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PARENTAL EDUCATION RIGHTS
IN THE UNITED STATES AND CANADA:
HOMESCHOOLING AND ITS LEGAL PROTECTION

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INTRODUCTION

“The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law... It is not to be abrogated or abridged, without the most coercive reason.”
Lord O’Hagan of the Privy Council, Re Meades (1871)

In many periods throughout history, parental rights have been considered absolute. The archetypal example is that of the Roman paterfamilias who in effect, owned his offspring, holding life and death rights over his children. In ancient times, the common conception of the state was modeled on the family, with the ruler viewed as a father.1 However, for the past two centuries, arguably since the French Revolution, we are witnessing the opposite tendency, that is, the state has displaced many familial roles and now routinely makes life and death decisions, in addition to regulating the minutiae of daily life.2

1 Aristotle made this point in his Nicomachean Ethics: “In fact laws and customs have the same place in states as paternal precepts and customs have in families.” Nicomachean Ethics, Book X, c. 9, n.1180, a.34.

2 In a vigorous commentary against the pervasive presence of the modern state, Benedict XVI has called for a return to the principle of subsidiarity: “We do not need a State which regulates and controls everything, but a State which, in accordance with the principle of subsidiarity, generously acknowledges and supports initiatives arising from the different social forces and combines
Similarly in education, parents traditionally had full responsibility for the upbringing of their children. All education, apart from very technical matters, took place in the family setting, whether in the fields, in the workshop or around the hearth. Largely due to the ideas of the Enlightenment, for the past two hundred years the state has steadily taken over education, creating a public school system and enforcing attendance for all children as a means to provide a universal education that assimilates all citizens into the national identity. This development has markedly reduced freedom for parents. That said, in the late twentieth century there has been progress towards parental input and guidance in certain states due to democratic tendencies and a societal openness to new ideas. At this stage, one can argue that there exist two general approaches: a continental European “socialist” system — where state rules are the only rules — and the more laissez-faire approach in Great Britain, the United States and Canada, where the rules are more flexible and what counts ultimately is the education of the children. These latter countries offer much in the way of educational opportunity. Yet even in these established democracies, the debate continues between those who want stronger state control over education at the expense of parental involvement and those who view parental education rights as an important marker for liberty.


3 St. Thomas Aquinas writes in the Summa Theologica: “The father is the principle of generation, of education, and of discipline and of all things that have to do with the perfection of human life.” II-II, question 102, art. 1. Author’s translation. The original reads: “Pater est principium et generationis et educationis et disciplinae, et omnium quae ad perfectionem humanae vitae pertinent.”

4 See C. Naval, Educar Ciudadanos: La polémica liberal-comunitarista en educación (Pamplona: EUNSA, 1995) for an excellent review of this topic and the contemporary debate over education in North America.


6 E.A. DeGroff has written: “It is difficult to imagine anything more destructive of liberty than a government with the authority to override parental choices
The debate can be encapsulated in a series of questions that are pertinent to this thesis. Who decides what and how the child studies? What is the correct balance between the state’s interest in a standard curriculum and the rights of communities and families to promote their cultural and religious values? More concretely, what space is there for parental choice of schooling options? Is a school merely the value-neutral locus for technical and functional training, or does it also comprehend “cultural initiation”, including the transmission of moral precepts? What rights do parents have to send their children to one school over another or to one type of school over another?

The education of children receives constant attention, both by ideologically motivated groups and individuals and by state bureaucratic organizational structures that propose “uniformity” and claim that compulsory public education imposes no values while allowing for a diversity of ideas. Drawing attention to the flaw implicit in this position, a legal expert on education has recently pointed out:

They wish to forget that education presupposes and always implies a certain conception of the person and life. The supposed neutrality of the school, leads, most of the time, to the virtual disappearance of religious dimensions in the fields of culture and education. A correct

correcting the development and values of the next generation — particularly religious or moral values. One of the keys to maintaining American democratic institutions has been the freedom of diverse families to choose for themselves what values to hold and what course to follow.” E.A. DeGroff, “Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years” (2009) 38 J.L. & Educ. 83, pp. 126–27. See also R.W. Garnett, “Taking Pierce Seriously: The Family, Religious Education, and Harm to Children” (2000) 76 Notre Dame L. Rev. 109, arguing that parental oversight of children’s education and development is indispensable to the continuation of a liberal republic.

