³¹

Several factors have contributed to homeschooling's rebirth, including parents' desires to improve their children's education, remove them from overcrowded classes, create a more structured learning environment, and instill religious values in addition to secular knowledge in their children.³² For instance, according to a 1999 United States Department of Education survey, the parents of nearly 49% of United States homeschool students explained that one of the reasons they homeschooled was to give their children a better education than their children otherwise would have received at a public or private school.³³ The term *homeschooling* includes a range of variations, from modern-day students studying at their homes or attending cooperatives (co-ops) to individuals in history receiving a private education at their homes due to the inaccessibility of public schools; however, the principle of receiving an education at home without attending a public or private school has remained constant.³⁴ In the modern-day TOPS context, homeschooling generally encompasses students who attend school at home or co-ops in lieu of attending accessible public and private schools.³⁵

Homeschooling as a School Choice, 11 J. SCH. CHOICE 604, 604–05 (2017) [hereinafter Ray, *A Systematic Review*].

27. Ray, *A Systematic Review*, *supra* note 26, at 605.

28. Sentell, *supra* note 15.

29. *Id.*

30. *Id.*

31. *Id.*

32. McMullen, *supra* note 2, at 77–78.

33. Stacey Bielick et al., *Homeschooling in the United States: 1999*, NAT'L CTR. FOR EDUC. STATISTICS 11 tbl.4 (2001), <https://nces.ed.gov/pubs2001/2001033.pdf> [<https://perma.cc/L2PP-3HNR>].

34. See generally McMullen, *supra* note 2, at 76–78. A co-op is a collective of homeschool students taking classes at a location together as a group instead of solely by themselves at their respective houses.

35. See generally *id.*

1. Homeschoolers' Academic Performance

Statistics demonstrate that homeschool students consistently excel academically when compared to public and private school students.³⁶ In 2000, right after TOPS's inception, homeschool students' average SAT score was 1100 compared to the general population's average score of 1019.³⁷ Another study demonstrates that today, homeschoolers "typically score 15 to 30 percentile points above public-school students on standardized academic achievement tests" and "above average on the SAT and ACT."³⁸ In 1998, the year the TOPS program first began providing Louisiana college students with financial assistance,³⁹ homeschool students' median scores on the Iowa Test of Basic Skills and the Tests of Achievement and Proficiency ranged from the 62nd to the 91st percentile of public school students, with the main concentration ranging from the 75th to the 85th percentile.⁴⁰ Homeschool students' median scores on these tests ranged from the 53rd to the 89th percentile compared to private school students, with the main concentration ranging from the 65th to the 75th percentile.⁴¹ Homeschool students also demonstrated a higher grade-to-grade score increase compared to public school students, and homeschool students' median scores outscored the public and private school median scores in every grade from K–12 as well as in every subject tested.⁴²

Based on homeschool students' success, Harvard University started intentionally sending admissions officers to homeschool conferences to recruit these students, and Rice and Stanford Universities began admitting

36. See *infra* Section I.A.1.

37. Cloud & Morse, *supra* note 24.

38. Ray, *Homeschooling: The Research*, *supra* note 22.

39. *TOPS Report: Analysis of the TOPS Program from 2009-2018*, *supra* note 23, at 3.

40. Lawrence M. Rudner, *Scholastic Achievement and Demographic Characteristics of Home School Students in 1998*, 7 EDUC. POL'Y ANALYSIS ARCHIVES 1, 16 (1999). The Tests of Achievement and Proficiency evaluates the academic skills high school students utilize to academically develop. *Id.* at 3. The Iowa Test of Basic Skills is a standardized examination that measures students' aptitude and yearly progress to ensure students maintain appropriate progress from kindergarten through the eighth grade. Erin Hasinger, *ITBS Guide*, TESTS.COM, <https://www.tests.com/ITBS-Testing#:~:text=The%20Iowa%20Test%20of%20Basic,specifically%20for%20different%20grade%20levels.&text=Ap%20proximately%2030%20minutes%20are%20given,given%20to%20children%20in%20kindergarten> [<https://perma.cc/PLB7-BEDA>] (last updated 2021).

41. Rudner, *supra* note 40, at 16.

42. *Id.*

homeschool students at a rate “equal to or higher than” the rate at which they admitted public school students around the year 2000.⁴³ In light of the evidence demonstrating homeschool academic qualifications, homeschool students have the same chance of admission to Ivy League universities as public school students.⁴⁴ Also, as reported in a recent NBC News article, homeschool students’ college applications frequently stand out from the rest of the applications, and according to one college dean of admissions, homeschool students often bring innovative thinking skills to their respective universities.⁴⁵

Furthermore, diverse segments of society excel in the homeschooling process.⁴⁶ For instance, approximately 41% of homeschool students are minorities, with African-American homeschool students averaging 23% to 42% higher on standardized academic achievement tests than African-American public school students.⁴⁷ Holistically, homeschool students on average rank in the 65th to 80th academic percentile nationally on standardized tests compared to public school students who on average rank at the 50th percentile.⁴⁸

Finally, a study by University of Minnesota researchers found that homeschool students’ standardized test scores directly correlate with those students’ college retention rates and with their GPAs during their first two semesters of college.⁴⁹ On average, homeschool students had higher college GPAs after their freshman year of college compared to a societal cross section of public and private school students.⁵⁰ Homeschool students, on average, also had higher high school GPAs than those students.⁵¹ Accordingly, statistics spanning decades from TOPS’s

43. Cloud & Morse, *supra* note 24.

44. Tara Kunesh, *Statistics on Public School vs. Homeschool*, LOVE TO KNOW, https://home-school.lovetoknow.com/Statistics_on_Public_School_Vs_Homeschooling [<https://perma.cc/ES85-4UHD>] (last visited Sept. 30, 2020).

45. See Allison Slater Tate, *Colleges Welcome Growing Number of Homeschooled Students*, NBC NEWS (Feb. 17, 2016, 12:37 PM ET), <https://www.nbcnews.com/feature/college-game-plan/colleges-welcome-growing-number-homeschooled-students-n520126> [<https://perma.cc/CEF3-9YDB>].

46. See generally Ray, *Homeschooling: The Research*, *supra* note 22.

47. See *id.*

48. Brian D. Ray, *Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study*, 8 ACAD. LEADERSHIP: ONLINE J. 1, 2 (2010).

49. Martin C. Yu, Paul R. Sackett & Nathan R. Kuncel, *Predicting College Performance of Homeschooled Versus Traditional Students*, 35 EDUC. MEASUREMENT: ISSUES & PRAC. 31, 37–38 (2016).

50. *Id.* at 33, 34 tbls.1, 2 & 3.

51. *Id.* at 33, 34 tbls.1, 2 & 3.

inception to the present day indicate that homeschool students on average score higher on standardized tests and have higher GPAs than cross sections of public and private school students.

2. *The Homeschool Stigma*

Despite the evidence that homeschool students on average consistently outperform their public and private school counterparts, the homeschool minority frequently faces discrimination from society, ranging from a general dislike or perception of homeschooling's inferiority to legal action taken to restrict homeschooling.⁵² For instance, the National Education Association (NEA), which has been called the most powerful and largest union in the United States, repeatedly attempts to influence legislatures across the country to regulate homeschooling in their jurisdictions.⁵³ In fact, the NEA's own platform explicitly states that it views homeschooling as incapable of "provid[ing] the student with a comprehensive education experience."⁵⁴ The NEA has translated its views into action by officially advocating for homeschooling's abolition each year since 1988.⁵⁵

Similarly, the legal community frequently endeavors to place more stringent restrictions on homeschooling through advocacy in various academic journals.⁵⁶ For example, a recent challenge to homeschooling came from Harvard Law Professor Elizabeth Bartholet in which she argued for a presumptive ban on homeschooling.⁵⁷ According to Professor Bartholet, the ban is necessary because homeschooling stunts both students' academic development and their ability to contribute to society's

52. See generally GarySixNoine, *People Who Homeschool Their Kids Are Ridiculous*, REDDIT (Oct. 17, 2018), https://www.reddit.com/r/unpopular_opinion/comments/9oxwaw/people_who_homeschool_their_kids_are_ridiculous/ [<https://perma.cc/JZ57-ZGH2>]; Dana Goldstein, *Liberals, Don't Homeschool Your Kids*, SLATE (Feb. 16, 2012, 7:10 AM), <https://slate.com/human-interest/2012/02/homeschooling-and-unschooling-among-liberals-and-progressives.html> [<https://perma.cc/2GEY-EPK4>]; Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 BYU EDUC. & L. J. 59, 60, 60 n.10 (2017).

53. Raley, *supra* note 52, at 60.

54. *Id.* at 60 n.9.

55. *Id.* at 60 n.10.

56. *Id.* at 60–61, 60 n.12.

57. Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 57 (2020).

civic existence.⁵⁸ Relatedly, homeschool students face a stigma throughout the media and society as well.⁵⁹

B. Louisiana's TOPS Program

In 1989, the Louisiana Legislature passed the Louisiana College Tuition Plan to provide financial assistance to Louisiana students.⁶⁰ The Louisiana Legislature subsequently created the Tuition Opportunity Program for Students during the 1997 legislative session, later renaming it the Taylor Opportunity Program for Students—the modern-day TOPS.⁶¹ TOPS began providing Louisiana college students with financial assistance at the start of the 1998 academic year.⁶² The program currently applies not only to Louisiana public universities but also to technical and community colleges, some proprietary schools, and private colleges in Louisiana.⁶³ Since its inception, the legislature has amended the TOPS program numerous times, including reorganizing and recodifying the

58. *Id.* at 4. *Harvard Magazine* subsequently published an article favorably discussing Professor Bartholet's paper and its assertion that homeschooling promotes academic and social inferiority in homeschool students. The illustration at the top of the article depicts a homeschool child inside a house with barred windows looking out at the children who are free to play outside. Four books—the Bible, Arithmetic, Writing, and Reading—form one of the “prison” walls. Erin O'Donnell, *The Risks of Homeschooling*, HARV. MAG. (June 2020), <https://harvardmagazine.com/2020/05/right-now-risks-homeschooling> [https://perma.cc/62MH-VWP2]. Ironically, *Harvard Magazine* accidentally misspelled *arithmetic* when it initially released the article before quickly correcting the spelling error. See Virginia Kruta, *Harvard Smart People Misspell “Arithmetic” While Advocating “Ban” on Homeschooling*, DAILY CALLER (Apr. 19, 2020, 12:42 PM ET), <https://dailycaller.com/2020/04/19/harvard-magazine-misspells-arithmetic-ban-homeschooling/> [https://perma.cc/LY4X-E47Q].

59. *Mean Girls—Homeschooled*, YOUTUBE (Oct. 30, 2010), <https://www.youtube.com/watch?v=scxdTXrfni0> [https://perma.cc/N8HY-H2RP] (showing a scene from the movie *Mean Girls* depicting homeschoolers as socially awkward and referring to them as “weirdly religious” and “freaks”); see Goldstein, *supra* note 52 (arguing against homeschooling by asserting it negatively affects homeschool students' social views and hinders students remaining in public schools).

60. Leigh Guidry, *TOPS Is Turning 20; What Now?*, DAILY ADVERTISER (May 30, 2017), <https://www.theadvertiser.com/story/news/local/education/2017/05/30/tops-turning-20-what-now/348809001/> [https://perma.cc/M9KB-ZFS6].

61. *TOPS Report: Analysis of the TOPS Program from 2009-2018*, *supra* note 23, at 3.

62. *Id.*

63. Guidry, *supra* note 60.

program in Louisiana Revised Statutes §§ 17:5001–5122 in 2015 to clarify its requirements.⁶⁴

Despite the changes, the program has always served the same commendable purpose of providing monetary assistance to students.⁶⁵ The program has helped hundreds of thousands of students attend college over the years.⁶⁶ TOPS aid eligibility is not contingent on household income but rather hinges upon students' academic performance.⁶⁷ Originally, the minimum academic standard to receive TOPS required students to possess a 2.5 GPA, have an ACT score equal to or above the ACT's national average, and take certain classes.⁶⁸ According to “the father of TOPS” Charles McDonald—the primary author of the 1997 TOPS bill, former chair of the Louisiana House Education Committee, and current Louisiana Board of Regents member—one of the Louisiana Legislature's primary desires was “that everybody participate” in the program and that students “pulling the grades deserved the scholarship.”⁶⁹ Furthermore, McDonald stated, “The ACT is the only criteria or standard we can compare across the board.”⁷⁰ In addition to initial high school GPA, ACT, and core curriculum requirements,⁷¹ TOPS eligibility requires recipients to be full-time college students, earn a minimum of 24 credit hours each academic year, and meet a cumulative TOPS GPA requirement during college.⁷² Moreover, TOPS has additional requirements that apply to all students, including citizenship and residency requirements.⁷³

TOPS provides four types of awards to students—TOPS-Tech, Opportunity, Performance, and Honors—with the higher awards requiring higher high school GPAs and ACT scores.⁷⁴ Regarding the ACT score

64. *TOPS Report: Analysis of the TOPS Program from 2009–2018*, *supra* note 23, at 5.

65. *Id.* at 3.

66. Guidry, *supra* note 60.

67. *Id.*

68. *Id.* (Examples of the required courses include physics and chemistry.).

69. *Id.*

70. *Id.*

71. Louisiana Revised Statutes § 17:5025 requires students to take certain classes to be eligible for TOPS, including broad requirements such as four units of social studies as well as specific requirements including English I, English II, and Biology I. LA. REV. STAT. § 17:5025 (2021).

72. *TOPS Report: Analysis of the TOPS Program from 2009–2018*, *supra* note 23, at 9.

73. LA. REV. STAT. § 17:5022 (2021); *Id.* § 17:5023 (Nearly all students must have resided in Louisiana for the two years prior to their high school graduation.).

74. *TOPS Report: Analysis of the TOPS Program from 2009–2018*, *supra* note 23, at 8–9.

requirement, the following specific requirements apply for most public and private school students. The primary method students use to receive the TOPS-Tech Award requires a composite score of 17 or higher on the ACT or an equivalent score on the SAT.⁷⁵ The Opportunity Award requires a composite ACT score “at least equal to or higher than the state’s average composite score, truncated to a whole number, reported for the prior year but never less than twenty or an equivalent concordant value” for the SAT.⁷⁶ In 2021, the required score was a 20.⁷⁷ The Performance Award requires a minimum ACT composite score of 23 or a comparable SAT score.⁷⁸ Finally, the Honors Award requires a minimum ACT composite score of 27 or a comparable SAT score.⁷⁹

The Louisiana Legislature created more stringent requirements for Louisiana homeschool students to receive TOPS funding compared to those of Louisiana public and private school students. Specifically, Louisiana Revised Statutes § 17:5029(B)(3) requires homeschool students to earn at least two points higher on the ACT for TOPS-Tech and Opportunity Awards and at least one point higher on the ACT for the Performance and Honors Awards.⁸⁰ Thus, in 2020, homeschool students seeking to qualify for the Opportunity Award needed to earn a 22 on the ACT instead of a 20 like their public or private school counterparts, a 24 instead of a 23 for the Performance Award, and a 28 instead of a 27 for the Honors Award.⁸¹

Regarding the high school GPA requirement, the Louisiana Revised Statutes’ standards for recent graduates currently require a 2.5 minimum cumulative GPA for the TOPS-Tech and Opportunity awards⁸² and a 3.0 minimum cumulative GPA for the Performance and Honors awards.⁸³ By contrast, the legislature does not consider homeschool GPAs or core

75. LA. REV. STAT. § 17:5024(B)(1)(d) (2021) (The other method utilizes the ACT WorkKeys system.).

76. *Id.* § 17:5024(B)(1)(a).

77. *The TOPS Opportunity Award, supra* note 13.

78. LA. REV. STAT. § 17:5024(B)(1)(b) (2021).

79. *Id.* § 17:5024(B)(1)(c).

80. *Id.* § 17:5029(B)(3)(b)(ii)–(iii).

81. *The TOPS Opportunity Award, supra* note 13; *The TOPS Performance Award*, LA. OFF. OF STUDENT FIN. ASSISTANCE, <https://mylosfa.la.gov/students-parents/scholarships-grants/tops/the-tops-performance-award/> [<https://perma.cc/5L4R-MP9A>] (last visited Nov. 15, 2020); *The TOPS Honors Award*, LA. OFF. OF STUDENT FIN. ASSISTANCE, <https://mylosfa.la.gov/students-parents/scholarships-grants/tops/the-tops-honors-award/> [<https://perma.cc/532P-ZGV4>] (last visited Nov. 15, 2020).

82. LA. REV. STAT. § 17:5024(A)(1)–(2) (2021).

83. *Id.* § 17:5024(A)(2)(c)(ii)–(iii).

curriculum.⁸⁴ Since many students—regardless of their public, private, or homeschool background—struggle on the ACT and other standardized tests in spite of their specific pre-test preparation, the requirement for a GPA with a lower ACT score is actually easier for many students to achieve as opposed to a higher ACT score with no GPA.⁸⁵

This higher ACT score requirement causes tangible, harmful financial repercussions for homeschool students and their families.⁸⁶ Each year, numerous homeschool students across Louisiana either do not receive TOPS at all or receive a lower award than they would have otherwise received if they were under the public and private school GPA and ACT requirements.⁸⁷ For example, two recent homeschool graduates each scored a 21 on the ACT—one point higher than what public and private school students must score for the TOPS Opportunity Award—and had qualifying high school GPAs according to public and private school standards, yet neither student received any TOPS aid because § 17:5029(B)(3) required the students to score a 22 to be eligible for the TOPS Opportunity Award.⁸⁸ Another recent homeschool graduate scored a 23 on the ACT—the public and private school requirement for the Performance Award—but was denied the Performance Award and its \$400 yearly stipend because as a homeschooler the student needed to score a 24.⁸⁹ Over the last several years, an estimated 15 to 20 students from one Baton Rouge co-op alone have not received TOPS awards that they would

84. *Id.* § 17:5029(B).

85. See Christine Sarikas, *Are You Smart but Scoring Low on the SAT/ACT? What To Do*, PREPSCHOLAR (Nov. 10, 2015), <https://blog.prepscholar.com/smart-but-scoring-low-on-sat-act-what-to-do> [<https://perma.cc/6MMF-TCK2>] (“It’s possible, and even fairly common, for [students] to put in a significant amount of time studying for a standardized test and still not get the score [they] want.”) (bold type removed); *Intensive ACT Test Prep During Class Leads to Lower Scores; Students Don’t Connect Grades, Study Habits to Exam Scores*, UCHICAGO NEWS (May 27, 2008), <https://news.uchicago.edu/story/intensive-act-test-prep-during-class-leads-lower-scores> [<https://perma.cc/6X9T-LZPM>]; *3 Reasons Students Score Low On The ACT Test And What To Do About It*, TEST PREP TOOLKIT, <https://www.testpreptoolkit.com/act-test/3-reasons-students-fail-their-act-test-and-how-to-resolve-them> [<https://perma.cc/TV3V-4ZVX>] (last visited Nov. 10, 2020) (“It is common for many students to get a low score on a standardized test, although they have studied enough for it.”).