7 See generally, I.M. Briones Martínez, “Conciliación entre fe y cultura en la escuela”, www.iustel.com, Revista General de Derecho Canónico y Derecho Eclesiástico del Estado, n.3 (2002) 49 (last visited June 21, 2011), where she defines a school as “one of the places of cultural initiation, and in some countries and over many centuries, one of the privileged places of transmitting a culture forged by Christianity.” Author’s translation, p. 63 [hereinafter “Briones, Conciliación”].
pedagogical approach, however, ought to situate itself in the more
decisive area of ends, to address not only the “how”, but also the
“why”, to overcome the ambiguity of aseptic education and return to
the educational process that unity that prevents dispersion through
various branches of knowledge and learning, and remains within the
centre of the person’s complex transcendental and historical identity.
The integral education of the person and the harmonization between
faith, culture and life appears impossible in public schools in countries
where the political and legal system is based on the principle of
secularism, which has been termed “state neutrality” in religious
matters.8

In this respect, responsible parents who are primarily concerned about
the integral formation of their children, technical as well as moral, prefer
that their children receive an education that respects their firmly-held
convictions and family identity. In a situation where parental views clash
with the state-sponsored curriculum, parents are seeking out options to
reclaim the schooling process for the sake of their children’s upbringing.

**Parental and State rights in conflict?**

All the international declarations or covenants recognize the right of
parents to educate their children according to their own beliefs or
convictions. The issue is how that “theoretical right” is translated into
action, that is, into the actual provision of education. In some countries
private education, outside the publicly funded system, is not available; in
others it is accessible only to the wealthy.

Indeed, the state has an interest in ensuring that children are educated,
for the functioning of society and for the common good. Since the mid-
nineteenth century, in North America this has been translated into a public
education system where children are taught a wide variety of subjects, from
mathematics and science to literature and languages. In order to provide
such education, each jurisdiction has set up a network of public schools,
legislated compulsory attendance and developed the means to investigate
truant children.

8 Briones, Conciliación, p. 50. Author’s translation, emphasis added.
The state seeks to guarantee a minimum level of education so that the child will develop skills useful for society and be integrated socially into the mainstream culture. Although there are a number of responsible and competent parents who ably organize and impart a well-rounded and technically proficient education to their children in a non-public or private setting, under certain circumstances, for example where parents mistreat their children, the state’s right to educate appears to override the parental right to raise one’s children as one sees fit. Others consider that the state’s regulatory role consists precisely in favouring a responsible exercise of freedom by parents.\(^9\)

Thus, a balance should be achieved between the state’s collective interest in developing a well-integrated citizenry and functional workforce, and the parental right to provide an intellectual and technical education which will serve them in the future while preserving their moral and cultural identity. Attempts to arrive at a delicate balance have not been smooth and have resulted in tensions between the state educational apparatus and parents.

**The Rise of Homeschooling**

Parental education rights are broad; they have given birth to a spectrum of educational choices. One of these is homeschooling.

Over the past three decades, a widespread movement to educate children at home has grown among parents in the United States and Canada. Homeschooling, as it is generally known, is a social, cultural, and often religious phenomenon that has increasingly developed into a well-documented and legally protected reality. Far from being a new idea, homeschooling was a normal form of education into the nineteenth century, but largely disappeared with the advent of compulsory formal schooling. In the late twentieth century, however, it appeared once more as schools became rigidly standardized and the moral environment in large part declined, and parents sought alternatives. Homeschooling did not emerge from the vision or work of a single individual, nor does it owe its allegiance

to a political party or doctrine; it is a grassroots movement with many and varied components.\textsuperscript{10}

From its early days, homeschooling parents met with social and legal impediments. To cite but one example, in a 1981 West Virginia case, a judge used scare-mongering language to argue that if a family could homeschool their children, then all parents or guardians would:

\begin{quote}
have the right to keep their children in medieval ignorance, quarter them in Dickensian squalor beyond the reach of the ameliorating influence of the social welfare agencies, and so separate [them] from organized society in an environment of indoctrination and deprivation that the children [would] become mindless automatons incapable of coping with life outside their own families.\textsuperscript{11}
\end{quote}

That said, the freedom to educate one’s children at home was achieved through a counter-cultural and increasingly religiously motivated effort that now enjoys substantial legislative protection in both the United States and Canada. Over time, courts adjudicated a number of cases where state and parental rights collided, in the process recognizing the principle of parental freedom but simultaneously upholding specific state requirements to ensure that children educated at home meet an acceptable standard of education. Due to the varying approaches of federal and state courts in the United States, at times the jurisprudence leads to uncertainty as to the limits of parental rights.\textsuperscript{12}

For the present, homeschooling provides a legally viable and socially acceptable alternative to secularized public schooling for parental


\textsuperscript{12} In 2009, a North Carolina state court judge ruled that children ought to attend public school to receive a “more well-rounded education” even though he agreed that the mother “had done a good job” homeschooling. See “Judge Orders Homeschoolers into Public District Classrooms”, World Net Daily, available at www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=91397 (last visited June 21, 2011).
transmission of moral and cultural values.\textsuperscript{13} Moreover, homeschooling allows parents to elaborate a curriculum “based on the unitary concept of the human person, seeking cultural identity and valuing diversity at the same time.”\textsuperscript{14}

**Motives for this Thesis**

This study will address the fundamental issue of what rights parents have and what are the limits to mandatory public schooling. We will see that home education involves disparate interests: the best interests of the child, compulsory state education, and the parental right to educate their children according to one’s beliefs and convictions.

The specific object of this thesis is to investigate the legal aspects of homeschooling in English- and French-speaking North America and draw conclusions as to the parental right to homeschooling and the proper limits to state authority. We will review the laws and policies that currently regulate home education in the United States and Canada. In addition, the study will analyze judicial decisions in those countries that consider the interplay of legal rights related to homeschooling. Where does the parental interest give way to state intervention? Or, to put it another way, where does the family yield to the wider community?

Chapter 1 will discuss parental rights in education as they are enshrined in the various international law instruments, as well as Catholic Magisterial teaching expressed in relevant documents of Vatican II and the current *Code of Canon Law*.

Chapter 2 will survey the homeschooling movement in North America as an expression of parental choice in education and describe its extent and success. Our study will present the wide-ranging (and at times unexpected) motivations that lead parents to undertake education in the home. In order


\textsuperscript{14} Briones, Conciliación, p. 61. Author’s translation.
to substantiate claims in support of homeschooling, we will also review academic literature and social science studies.

Chapters 3 and 4 will set out the federal and state regimes in the United States and Canadian provinces as they apply to homeschooling, and will categorize the laws of each state jurisdiction according to a scale of lesser to greater restrictiveness. We will also consider the current academic debate over the “compelling” state interest to intervene further and put in place new regulations that ensure a liberal education across cultural and religious lines.

Chapters 5 and 6 will present and analyze legal cases in the United States and Canada which have developed the doctrine of parental education rights and decided upon the extent of allowable regulation and state intervention in home education.

A final chapter will offer conclusions from the study.

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Thanks also to my parents, to my theology and canon law professors, to my colleagues and the dedicated staff of the Pontifical University of the Holy Cross. I could not close without mentioning my benefactors, in particular the Foundation for Culture and Education for its financial assistance over the course of my five years in Rome.
Chapter I. **The Basis of Parental Education Rights**

In order to properly understand the homeschooling phenomenon, we will first consider the broader context of parental education rights and review the principles that support the primary role of parents and their right to choose an education for their children.\(^\text{15}\) These are enshrined in a variety of international declarations as well as in Catholic Magisterial teaching and the *Code of Canon Law* of 1983.