86. Telephone interview with Duane Drummond, homeschool parent (Nov. 11, 2020).

87. See *id.*

88. *Id.*; telephone interview with Virginia Conner, homeschool parent (Nov. 11, 2020); see LA. REV. STAT. § 17:5029(B)(3) (2021).

89. Telephone interview with Duane Drummond, *supra* note 86.

have received under equal GPA and ACT standards, resulting in the wholesale exclusion from the scholarship in some cases and a reduced award compared to their public and private school peers in others.⁹⁰ Extrapolated across all homeschool graduates throughout the entire state of Louisiana, the number of homeschool students negatively affected by TOPS's differing standards every year since the program's inception in 1997 is significant and will continue to increase each year unless the Louisiana Legislature adjusts TOPS's standards.⁹¹

The Louisiana Legislature's purpose in establishing academic qualifications—namely GPA, core unit, and ACT requirements—for students to receive TOPS awards was to preserve state funds from being unnecessarily disbursed to academically unqualified students.⁹² At the time of TOPS's enactment, the legislature did not consider homeschool GPAs to be “credible” since homeschool parents—as teachers—grade their own children's work.⁹³ Thus, to offset the alleged lack of legitimate grades and to address a fear that homeschool GPAs would create unreasonable and unfair competition against public and private school students, the legislature raised the ACT requirement for homeschool students to qualify for any given award and eliminated the GPA requirement.⁹⁴ The Louisiana Legislature chose to rely upon the ACT since the ACT is a standardized test with results that depend solely upon a student's academic prowess rather than on perceived inappropriate assistance or biased grade adjustments.⁹⁵ Accordingly, the legislature viewed a homeschool student with a higher ACT score to be academically qualified in the same way as a public or private school student with a lower ACT score.⁹⁶

Regarding the core unit requirement, the legislature instituted this curricular requirement to ensure that students earning TOPS were prepared for college by already succeeding in academically rigorous courses while in high school.⁹⁷ Because the legislature distrusted homeschool

90. *Id.*

91. *See id.*

92. The legislative history concerning TOPS's GPA, ACT, and core unit requirements is not generally available. However, Charles McDonald, former chair of the Louisiana House Education Committee and the primary author of the original TOPS legislation, provided the information via interview. McDonald, *supra* note 5.

93. *Id.*

94. *Id.*

95. *Id.*

96. *See id.*

97. *Id.*

coursework's academic rigor, the state required homeschool students to earn higher ACT scores in lieu of requiring specific core units.⁹⁸ However, BESE, under Louisiana Revised Statutes § 17:236(A), only certifies home study programs—a requirement for homeschool students to receive TOPS—when BESE determines that a particular homeschool “offers a sustained curriculum of a quality at least equal to that offered by public schools at the same grade level,”⁹⁹ creating a stark legislative contrast between the TOPS program and § 17:236.

Based upon their state-approved curriculum, homeschool students earn accurate GPAs for their high school careers.¹⁰⁰ Although grading processes differ per homeschool, homeschool students generally earn their GPAs based upon objective numerical grading scales that convert their letter grades derived from actual quiz and test scores to a reliable GPA scale.¹⁰¹ The letter grades themselves often result from a grading system that objectively assigns a certain value of points for each answer with wrong answers automatically subtracting the missed points from the total score of 100, thereby removing subjectivity from the grading process.¹⁰² Essentially, this type of system focuses on the actual objective numbers based on a particular student's performance rather than on a teacher's subjective views.¹⁰³

C. Constitutional Standards for Analyzing Legislation

Constitutional analytical standards provide frameworks by which courts analyze legislation to determine whether a discriminatory law actually violates a state constitution or the federal constitution. Discriminatory state legislation requires an equal protection analysis under both state and federal constitutional provisions to determine the legislation's constitutionality according to equal protection principles. The Fourteenth Amendment of the United States Constitution explicitly

98. *Id.*

99. LA. REV. STAT. §§ 17:236(A), 17:5029(B)(1) (2021).

100. See *How to Calculate GPA for your Homeschooler*, THE WRITE FOUND. (2021), [https://thewritefoundation.org/articles/how-to-calculate-gpa/#:~:text=Y ou%20should%20award%20either%201,This%20is%20the%20yearly%20GPA \[https://perma.cc/QB7K-PT77\]](https://thewritefoundation.org/articles/how-to-calculate-gpa/#:~:text=Y ou%20should%20award%20either%201,This%20is%20the%20yearly%20GPA [https://perma.cc/QB7K-PT77]).

101. See *id.* (describing one calculation method for this process).

102. See *Administering/Grading*, ABEKA (2021), [https://athome.abeka.com/help/gradingfaqs.aspx \[https://perma.cc/FN6J-TZGZ\]](https://athome.abeka.com/help/gradingfaqs.aspx [https://perma.cc/FN6J-TZGZ]).

103. See generally *id.*; *How to Calculate GPA for your Homeschooler*, *supra* note 100. For a further discussion of and resolution regarding homeschool GPA reliability and legislative consistency, see *infra* Section II.C.

provides protection against state violations of equal protection and due process.¹⁰⁴ The Fifth Amendment explicitly provides protection against federal due process violations and implicitly protects against equal protection violations.¹⁰⁵ Accordingly, the Fifth Amendment equal protection analysis follows the same pattern as the Fourteenth Amendment equal protection analysis.¹⁰⁶ Overall, the equal protection analysis utilizes three analytical methods to determine the validity of discriminatory legislation—strict scrutiny, intermediate scrutiny, and rational basis scrutiny.¹⁰⁷

Strict scrutiny is the standard protecting fundamental rights, and it is also the standard used to evaluate laws promoting governmental racial discrimination and discrimination against other suspect classifications such as religion or national origin.¹⁰⁸ To pass strict scrutiny, a law must be narrowly tailored while furthering a compelling government interest.¹⁰⁹ By contrast, intermediate scrutiny is the middle level of scrutiny that measures whether the law or governmental conduct closely relates to an important governmental interest.¹¹⁰ For example, gender discrimination is analyzed under the intermediate scrutiny standard.¹¹¹ Rational basis, also known as reasonable relation, is the lowest level of scrutiny and requires that the law have a rational basis or be reasonably or rationally related to the state's legitimate interest in order for the law to be valid.¹¹² The rational basis standard serves as the catch-all for everything not included under strict or intermediate scrutiny.¹¹³

Yet these three standards are inherently malleable, shifting in their application from case to case rather than automatically applying in the exact same fashion for each case. For instance, in *Eisenstadt v. Baird*, a decision that has been cited by courts in over one thousand opinions and

104. U.S. CONST. amend. XIV.

105. U.S. CONST. amend. V; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995).

106. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

107. Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231, 1241 (1998).

108. Raley, *supra* note 52, at 61; *Adarand Constructors*, 515 U.S. at 227; *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> [<https://perma.cc/K3GY-3E7U>] (last visited Nov. 10, 2020).

109. *Adarand Constructors*, 515 U.S. at 227.

110. *Craig v. Boren*, 429 U.S. 190, 199–200 (1976).

111. *Id.* at 197.

112. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016).

113. *See id.*

has been cited by the highest courts of every United States jurisdiction,¹¹⁴ the United States Supreme Court utilized a “more searching” approach to rational basis concerning an equal protection question.¹¹⁵ This approach is known as “rational basis with bite” and permits courts to still strike down laws that reasonably relate to a legislature’s legitimate interest, in contrast to ordinary rational basis review.¹¹⁶ In *Eisenstadt*, the Court stated that it applied the normal rational basis standard in its analysis, yet the Court actually imposed a much stricter application of the standard than in traditional rational basis cases.¹¹⁷ Under this more searching methodology, the Court found a state law restricting the distribution of contraception unconstitutional in spite of the state’s potential arguments that the law had a rational intent to protect societal health and morals.¹¹⁸ In fact, the Court disregarded what it considered to be the law’s “superficial” purposes and utilized this more searching scrutiny to determine what it found to be the statute’s real purpose and declare it unconstitutional.¹¹⁹ In doing so, the Court enhanced future courts’ flexibility to strike down seemingly rational laws.¹²⁰

Rather than utilizing the more stringent strict scrutiny standard traditionally used in race-discrimination cases, the Supreme Court similarly employed a more searching rational basis review in *Bolling v. Sharpe*, where it found that there was not a rational basis to permit racial segregation in Washington, D.C., schools.¹²¹ In fact, today the Supreme

114. Every United States circuit court of appeals, every state’s highest court, and the highest courts of Puerto Rico and Washington, D.C. have cited *Eisenstadt*. See Roy Lucas, *New Historical Insights on the Curious Case of Baird v. Eisenstadt*, 9 ROGER WILLIAMS U. L. REV. 9, 43, 43 nn.143–44 (2003).

115. NOAH FELDMAN & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 519 (Saul Levmore et al. eds., 20th ed. 2019).

116. *Rational Basis Test with “Bite,”* EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rationalbasiswbite.htm> [https://perma.cc/3XKN-QZHX] (last visited Sept. 28, 2020).