\(^\text{15}\) An excellent discussion of the philosophical and pedagogical basis of parental education rights is found in M. Elton, *El derecho de los padres a la educación de sus hijos* (Pamplona: EUNSA, 1982) [hereinafter "Elton, Derecho de los Padres"]; a more recent presentation of these principles can be found in *El derecho de los padres a elegir la educación en libertad* (Madrid: Acción para la Educación, 2005); for a comprehensive treatment of the legal issues, see I. Martínez-Echevarría, *El complejo relacional educativo como contrato a favor de tercero*, Ph.D. thesis published by Universidad Complutense, Madrid, 2004.
1. International Human Rights Instruments

Introduction

To discuss homeschooling is ultimately to discuss parents’ rights to educate their own children. Parents who choose to undertake homeschooling have decided to exercise their natural rights as progenitors and caregivers for their children. These rights are explicitly avowed in international human rights documents recognized by all states.

The underlying ethos of human rights declarations is that people are entitled to certain rights and freedoms by the mere fact of being human. In order to qualify as a human right, the right must be one which is possessed equally by all human beings and cannot, therefore, be linked to a particular status, for example citizen or landowner. Human rights are universal because they apply to all places and cultures, without regard for local customs or practices which depart from accepted norms.

Human rights comprise a broad range of what has been described as “first-generation” rights, but also a range of “second-generation” rights. First-generation rights concern traditional civil and political liberties such as freedom of speech and religion, which do not require the active conferral of a benefit. They are largely “negative” in nature, in that they restrain the state’s actions in relation to individuals: they guarantee individuals, within reasonable limits, freedom from state interference. Second-generation rights, on the other hand, guarantee to individuals access to certain benefits

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J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection
or services and, in final analysis, are seen to impose on the state the obligation to provide or, at least, to ensure provision of those benefits or services. In this sense, state-organized education is a second-generation right.18 While second-generation rights can be better classified as claims, this thesis will refer to both first-generation and second-generation rights as freedoms.

The word “right” is used to express a moral entitlement; that is, what is commonly accepted that people ought to possess. However, moral rights are small comfort to someone who is being oppressed. In order to prevent such oppression, the normative values underlying human rights have been translated into legal rights. Only legally enshrined rights can be enacted into legislation or enforced judicially. Currently, human rights are found in a variety of international, constitutional and domestic laws, and can properly be called positive statements of the natural law, as applied to governments, communities and individuals. That is, these rights are not an arbitrary creation by the state: they arise from human nature and are rooted in the moral order.19

In the following subsections, we will provide an overview of these major expressions of human rights pertaining to religious freedom and education, the subject of this thesis. Additionally, we will briefly discuss academic viewpoints that consider the guiding principles for interpreting education rights.

18 Smith and Foster, Balancing Rights.

Among the various international human rights instruments, there are six to which the United States and Canada are signatories that are of particular interest to this thesis: 20

1. Universal Declaration of Human Rights [Universal Declaration]


3. International Covenant on Civil and Political Rights [ICCPR]


5. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief [Declaration on Religion]


The best known expression of human rights is contained in the Universal Declaration, which provides for a variety of human rights and freedoms, including those pertaining to religion, education and equality. The ICCPR and ICESCR deal with a variety of economic, social, civil and political rights. The Convention, the most recent instrument on human rights, is especially noteworthy because it explicitly recognizes for children a broad spectrum of the rights dealt within the Covenants.

Although these general freedoms or universal rights have existed for over half a century, they are not protected to the same extent by all signatory states. Countries have only a moral commitment to support the Universal Declaration, which “was not generally conceived as law, and had no binding effect on member states,” 21 and the same is true of the Declaration on

20 The UNESCO Convention against Discrimination in Education [(1962) 429 U.N.T.S. 93] will not be discussed here, as it is an international instrument of lesser importance that neither the United States nor Canada have ratified, and therefore is of no force and effect in those countries.