117. See *Eisenstadt v. Baird*, 405 U.S. 438, 442–43, 447 n.7, 447–53 (1972).

118. *Id.* at 442, 454–55.

119. *Id.* at 452, 455.

120. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996).

121. *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954) (applying the standard in a similar fashion as equal protection analysis to the Fifth Amendment’s Due Process Clause while additionally indicating that equal protection principles are implicit within the amendment). Some scholars believe *Bolling* stands for strict scrutiny rather than rational basis review. Gregory Dolin, *Resolving the Original Sin of Bolling v. Sharpe*, 44 SETON HALL L. REV. 749, 760 (2014). However, *Bolling*’s use of the phrase “reasonably related” in regard to the lack of any

Court continues to utilize the rational basis with bite standard, as displayed in *Bolling*, when a plaintiff evoking the Court's sympathy possesses a particularly strong interest against state discrimination.¹²² In these cases, the Court weighs the substantial harm individual plaintiffs will face against a state's interest in passing the law.¹²³ Hence, courts do not require the implication of fundamental rights or suspect classes to invoke the elevated rational basis inquiry.¹²⁴ Furthermore, in *Romer v. Evans*, a case concerning alleged discrimination against homosexual individuals as a "class of persons" and a singled-out "named group" facing a "special disability upon" them,¹²⁵ the Court also used the rational basis test in such a heightened form that the methodology, according to Justice Scalia's dissent, found "no support in law or logic."¹²⁶ The law in question was a state constitutional amendment that prohibited Colorado's government from using official state action to grant homosexuality a special protected status in discrimination cases.¹²⁷ The majority in *Romer* found no legitimate state purpose—rational basis's second prong—to impose Colorado's "classification of persons" on the distinct body, homosexuals, that the majority claimed faced discrimination via the amendment.¹²⁸ According to the Court, even if Colorado had a legitimate purpose, its means were too narrow to pass constitutional muster because the amendment at issue singled out individuals based upon a "single trait" before precluding them from equal protection.¹²⁹ The Court's analysis further buttressed the power of rational basis with bite.

Finally, in *Carey v. Population Services International*, the Supreme Court allegedly applied a strict scrutiny standard of review in affirming the lower court's holding that a New York law barring the sale or distribution of contraceptives to minors under 16 years old was

appropriate governmental goal actually directly connects its analysis to rational basis review since rational basis review consistently utilizes that language or a similar phrase, such as "rationally related," throughout its analysis. *Bolling*, 347 U.S. at 500; see *Levels of Scrutiny Under the Equal Protection Clause*, *supra* note 108. This "reasonable relation" language harkens to the ratcheted-up rational basis review the Court sometimes uses, and regardless of the standard of scrutiny, the language shows that the lack of a reasonable relation to appropriate governmental objectives in *Bolling* was unconstitutional. *Bolling*, 347 U.S. at 500.

122. *Rational Basis Test with "Bite," supra* note 116.

123. *Id.*

124. *Id.*

125. *Romer*, 517 U.S. at 631–33.

126. *Id.* at 637, 640 (Scalia, J., dissenting).

127. *Id.* at 623–24 (majority opinion).

128. *Id.* at 635.

129. *Id.* at 621.

unconstitutional.¹³⁰ In practice, however, the Court's strict scrutiny review resembled its rational basis analysis in *Eisenstadt*.¹³¹ Consequently, *Carey* again represented the repeated confluence among the standards and the strength that courts can attribute to rational basis scrutiny.

Hence, the case law reveals that rational basis can be very searching and has teeth to tear down laws in spite of being the lowest level of scrutiny, all while encompassing a broad and changeable spectrum of constitutional claims. The cases also indicate that the use of the standards themselves by courts is exceedingly flexible. This searching flexibility permits courts to more frequently find that laws violate rational basis via the rational basis with bite method than was traditionally understood, including in the homeschooling context.

II. ARGUMENTS AGAINST HOMESCHOOL DISCRIMINATION

The constitutional analytical frameworks apply specifically to the question of whether Louisiana Revised Statutes § 17:5029(B), which requires homeschool students to score higher on the ACT than public and private school students, violates the Constitution. A logical inquiry about the discrimination's validity illuminates whether or not TOPS's homeschool requirements are appropriate from a policy perspective.

A. State Equal Protection Analysis

All states must provide the minimum protection required by the United States Constitution; however, states can provide additional protection beyond the Constitution's standards.¹³² Like the federal Constitution, under the Louisiana Constitution "[n]o person shall be denied the equal protection of the laws."¹³³ Yet Louisiana did not intend "solely to mimic the federal Equal Protection clause" with this provision but instead desired to provide stronger equal protection guarantees.¹³⁴ Therefore, Louisiana courts interpret the state equal protection guarantee more broadly than they

130. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681–82, 686 (1977).

131. See Patricia A. Olah, *The "Squeal" Rule and a Minor's Right to Privacy*, 12 HOFSTRA L. REV. 497, 510–11 (1984).

132. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977).

133. LA. CONST. art. 1, § 3.

134. John Devlin, *Louisiana Constitutional Law*, 54 LA. L. REV. 683, 716, 716 n.135 (1994).

interpret the United States Constitution's equal protection guarantee.¹³⁵ They do so by relying upon the Louisiana Supreme Court case *Sibley v. Board of Supervisors of Louisiana State University*, in which the court rejected the federal methods of scrutiny and adopted its own somewhat similar interpretive frameworks.¹³⁶ The Louisiana Supreme Court in *Sibley* extended the rational basis standard used in education cases to prohibit more state action and thereby provide more extensive constitutional protections to individuals than the United States Constitution's rational basis standard provides.¹³⁷

According to *Sibley*, Louisiana recognizes three types of classes with decreasing levels of protection when dealing with equal protection questions.¹³⁸ First, laws classifying individuals based upon religion or race are "repudiated completely."¹³⁹ Secondly, laws classifying people based on "birth, age, sex, culture, physical condition, or political ideas or affiliations" violate state equal protection "unless the state or other advocate of the classification shows that the classification has a reasonable basis."¹⁴⁰ Lastly, laws classifying people "on any other basis . . . [are] rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest."¹⁴¹ Because "any other basis" qualifies as a way to create legal classifications in Louisiana, a law delineating individuals solely on the basis of being a homeschooler, as done in § 17:5029(B), creates a classification under *Sibley*'s third tier.¹⁴² Louisiana homeschool students are disadvantaged by § 17:5029(B).¹⁴³ Therefore, under Louisiana law, this homeschool classification must face evaluation to see if it "suitably further[s] any appropriate state interest" that would then make it valid.¹⁴⁴

Successful *Sibley* challenges under the third standard thus depend upon showing that the state interest was inappropriate or that the law in

135. See *Sibley v. Bd. of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1104, 1107–08 (La. 1985); Michael Lester Berry Jr., *Equal Protection - The Louisiana Experience in Departing from Generally Accepted Federal Analysis*, 49 LA. L. REV. 903, 914 (1989).

136. See *Sibley*, 477 So. 2d at 1104, 1107–08.

137. Berry, *supra* note 135, at 914; see *supra* Section I.C.

138. *Sibley*, 477 So. 2d at 1107.

139. *Id.*

140. *Id.*

141. *Id.* at 1107–08

142. See *id.*; LA. REV. STAT. § 17:5029(B) (2021); see *Oliver v. Magnolia Clinic*, 85 So. 3d 39, 44 (La. 2012).

143. See *supra* Section I.B.

144. See *Sibley*, 477 So. 2d at 1107–08; see *Oliver*, 85 So. 3d at 44.

question fails to suitably further the state's interest.¹⁴⁵ Hence, the standard permits a balancing between state and individual interests for members of the discriminated class to see which are stronger.¹⁴⁶ *Sibley*'s holding does not permit a law to stand solely because the Louisiana Legislature reasonably believed that the law would suitably further an appropriate state interest when it passed the law; instead, the law must actually suitably further that interest after analyzing the law's effect, such as in relation to data.¹⁴⁷

Under *Sibley*, § 17:5029 does not suitably further the state's appropriate interest after analyzing the effect based on the data because the program disregards valid homeschool GPAs and unnecessarily requires higher ACT scores for homeschool students. Accordingly, the statute violates *Sibley*'s third tier of equal protection analysis. To illustrate, the TOPS legislation makes homeschool students a disadvantaged class by requiring this particular group of students to score higher on the ACT than what all Louisiana public and private school students must score for the same amount of state aid.¹⁴⁸ Homeschool students "typically score 15 to 30 percentile points above public-school students on standardized academic achievement tests" and "above average on the . . . ACT,"¹⁴⁹ earn SAT scores that on average are higher than both public and private school

145. Berry, *supra* note 135, at 915.

146. Allen v. Burrow, 505 So. 2d 880, 887 (La. Ct. App. 1987).

147. See Berry, *supra* note 135, at 918; *Sibley*, 477 So. 2d at 1107. Additionally, based on TOPS's targeted focus on only awarding funds to qualified students, a strong state interest in aiding qualified students with the furtherance of their higher education, and the importance in not discriminating against qualified homeschool students, TOPS's homeschool qualification disparities also fail to suitably further any other appropriate state interest. Cf. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (explaining that the discriminatory public education measures in question were "not reasonably related to any proper governmental objective" (emphasis added)).

148. LA. REV. STAT. § 17:5029(B)(3)(b) (2021).

149. Ray, *Homeschooling: The Research*, *supra* note 22. Louisiana does not provide statistics regarding homeschool students' academic success or track their academic progress unlike its studies of public school students, rendering it necessary to extrapolate Louisiana students' success from national studies. See generally *New School Performance Measure Tracks Student Progress in Louisiana*, DEP'T OF EDUC.: LA. BELIEVES (Aug. 29, 2018), <https://www.louisianabelieves.com/newsroom/news-releases/2018/08/29/new-school-performance-measure-tracks-student-progress-in-louisiana> [<https://perma.cc/EWW4-LVE4>]. Importantly, Louisiana's choice to not provide data about these students should not then insulate the legislature's homeschool provisions from constitutional equal protection evaluation due to a lack of Louisiana-centric data.

students' SAT scores,¹⁵⁰ and earn on average higher high school GPAs as well as higher college freshman GPAs than public and private school students.¹⁵¹ Thus, requiring homeschool students to score higher on the ACT or SAT than public and private school students for the same amount of TOPS money does not suitably further the state interest of distributing state money to only qualified students.¹⁵² Instead, homeschool students that meet the public and private school GPA and ACT standards also sufficiently comply with the legislature's intended level of academic readiness when it established the public and private school standards.¹⁵³ By applying higher requirements that prevent numerous qualified homeschool students from receiving TOPS aid, Louisiana Revised Statutes § 17:5029(B) fails to substantially further the state's true interest in aiding all qualified students.¹⁵⁴

Additionally, a requirement precluding homeschool students from submitting GPAs does not suitably further the state interest as required under *Sibley* because homeschool GPAs and standardized test scores already adequately screen which students deserve specific TOPS awards. The GPAs and scores are adequate based upon homeschool students' academic qualifications expressed in the data detailing homeschool students' high GPAs and standardized test scores.¹⁵⁵ TOPS's double standard disadvantages numerous qualified homeschool students because of a legislative lack of trust in the very educational process and grading system—homeschooling—that fostered these students' academic success.¹⁵⁶ The Louisiana Legislature's discrimination thereby fails to actually protect state funds in a manner that outweighs the financial cost

150. Yu, Sackett & Kuncel, *supra* note 49, at 33, 34 tbls.1, 2 & 3.

151. *Id.*

152. *See generally* McDonald, *supra* note 5.

153. *See supra* Section II.A.

154. It is possible that the above data samples may not be from completely representative cross-sections of homeschool students by oversampling higher-scoring homeschool students. If so, the oversampling would derive from the fact that it is possible that the higher-scoring homeschool students take standardized examinations more frequently. *See generally* McMullen, *supra* note 2, at 85. Nevertheless, since standardized examinations are necessary to participate in TOPS for college, as well as college generally, the homeschool students with these standardized test scores are the ones who already are academically qualified to receive TOPS money and thus, would not inappropriately receive state money. *See generally* LA. REV. STAT. § 17:5029(B) (2021).

155. *See generally* Ray, *Homeschooling: The Research*, *supra* note 22; *see generally* Yu, Sackett & Kuncel, *supra* note 49, 33, 34 tbls.1, 2 & 3.

156. *See generally* McDonald, *supra* note 5; *see supra* Section II.A.

to homeschool students as a result of Louisiana's heightened homeschool requirements.¹⁵⁷

Accordingly, the requirement that homeschool students score higher on the ACT and SAT violates Louisiana equal protection under the *Sibley* test by not suitably furthering the state's appropriate interest in only granting TOPS awards to qualified students. The Louisiana Legislature cannot constitutionally discriminate against Louisiana homeschool students concerning TOPS awards by not accepting their GPAs and by requiring them to score higher on the ACT than other Louisiana high school students when the data shows that homeschool GPAs and curriculum are acceptable determinants of qualified scholarship candidates.

B. Federal Equal Protection Analysis

Multiple scholars have advocated that discrimination against homeschool students should face elevated forms of constitutional scrutiny.¹⁵⁸ In fact, the same transcendent principle forbidding discrimination against societal groups that the United States Supreme Court expanded in *Romer* analogically applies to discrimination against homeschool students, especially since *Romer* validated a more rigorous application of equal protection standards to a broad spectrum of unique groups in society rather than to only a few.¹⁵⁹ Homeschool students are a distinct minority group, composing 3% to 4% of United States primary and secondary education students as of spring 2019, compared to the much

157. See generally *TOPS OPH Annual Award Amounts for 2019-20*, *supra* note 11, at 1; see generally *TOPS*, *supra* note 11.

158. E.g., Raley, *supra* note 52, at 63 (advocating for strict scrutiny by stating that “homeschooling should . . . be recognized as a ‘deeply rooted’ fundamental right”); Linda Wang, Comment, *Who Knows Best? The Appropriate Level of Judicial Scrutiny on Compulsory Education Laws Regarding Home Schooling*, 25 J. CIV. RTS. & ECON. DEV. 413, 447–48 (2011) (advocating for strict scrutiny in certain situations).

159. See *Romer v. Evans*, 517 U.S. 620, 623–24 (1996). The Court held the following: “One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’ Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution.” *Id.* at 623 (citation omitted) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)); see *supra* Section I.C.; see *infra* Section II.B.

larger population of public and private school students.¹⁶⁰ As a minority group, homeschool students face considerable societal discrimination, from unjustified calls to abolish homeschooling to unfounded assertions that homeschooling stunts homeschoolers' academic and social development.¹⁶¹

Since courts are usually hesitant to expand scrutiny protection to additional groups via the creation of new protected classes, courts should at a minimum apply the rational basis with bite standard to discrimination based on an individual's status as a homeschool student. The rational basis with bite standard would permit courts to carefully analyze whether discriminatory homeschool legislation rationally relates to a state's legitimate interest in passing the law.¹⁶² Homeschool students, with their own specific statutory section detailing their differing TOPS requirements from other types of students, are a specific singled-out "named group" per *Romer* in Louisiana Revised Statutes § 17:5029(B).¹⁶³ The statute also imposes a "special disability" per *Romer* on homeschool students because the statute requires homeschool students to score one to two points higher on the ACT compared to public and private school students.¹⁶⁴ Therefore, homeschool students deserve, at a minimum, treatment as a "class of persons" in the same context as *Romer* used the term when granting homosexuals heightened rational basis with bite scrutiny due to this classification.¹⁶⁵

1. *Cleburne v. Cleburne Living Center*

The Supreme Court has addressed various types of discrimination under a searching rationality standard in multiple cases with diverse issues.¹⁶⁶ For instance, in *Cleburne v. Cleburne Living Center*, the Supreme Court displayed the rational basis with bite application in

160. Ray, *Homeschooling: The Research*, *supra* note 22; see Ray, *A Systematic Review*, *supra* note 26, at 604–05.

161. Raley, *supra* note 52, at 60, 60 n.10; see generally Bartholet, *supra* note 57, at 4–6.

162. Nachbar, *supra* note 112, at 1629.

163. LA. REV. STAT. § 17:5029(B) (2021); *Romer*, 517 U.S. at 632.

164. *Romer*, 517 U.S. at 631; LA. REV. STAT. § 17:5029(B)(3)(b) (2021).

165. *Romer*, 517 U.S. at 633, 635. This "at a minimum" approach is how this Comment treats the homeschool class question and utilizes rational basis with bite while recognizing the potential for even stronger protections of homeschool students.

166. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer*, 517 U.S. 620.

action.¹⁶⁷ The city of Cleburne denied Cleburne Living Center a required special use permit necessary for operating a group home for intellectually disabled individuals even though no such special permit was necessary for operating other housing buildings such as apartments, fraternities, or elder-care nursing homes.¹⁶⁸ The living center sued, alleging that the city unlawfully discriminated against the intellectually disabled individuals based on those individuals' "distinguishing characteristic" of being intellectually disabled.¹⁶⁹

According to the Court, the special permit requirement for the singled-out group—intellectually disabled individuals—was constitutional if the legislation was "rationally related to a legitimate governmental purpose."¹⁷⁰ This standard, coupled with the court's intensive application, was rational basis with bite.¹⁷¹ In its searching analysis of the city's reasoning, the Court found that the discriminatory permit requirement sprang from a "fear" of potential negative effects that the intellectually disabled individuals would have on the community.¹⁷² The Court found that "prejudice" by a legislature or a legislature's "unsubstantiated" fear of potential negative effects "are not permissible bases" for discriminating between facilities for the intellectually disabled on one hand and other types of living facilities on the other.¹⁷³ Thus, the city violated equal protection under the rational basis with bite standard.¹⁷⁴ The city had no rational basis for requiring the special permit compared to other housing buildings because prejudice and unsubstantiated fears were such prominent reasons for the discriminatory legislation.¹⁷⁵

Relating to *Cleburne*'s special requirement specifically burdening the intellectually disabled, Louisiana Revised Statutes § 17:5029(B) singles out homeschoolers as a group subject to the higher ACT and no GPA requirements.¹⁷⁶ Accordingly, rational basis with bite applies. Since rational basis with bite carefully assesses if a law rationally relates to the state's legitimate interest, the disparate TOPS requirements for homeschool students needed to pass this test based on the data from when

167. *See Cleburne*, 473 U.S. at 448–50.

168. *Id.* at 435, 447.

169. *Id.* at 437, 441.

170. *Id.* at 441–42, 446.

171. *See id.* at 446, 448–50.