21 K.H. Fogarty, Equality Rights and Their Limitations in the Charter (Toronto: Carswell, 1987), p. 162. Elton identifies two fundamental difficulties involved in giving legal force to the Universal Declaration: first, the diversity of views concerning the extension and content of each right; and secondly, the resistance of
Religion. The language used by the texts of the Universal Declaration and the Declaration on Religion is merely exhortative; that is, it encourages states to enshrine these rights in their national legislation, but cannot enforce them in any way. This is because international law has no legal superiority over domestic law; it can only be referenced by judicial decisions or legislative pronouncements. Nevertheless, the declarations are statements of principle that constitute a significant moral commitment for the signatory countries. In certain cases, the egregious violation of human rights can lead to sanctions from the international community. As a result, the universal acceptance of basic rights by all countries in the past half-century now forms the basis of relations within the international community, and an individual country that attempts to discount a violation of these rights within its borders as an “internal issue” may find itself politically, economically or even culturally disadvantaged.

By contrast, the American Convention, ICCPR, ICESCR, and Convention are treaties which are binding on member states. An international treaty, like any contractual agreement, binds only the parties to that agreement, in this case the various states which have signed and legally ratified the instrument.22

22 The ICCPR and ICESCR were both signed on December 16, 1966, and took legal effect only when the member states passed legislation to effect its provisions in national law. ICESCR came into force first, January 3, 1976, followed by ICCPR on March 23, 1977.
1.1. Universal Declaration of Human Rights

The development of human rights protection following World War II created a thorough framework of collective and individual rights, beginning with the United Nations Universal Declaration of Human Rights. This document is the first to acknowledge freedom in education as a legitimate right belonging to parents.

What is freedom in education? In the first place it is a “negative” freedom, freedom from coercion; but positively stated, it is a right to parental choice in education. Article 26 of the Universal Declaration reads:

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 26(3) guarantees parents the right to guide or even control the education of their children and has been asserted by parents throughout the world as its implications are enormous. The meaning of “prior” in the text of Article 26(3) has never been made fully clear; it may refer to the subsequent right of the state, or to the understanding that paternity creates a relationship higher than other bonds. It has been argued that the word was chosen as the result of compromises, accommodations, and the strong

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24 For a thorough discussion of freedom in education as a human right see J.A. Araña y Mesa, La fundamentación de la libertad de enseñanza como derecho humano (Rome: Edusc, 2005); and A. Fernández, ed. Hacia una cultura de los derechos humanos: Un manual alternativo de los derechos fundamentales y del derecho a la educación (Geneva: Universidad de verano de derechos humanos y del derecho de la educación, 2000).


J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection
feelings of parents, especially religious ones, that they should have some right to decide the kind of schooling that their children would receive.\textsuperscript{26}

The exercise of parental choice in education is in many cases an exercise of religious freedom, \textsuperscript{27} guaranteed in Article 18 of the \textit{Universal Declaration}. Article 18 protects the freedom to “manifest... religion or belief in teaching”, thus recognizing the right of all to teach religion.\textsuperscript{28} Parents who choose to educate or form their children according to their religious beliefs are therefore exercising rights found at both Article 26(3) and Article 18.

Parents must consider whether the state’s educational system makes this possible, and if the state obstructs the parental objective of religious instruction, parents must look for an alternative means of education. Article 18, reinforced by Article 26(3), thus supports a right to private forms of schooling as motivated by religious freedom.

Moreover, the interplay of Articles 18 and 26(3) protects the parental right to instruct their children in a particular belief system, whether a creed or a worldview. By extension, homeschooling, in which parents transmit their belief system independently of any intervention by the state, would fall into this sphere of international law.

\textsuperscript{26} Drinan, God and Caesar, p. 122.


\textsuperscript{28} The entire article reads: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”
CHAPTER I

1.2. American Convention on Human Rights

The *American Convention*, signed by members of the Organization of American States in 1969 and therefore binding on the United States and Canada, makes explicit the connection between religious freedom and parental rights in education by placing both rights in the same article as follows:

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Drinan observes subtle but important differences between the *Universal Declaration* and the *American Convention*. He points out that the authors of the latter document, coming from largely Catholic nations in Latin America, have given greater weight to the right of parents to determine the religious training of their children.

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America, inserted into Article 12(1) the right to “profess or disseminate” rather than merely “profess” their religion, thus granting a clear and unambiguous right to proselytize. In addition, the American Convention document is also stronger on the rights of parents, amplifying the content at Article 12(4) to include “religious and moral education”,\textsuperscript{30} likely the result of having been enacted chronologically posterior to the International Covenants.