172. *See id.* at 448.

173. *See id.* at 448, 450.

174. *See id.*

175. *See id.*

176. *Cf. id.* at 442; LA. REV. STAT. § 17:5029(B) (2021).

the Louisiana Legislature actually instituted the requirements.¹⁷⁷ The state's interest in preserving its financial aid for qualified students is legitimate because scholarship funds are limited and must be apportioned where the funds will create the most value. Yet that is only one prong of the rational basis with bite test, and the "rationally relates" prong remains.

When Louisiana first began disbursing its TOPS aid, the standardized test data clearly indicated that homeschool students as a group averaged higher scores and possessed greater academic skills than their public and private school counterparts who were under the lower TOPS standards.¹⁷⁸ For instance, an article that was published in 1998, the same year that TOPS first began providing financial aid to qualifying students, explained that according to data, public schools frequently created a "poor product—illiterate and unprepared graduates."¹⁷⁹ For example, at TOPS's inception, American 13-year-olds often earned mathematics scores inferior to those of over a dozen other developed nations, and two-thirds of high school juniors did not know the American Civil War occurred in the last half of the 19th century.¹⁸⁰ By contrast, a study conducted by University of Maryland Professor Lawrence Rudner detailing homeschool students' academic achievements in 1998 found that on the analyzed standardized tests, the majority of homeschool high school students scored between the 75th and 85th percentile compared to their public school counterparts' median scores.¹⁸¹ Those same homeschool scores ranged from the 65th to the 75th percentile compared to their private school counterparts' median scores.¹⁸² This data thereby proves that the Louisiana Legislature's fear that the homeschool curriculum and educational process would not create "credible" grades was unsubstantiated per *Cleburne* and did not rationally relate to homeschoolers' actual academic qualifications or to a need for differing qualifications to appropriately screen out unqualified students.¹⁸³ Since *Cleburne* shows that unsubstantiated fears "are not permissible

177. See *supra* Section I.C.

178. See *infra* Section II.B.1. For a discussion about the use of national statistics, see *supra* note 149.

179. *TOPS Report: Analysis of the TOPS Program from 2009-2018*, *supra* note 23, at 3; Isabel Lyman, *What's Behind the Growth in Homeschooling*, USA TODAY MAG. (Sept. 1998), <http://libezp.lib.lsu.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=f6h&AN=1073439&site=eds-live&scope=site&profile=eds-main> [<https://perma.cc/8VLS-YK57>].

180. See Lyman, *supra* note 179.

181. Rudner, *supra* note 40, at 16.

182. *Id.*

183. McDonald, *supra* note 5; *cf.* *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

bases” when crafting legislation, § 17:5029(B) with its disparate homeschool curriculum, GPA, and ACT standards violates equal protection under a rational basis with bite analysis.¹⁸⁴

From its initial passage to the present day, the Louisiana Legislature has consistently amended and recodified the TOPS statutes to apply them to the next academic year or to streamline their provisions.¹⁸⁵ Importantly, none of these adjustments has changed the fact that homeschooling is still TOPS’s distinguishing characteristic per *Cleburne* that creates a singled-out group with disparate requirements.¹⁸⁶ These amendments and recodifications permit the application of rational basis with bite scrutiny to determine whether, based on the current data, the Louisiana Legislature’s reasoning rationally relates to a legitimate state interest.

Louisiana retains the legitimate interest of preserving state aid for qualified students.¹⁸⁷ By contrast, when looking at the available data, it is clear that homeschool students generally earn standardized test scores that are “15 to 30 percentile points above public-school students” and consequently “above average on the SAT and ACT.”¹⁸⁸ Further, homeschool students’ high school GPAs as a group are higher on average than public and private school students’ GPAs as a group.¹⁸⁹ These homeschool GPAs are legitimate because former homeschool students’ college freshman GPAs are also higher on average compared to those of their public and private school counterparts, proving that homeschool grades did not merely spring from a biased grader or inferior curriculum.¹⁹⁰ Hence, the discriminatory homeschool requirements still do not rationally relate to preserving state aid for qualified students because the data shows that equal GPA and ACT standards would determine which students truly merit aid. In other words, homeschoolers who meet the public and private school requirements are qualified to receive funds in the same degree as public and private school students meeting the requirements. This determination negates the reasoning behind establishing different standards. Consequently, the current TOPS requirements continue the legislature’s original reasoning based on an unsubstantiated fear about the effects of equal homeschool TOPS

184. *Cf. Cleburne*, 473 U.S. at 448.

185. *See generally* LA. REV. STAT. § 17:5024 (2021); *TOPS Report: Analysis of the TOPS Program from 2009-2018*, *supra* note 23, at 5.

186. LA. REV. STAT. § 17:5029(B) (2021); *cf. Cleburne*, 473 U.S. at 441, 448.

187. *See generally* McDonald, *supra* note 5.

188. Ray, *Homeschooling: The Research*, *supra* note 22.

189. Yu, Sackett & Kuncel, *supra* note 49, at 33, 34 tbls.1, 2 & 3.

190. *See id.*

standards, which is, as in *Cleburne*, an impermissible basis by which to craft legislation.¹⁹¹

In light of this analysis, it is not and was never rational—and therefore could not logically be rationally related to a legitimate state interest, especially under rational basis with bite—for the Louisiana Legislature to doubt homeschool GPAs and curriculum in such a way that homeschool students must score higher on the ACT to earn the same amount of TOPS money as public school students who score lower on the ACT. Rather, the targeted concerns about the adequacy of homeschooling were and are unsubstantiated when compared to the public and private school data, especially since BESE-authorized homeschools' curriculum equals or exceeds public schools' curriculum according to Louisiana Revised Statutes § 17:236(A).¹⁹²

2. *Additional United States Supreme Court Jurisprudence*

After *Meyer v. Nebraska*, where the Court found that liberty under the Fourteenth Amendment includes “the right . . . to acquire useful knowledge . . . and bring up children,”¹⁹³ and *Pierce v. Society of Sisters*, where the Court found that parents have the right “to direct the upbringing and education of children under their control,”¹⁹⁴ the right to homeschool itself is supported in jurisprudence.¹⁹⁵ Although homeschooling is not yet recognized as a fundamental right, compelling arguments exist that it should be.¹⁹⁶ This right's strength indicates that laws creating a chilling effect on the practice of homeschooling—such as a requirement for higher standardized test scores to receive the same amount of state educational funding—are unconstitutional.¹⁹⁷ This unconstitutionality springs from the fact that *Meyer* and *Pierce* protect homeschoolers from state

191. *Cf. Cleburne*, 473 U.S. at 448.

192. *See* LA. REV. STAT. § 17:236(A) (2021).

193. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

194. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

195. *See, e.g., Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510; *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

196. *See Raley, supra* note 52, at 60 n.7, 63–64 (“[H]omeschooling has been the primary form of education for most of Western history, including at the times when the Constitution and the Fourteenth Amendment were adopted, and . . . states have almost always refrained from infringing on parents’ ability to educate their children at home. . . . [H]omeschooling should therefore be recognized as a “deeply rooted” fundamental right. . . . [H]omeschooling [also] falls under the fundamental right of parent-directed education.”).

197. *See generally* LA. REV. STAT. § 17:5029(B) (2021); *Levels of Scrutiny Under the Equal Protection Clause, supra* note 108.

interference.¹⁹⁸ Ultimately, the data demonstrating homeschool students' repeated academic excellence as a class shows that the TOPS requirement for homeschool students is not rational even under the rational basis with bite standard.¹⁹⁹

For instance, in *Plyler v. Doe*, the Supreme Court considered alleged unconstitutional education discrimination in an equal protection case.²⁰⁰ A Texas statute prevented children who entered the country illegally from receiving a free public education unlike all other children who were United States citizens or were legally within the United States.²⁰¹ The Texas law authorized school districts to not accept those students into public schools and prevented the districts from receiving state funds for those students' education.²⁰² The Court held that, since the Equal Protection Clause's purpose was "the abolition of all caste-based and invidious class-based legislation,"²⁰³ states cannot exclude certain classes from equal protection guarantees such as by this type of education funding discrimination.²⁰⁴ To reach this point, the Court used rational basis with bite to weigh the importance of the children receiving state funds for their education against the state's interest in preserving its limited resources for the education of its lawful residents.²⁰⁵ The Court found that the cost to the illegal immigrant children completely outweighed the state's economic interest in preserving its funds for whom it considered to be qualified students.²⁰⁶

Although the holding in *Plyler* was limited to students in elementary school through high school,²⁰⁷ its application to TOPS's homeschool situation does not pose a problem because TOPS's disparate treatment concerns high schoolers' pre-college qualifications—GPAs and ACT

198. Rankins v. La. State Bd. of Elementary and Secondary Educ., 637 So. 2d 548, 553 (La. Ct. App. 1994).

199. See generally Rudner, *supra* note 40, at 16; Cloud & Morse, *supra* note 24, at 5; Ray, *Homeschooling: The Research*, *supra* note 22; Yu, Sackett & Kuncel, *supra* note 49, at 33, 34 tbls.1, 2 & 3; *Rational Basis Test with "Bite," supra* note 116.

200. *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

201. *Id.*

202. *Id.*

203. *Id.* at 213.

204. See *id.*

205. *Rational Basis Test with "Bite," supra* note 116; *Plyler*, 457 U.S. at 227–30.

206. *Plyler*, 457 U.S. at 230.