It is interesting to note the parallel between the American Convention and the “right to education” contained in Article 14 of the recently enacted Charter of Fundamental Rights of the European Union.\textsuperscript{31} The addition of “pedagogical” principles in Article 14(3)\textsuperscript{32} recognizes parental rights to decide not only the child’s curriculum, but also the method of imparting it. For homeschooling advocates, this represents an important advance.

1.3. International Covenant on Civil and Political Rights\textsuperscript{33}

As the Universal Declaration is only a statement of moral principle, the United Nations drafted two further documents, called International Covenants, wherein member states formally pledged to uphold a diversity of rights in order to make rights enforceable by individuals as against states.

\textsuperscript{30} Drinan, God and Caesar, pp. 18-19.


\textsuperscript{32} Article 14(3) protects parental rights to “the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions.”

The language of the *Universal Declaration* concerning freedom of thought, conscience, religion, and education was codified in the *ICCPR*. Article 18 of the *ICCPR* deals specifically with parental education rights; section 4 reads:

4. The state parties to the present covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure religious and moral education of their children in conformity with their own convictions.

These provisions in Article 18 echo Article 26 of the *Universal Declaration* in ensuring that parents have a right to have the religious and moral education of their children conform to their own convictions. Moreover, this right protects what could be termed a “parental instinct” to provide appropriate religious and moral education drawn from values and beliefs held in their consciences, equivalent to an international recognition of the natural law as respects paternity and its corollary activities, childrearing and early education.34

Under the authorized interpretation of the United Nations Committee on Human Rights, Article 18(4) does not create a parallel and positive obligation for states to organize denominational religious instruction in their public schools. It does, however, create a negative obligation, not to subject students to a form of religious instruction that would infringe their freedom of religion. This right is expressed first and foremost in the freedom of parents to select private educational options for their children, and at the same time to set up and manage the institutions.35

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34 Drinan, God and Caesar, p. 18.

1.4. International Covenant on Economic, Social and Cultural Rights\textsuperscript{36}

The \textit{ICESCR} also covers parental education rights, concretely in Article 13, although this provision speaks of schools rather than education. The freedom of parents to choose for their children schools other than those established by the public authorities is safeguarded at Articles 13(3) & (4):

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

In the \textit{ICESCR}, the ratifying states commit themselves to respect the freedom of parents not only to choose for their children schools different than those established by the public authorities, as long as the minimal norms set out by the authorities are respected, but also to establish and direct educational institutions, always subject to the same minimum prerequisites. The fact that this disposition also guarantees the moral and religious education according to the convictions of the parents gives it greater force. In effect, it guarantees, without ambiguity, the natural right of parents to the education of their children, establishing schools and directing them according to the educational program that they consider

appropriate, as long as they respect the minimum exigencies imposed by the state.37

The right of parents inscribed in ICESCR at Article 13(3) is a liberty right to choose private schooling as an option, but this right does not confer entitlement to any benefit such as the funding of private schools. It prevents the state from prohibiting private schools, but it does not prevent the state from regulating them. ICESCR reinforces this liberty right by explicitly recognizing the right of persons and bodies to establish private educational institutions, subject to state regulation and the parameters governing the right to education stipulated in the Article 13(4).38

When they incorporate the terms of the Covenant into their national legislation, the signatory nations go beyond recognition at the international level; they oblige themselves to respect parental rights to educate their children. An example of how this has been translated into state law is the formal passage of a Parental Rights Act by the Michigan legislature, employing the following language:

It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children.39

In the United States, the Article 13 principle is demonstrated in the multiple schooling options available to parents. While 48 million U.S. children attend public school, 5 million attend private schools, over 2.5 million of whom go to Catholic schools. Another 1.5-2 million U.S. children are now homeschooled, and thereby are the most influenced by the educational choices of their parents.