207. Ignacia Rodriguez, *On Plyler v. Doe's 35th Anniversary, This Landmark Supreme Court Decision Must Be Honored and Protected*, NAT'L IMMIGR. L. CTR. (June 15, 2017), <https://www.nilc.org/2017/06/15/plyler-v-doe-must-be-honored-and-protected/#> [<https://perma.cc/5NG9-FGSJ>].

scores.²⁰⁸ Thus, similar to *Plyler*, for the TOPS equal protection issue, Louisiana homeschool students face discrimination compared to all other Louisiana students by having to score higher on the ACT and not being allowed to use their GPAs to qualify for TOPS.²⁰⁹ Likewise, this discrimination also creates a separate class—homeschool students—via “class-based legislation” specifically singling out homeschool students compared to public and private school students.²¹⁰ Like the students in *Plyler*, certain homeschool students—the ones not meeting the higher requirements for the TOPS Opportunity Award—face wholesale exclusion from the state benefits. Further, homeschool students meeting the baseline Opportunity Award requirements to receive some funds but not meeting the higher homeschool requirements for the Performance and Honors Awards receive fewer benefits than their similarly situated peers.

While Louisiana’s interest in preserving its state funds for qualified students is a legitimate state interest, when weighed via *Plyler*’s formula against the interest homeschool students have in receiving thousands of otherwise unavailable dollars for their education, the rational relation to this legitimate state interest becomes problematic.²¹¹ In light of the fact that homeschool students consistently earn higher high school and college freshman GPAs than their counterparts according to the University of Minnesota study, as well as score “above average on the SAT and ACT” compared to their counterparts, § 17:5029(B)’s discriminatory gatekeeper function to TOPS awards does not actually rationally relate to excluding unqualified students from TOPS awards.²¹² Instead, it weaves an unnecessary net that removes qualified homeschool students from TOPS’s stream and creates a weighty financial harm for those students removed from the stream.²¹³ Consequently, the cost to homeschool students of not receiving state TOPS funding for their education that they otherwise would have earned if equal standards applied to them means § 17:5029(B) fails the rational basis with bite standard under *Plyler*: the state’s similar

208. See generally LA. REV. STAT. § 17:5029(B) (2021); see generally *id.* § 17:5024.

209. *Id.* §§ 17:5029(B), 17:5024.

210. See *id.* § 17:5029(B) (“A student who completes a home study program shall be eligible to receive an award pursuant to this Chapter if each of the following conditions is met”); cf. *Plyler*, 457 U.S. at 213.

211. McDonald, *supra* note 5; see *Rational Basis Test with “Bite,” supra* note 116; see *supra* Introduction.

212. Yu, Sackett & Kuncel, *supra* note 49, at 33, 34 tbls.1, 2 & 3; Ray, *Homeschooling: The Research, supra* note 22; see generally LA. REV. STAT. § 17:5029(B) (2021).

213. See *supra* Introduction, Section I.B.

interest in preserving its funds for only qualified students is not suitably served by discriminating against qualified homeschool students.²¹⁴ In sum, Louisiana's homeschool GPA and ACT discrimination is unconstitutional under the United States Constitution's Equal Protection Clause.

C. Logical Shortfalls to Discriminating Against Homeschool Students

In addition to the state and federal constitutional arguments against the TOPS program's homeschool treatment, logical reasoning also demonstrates that homeschool students deserve to be measured by the same standards as public and private school students for TOPS purposes. For instance, homeschool families pay taxes that contribute to TOPS's funding.²¹⁵ Further, they pay taxes that contribute toward funding public education.²¹⁶ Unlike public school families, they do not experience the fruits of these contributions in the form of tax-funded state benefits for elementary and secondary education.²¹⁷ Thus, it is unfair that when homeschool students are able to receive a partially state-funded education with its benefits through TOPS, the state requires homeschool students to meet a higher standard than public and private school students to receive the same amount of funding.

It is also not rational that when homeschool students take the same standardized test that is no easier for them than for public and private school students, homeschool students must score higher for the same amount of state aid. As Charles McDonald, the "[F]ather of TOPS," stated about TOPS's standards, "The ACT is the only criteria or standard we can compare across the board."²¹⁸ Representative McDonald's statement accurately highlights the ability of this standardized examination to objectively reflect the academic abilities of students from all schools across Louisiana to determine whether they merit an award; as such, the state should use the score as an equal reflection of qualifications rather than as a pointless extra hurdle for homeschool students to clear. Otherwise, the higher ACT standards undercut the legislative goal "that

214. See *Rational Basis Test with "Bite," supra* note 116; cf. *Plyler*, 457 U.S. at 227–30.

215. Louisiana's budget, which largely derives its funds from taxpayers, funds TOPS. See generally Guidry, *supra* note 60.

216. See generally *How Is Education Funded?*, DEP'T OF EDUC.: LA. BELIEVES, <https://www.louisianabelieves.com/docs/default-source/general-funding/how-is-education-funded.pdf?sfvrsn=0> [<https://perma.cc/Y48H-VDMG>] (last visited Oct. 19, 2020).

217. See generally *id.*

218. Guidry, *supra* note 60.

everybody participate” and its understanding that only academically qualified students “deserve . . . the scholarship.”²¹⁹

Aside from the constitutional analysis, from a policy perspective the data shows that homeschool grades and test scores warrant equal consideration. This equal consideration stems from homeschool standardized test scores consistently being “15 to 30 percentile points above public-school students” to homeschoolers consistently earning higher first-year college GPAs—an indication that homeschool students’ average higher high school GPAs were also legitimate.²²⁰ One could argue that since statistics only demonstrate homeschool students’ average scores, meaning some students fall below the average, the policy of preserving state aid for qualified students would suffer if these below-average students enjoy the same TOPS standards.²²¹ That argument fails because the GPA and ACT standards would filter out unqualified homeschool students in the same way they filter out unqualified public and private school students in light of the required homeschool course quality and the fact that the ACT is a standardized playing field equal to all test-takers.²²² Also, an argument against averages uses a flawed premise because the mathematical studies necessary to determine a law’s propriety necessarily base themselves on averages.²²³ Further, the homeschool students going to college are likely the ones who are scoring higher and thereby qualifying for TOPS college scholarships anyway,²²⁴ similar to the trend in public and private schools that shows that when students perform well academically they are more likely to attend college than the students who do not perform as well.²²⁵

Regarding the curriculum used by homeschool students, BESE bases its certification of home study programs upon the legal finding that a particular homeschool “offers a sustained curriculum of a quality at least equal to that offered by public schools at the same grade level.”²²⁶ This recognition reflects a strange double standard because while Louisiana

219. *Id.*

220. Ray, *Homeschooling: The Research*, *supra* note 22; see Yu, Sackett & Kuncel, *supra* note 49, at 33, 34 tbls.1, 2 & 3.

221. See generally *supra* Sections I.A.1, I.B.

222. See LA. REV. STAT. § 17:236(A) (2021); see Guidry, *supra* note 60.

223. See, e.g., Yu, Sackett & Kuncel, *supra* note 49, at 33, 34 tbls.1, 2 & 3.

224. See McMullen, *supra* note 2, at 85.

225. See generally Amy Morin, *Benefits of Getting Good Grades in High School*, VERYWELLFAMILY, <https://www.verywellfamily.com/benefits-of-getting-good-grades-in-high-school-4161164> [<https://perma.cc/DDN7-QL68>] (last updated Aug. 7, 2020).

226. LA. REV. STAT. § 17:236(A) (2021).

officially validates homeschool curriculum as not only equal to but potentially stronger than public school curriculum in Louisiana Revised Statutes § 17:236(A), the state simultaneously distrusts homeschool GPAs and classes taken based on that state-approved homeschool curriculum for purposes of determining TOPS eligibility.²²⁷ Similarly, all post-secondary educational institutions in Louisiana accept the validity of homeschool diplomas,²²⁸ further illustrating this double standard.

Naturally, homeschool students earn their GPAs based on the calculations at their own homeschools and the grading methods of their own teachers—usually their parents. This fact causes some to question the legitimacy of those grades and GPAs.²²⁹ Yet homeschools' grading situations do not mean that homeschool GPAs are any less reliable than public or private school GPAs, contrary to the Louisiana Legislature's concern about this issue when originally crafting TOPS's differing GPA requirements.²³⁰ Rather, when one acknowledges that grading practices based on teachers' personal methods—and thereby GPA determinations deriving from those grades—vary not only for every school but even for every classroom throughout Louisiana, it is apparent that the root cause of concern about homeschool GPAs springs not from a homeschool to private and public school question but from a more general school to school question.²³¹ Since Louisiana Revised Statutes § 17:5024 accepts GPAs derived from differing grading methods at each of Louisiana's host of public and private schools, a statutory discrimination against GPAs derived from homeschools lacks consistency and misses the point in light of the high test scores and grades homeschool students consistently earn and the objective mathematical methods generally used to calculate homeschool GPAs.²³² Ultimately, homeschool GPAs, curriculum, and standardized test scores serve as reliable indicators showing which TOPS awards homeschool students deserve at the same level that GPAs, curriculum, and standardized test scores serve as reliable award indicators for public and private school students. Accordingly, it is not logical from

227. *See generally id.; id.* § 17:5029(B).

228. *Home Study*, DEP'T OF EDUC.: LA. BELIEVES, <https://www.louisiana-believes.com/schools/home-study> [<https://perma.cc/3WLF-KFM8>] (last visited Oct. 19, 2020).

229. McDonald, *supra* note 5.

230. *See id.*

231. *See generally* Katrina Schwartz, *How Teachers Are Changing Grading Practices with an Eye on Equity*, KQED (Feb. 10, 2019), <https://www.kqed.org/mindshift/52813/how-teachers-are-changing-grading-practices-with-an-eye-on-equity> [<https://perma.cc/2TWU-TCQ9>].

232. *See generally* LA. REV. STAT. §§ 17:5024, 17:5029(B) (2021).

a policy perspective to require homeschool students to meet a higher standard for Louisiana's TOPS funding than public and private school students.

III. EQUITABLE STANDARDS FOR EQUAL QUALIFICATIONS: A PROPOSED STATUTORY REFORM

As they now stand, TOPS's GPA and ACT requirements for homeschool students violate state equal protection under *Sibley*'s third tier and federal equal protection under the rational basis with bite standard because the discrimination against homeschool students is based on an irrational legislative belief that homeschool grades do not adequately indicate homeschool students' academic qualifications. This unconstitutionality necessitates a statutory revision to eliminate the distinction between public and private school students and homeschool students and to implement equal GPA and ACT requirements for all Louisiana public, private, and homeschool students applying for TOPS. By eliminating the Louisiana Legislature's unconstitutional homeschool distinction within Louisiana Revised Statutes § 17:5029(B) and replacing it with equal GPA and ACT requirements for all students, the law would suitably further the state's appropriate interest in conserving its funds for only qualified students, and TOPS's standards would rationally relate to that legitimate state interest.²³³ The proposed language reads as follows:

(3)(a) Except as otherwise provided by this Subsection, students shall meet the following minimum grade point average requirements, calculated on a 4.00 scale, for the respective awards:

(i) For an Opportunity Award, a minimum cumulative grade point average of 2.50.

(ii) For a Performance Award, a minimum cumulative grade point average of 3.25.

(iii) For an Honors Award, a minimum cumulative grade point average of 3.50.

(iv) For a TOPS-Tech Award, a minimum cumulative grade point average of 2.50.

(b) The following minimum grade point averages specifically apply:

(i) For a student who graduated during or after the 2007-2008 school year but prior to the 2021-2022 school year, the minimum

233. See *Sibley v. Bd. of Sup'rs of La. State Univ.*, 477 So. 2d 1094, 1107 (1985); see Nachbar, *supra* note 112, at 1629.

cumulative high school grade point average necessary for such student to be eligible for an Opportunity Award shall be 2.50 on a 4.00 scale.

(ii) For a student who graduated during or after the 2007-2008 school year but prior to the 2021-2022 school year, the minimum cumulative high school grade point average necessary for such student to be eligible for a Performance Award shall be 3.00 on a 4.00 scale.

(iii) For a student who graduated during or after the 2007-2008 school year but prior to the 2021-2022 school year, the minimum cumulative high school grade point average necessary for such student to be eligible for an Honors Award shall be 3.00 on a 4.00 scale.

(c) Except as otherwise provided by this Subsection, a student shall earn the following minimum test scores for the respective awards:

(i) For an Opportunity Award, a composite score on the 1990 version of the ACT which is at least equal to or higher than the state's average composite score, truncated to a whole number, reported for the prior year but never less than twenty or an equivalent concordant value on an enhanced or revised version of such test or on the SAT.

(ii) For a Performance Award, a composite score on the 1990 version of the ACT of twenty-three or higher or an equivalent concordant value on any enhanced or revised version of such test or on the SAT.

(iii) For an Honors Award, a score of twenty-seven or higher on the 1990 version of the ACT or an equivalent concordant value on any enhanced or revised version of such test or on the SAT.

(iv) For a TOPS-Tech Award, a composite score on the specified ACT of seventeen or higher or an equivalent concordant value on any enhanced or revised version of such test or on the SAT. The student may, as an alternative requirement, have attained a silver level score on the assessments of the ACT WorkKeys system.²³⁴

234. See generally LA. REV. STAT. § 17:5024; The current version of Louisiana Revised Statutes § 17:5029(B)(3) reads as follows:

(3)(a) Except as provided in Subparagraph (b) of this Paragraph, the student has a composite score on the 1990 version of the ACT which is at least three points higher than that required by R.S. 17:5024(B) for the

One potential concern about eliminating the GPA and ACT distinctions while leaving Louisiana Revised Statutes § 17:5025's core unit provisions untouched is that this distinction could disadvantage public and private school students compared to homeschool students.²³⁵ However, it is constitutional and necessary to distinguish between public, private, and homeschool students regarding the core unit requirement because the core unit standard intersects with a superseding area of constitutional law, namely *Meyer's*, *Pierce's*, and *Wisconsin v. Yoder's* protections for parental decisions regarding homeschooling and the curriculum that homeschools use.²³⁶ Since the United States Constitution in these cases as well as the Louisiana Constitution prevent BESE from mandating what homeschool curriculum can be used, it is likewise inappropriate for the state to essentially dictate which courses homeschool parents must teach by using TOPS funding as coercion to force homeschool students to take certain courses for TOPS money.²³⁷ Also, since course quality and course offerings invariably differ for each and

particular award or an equivalent concordant value on an enhanced or revised version of such test or on the SAT.

(b)(i) For a student qualifying for an initial program award for the 2005-2006 through the 2007-2008 award year pursuant to this Subsection, the student shall have a composite score on the 1990 version of the ACT which is at least two points higher than that required by R.S. 17:5024(B) for the particular award or an equivalent concordant value on an enhanced or revised version of such test or on the SAT.

(ii) For a student qualifying for an initial TOPS-Tech or Opportunity Award for the 2008-2009 award year or thereafter pursuant to this Subsection, the student shall have a composite score on the 1990 version of the ACT which is at least two points higher than that required by R.S. 17:5024(B) for the particular award or an equivalent concordant value on an enhanced or revised version of such test or on the SAT.

(iii) For a student qualifying for an initial Performance or Honors Award for the 2008-2009 award year or thereafter pursuant to this Subsection, the student shall have a composite score on the 1990 version of the ACT which is at least one point higher than that required by R.S. 17:5024(B) for the particular award or an equivalent concordant value on an enhanced or revised version of such test or on the SAT.

Id. § 17:5029(B)(3).

235. *See generally id.* § 17:5025.

236. *See Rankins v. La. State Bd. of Elementary and Secondary Educ.*, 637 So. 2d 548, 553-54 (La. Ct. App. 1994). A more in-depth discussion regarding TOPS's core unit distinction is beyond the scope of this Comment.

237. *See id.*

every school throughout Louisiana,²³⁸ Louisiana Revised Statutes § 17:236(A)'s indication that homeschool courses across the board have a quality equal to or exceeding public school courses suffices to guarantee homeschool courses' TOPS qualifications without requiring specific state-determined courses in the homeschool TOPS context.²³⁹

The proposed statutory amendment reflects homeschooling's credibility because Louisiana Revised Statutes § 17:5029(B), as it currently stands, implicitly denies the validity of homeschool education in light of the legislature's inherent distrust of homeschool grades.²⁴⁰ For state law to doubt homeschool students' academic qualifications and thereby perpetuate a false sense of homeschool students' academic inferiority is not an objectively accurate position for the Louisiana Legislature to take. Louisiana's homeschool students deserve the same consideration in their education as other students and would receive this consideration under the revision.

With this in mind, the Louisiana Legislature should amend Louisiana Revised Statutes § 17:5029(B) in conformity with the above proposed language to harmonize homeschool GPA and ACT requirements with § 17:5024. The amendment should also maintain § 17:5024's more intricate GPA and ACT requirements about earlier graduation dates and retain § 17:5029(B)'s unique administrative homeschool provisions, such as BESE certification, to ensure homeschools and homeschool students still operate under the required state procedures. Section 17:5029(B)(3) would thus read nearly identically to § 17:5024.²⁴¹ The same GPA and ACT standards for state TOPS funding would apply equally to all Louisiana high school students, meaning the proposed amendment itself does not violate equal protection. Therefore, the proposed revision would satisfy both state and federal constitutional requirements as well as reflect the policy arguments in the revision's favor.

CONCLUSION

The TOPS program's current requirements unconstitutionally discriminate against Louisiana homeschool students according to both state and federal constitutional law. Legislation that unequally funds

238. See generally DEP'T OF EDUC., 2020–2021 LOUISIANA HIGH SCHOOL PLANNING GUIDEBOOK: A PATH TO PROSPERITY FOR EVERY STUDENT 3 (May 19, 2020), https://www.louisianabelieves.com/docs/default-source/course-choice/high-school-planning-guidebook.pdf?sfvrsn=1fbd831f_52 [<https://perma.cc/SJ6Z-JZMR>].

239. See generally LA. REV. STAT. § 17:236(A) (2021).

240. See McDonald, *supra* note 5.

241. See generally LA. REV. STAT. § 17:5024 (2021).

homeschool students compared to others, despite the presence of credible homeschool grades and equal standardized test scores, causes unconstitutional *de jure* education discrimination. Coupled with these constitutional concerns, the policy concerns of subjecting qualified students to differing academic standards demonstrate that Louisiana Revised Statutes § 17:5029(B)'s discriminatory TOPS provisions are invalid and illogical. Therefore, the Louisiana Legislature should promptly amend this legislation to correct its unconstitutionality and to buttress rather than burden homeschool students' pursuit of promising academic careers.