38 Drinan, God and Caesar.
39 M.C.L.A. § 380.10.
Another example of the parental right to direct their children’s education according to their convictions can be found in 1972 case of Wisconsin v. Yoder, where the Supreme Court allowed Amish parents to withdraw their children from high school. The parents wanted their children to be educated to a grade-school level of literacy, sufficient to read the Bible, but not beyond that level, lest they be tempted by secular knowledge and worldliness. The Supreme Court acknowledged the parents’ right to raise their children in this manner and excused Amish children from laws requiring compulsory education through high school. The Yoder decision demonstrates how the Article 13 principle may be translated into national educational practices for religious parents with strong conscientious objection to state compulsion.

Dutch education expert Fons Coomans has contributed significantly to a better understanding of the scope and meaning of Article 13. In his discussion of the General Comment on the right to education by the United Nations Committee, Coomans draws out two noteworthy aspects. First, that the right to education implies positive state obligations, that is, Article 13 demands an effort on the part of the state to make education available and accessible. Coomans defines this as the right to receive an education or the “social dimension” of the right to education. Second, individuals have the personal freedom to choose between state-organized and private education; parents’ freedom to ensure their children’s moral and religious

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40 Wisconsin v. Yoder, 406 U.S. 205 (1972) [hereinafter “Yoder”]. This case will be analyzed in Chapter 5.

41 Drinan, God and Caesar, p. 127.


43 The General Comment on the right to education, adopted by the CESCR in December 1999 (21st session) U.N. Doc. EC.12 1999 10. A General Comment is a non-binding but authoritative interpretation of a treaty provision that also gives guidelines for the legislation, policy and practice of State Parties.
education according to their own beliefs implies also the freedom of persons or legal entities to establish their own educational institutions. Coomans calls this the right to choose an education — or, stated differently, the “freedom dimension” of the right to education. It requires the state to follow a policy of non-interference in private matters. As such, Article 13 also implies negative state obligations.

Coomans states that both the social and freedom aspects can be found in Articles 13 and 14 of ICESCR: Article 13(2) and Article 14 cover the social dimension, while 13(3) and (4) embody the freedom dimension. The elements of freedom of education are well expressed in paragraphs 3 and 4 of Article 13: freedom of choice and freedom to establish private schools. This aspect of freedom is typical of a democratic, pluralist society; its origin lies in the respect for individual liberty.

Article 13(3) requires that states “undertake to have respect for the liberty of parents” to choose other than public schools for their children and to ensure their religious and moral education. This obligation has a negative meaning, that is, as a protection against state interference, similar to those obligations related to the implementation of civil and political rights, such as the right to privacy and the right to family life. Coomans, however, interprets the obligation in a positive sense as well: it requires a state to adopt a favourable, tolerant attitude towards the religious or philosophical convictions of parents when the state seeks to introduce

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45 Article 14 reads: “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”

46 Coomans, Human Right, p. 95.

47 The same obligation is encountered at Article 18(4) of ICCPR and the UNESCO Convention against Discrimination in Education at article 5(1b).
subjects into the public school curriculum which may interfere with those convictions. For this proposition, he cites the European Commission human rights case of *Kjeldsen, Busk Madsen and Pedersen*.\(^{48}\) Coomans further submits that the undertaking to respect the liberty of parents in Article 13(3) requires a state to take positive action respecting parental convictions and grant an exemption for certain subjects of the curriculum.

Another element of freedom of education, found at Article 13(4), is “the liberty of individuals and bodies to establish and direct educational institutions” outside the system of state schools. The term “liberty” in Article 13(4) was expressly chosen over the term “right” in order to ensure that Article 13(3) “should not be understood as imposing upon State Parties to the Covenant the obligation to provide religious education in public schools.”\(^{49}\) Article 13(4) does not contain the term “to respect”, but the language does prohibit a state from interpreting the article in such a way that interferes with this educational liberty. A state incorporating the liberty to establish and direct educational institutions within its domestic legal order may legislate minimum educational standards, but such standards should not act to frustrate the exercise of this liberty. Coomans suggests that state implementation of Article 13(4) obliges an approach similar to that required by Article 13(3) “to have respect for the liberty of parents”.


1.5. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief  

The rights contained in ICESCR were further developed in the Declaration on Religion, adopted on 25 November 1981, but not binding upon member states. The protection of the rights of parents and their children is part of the objective announced in the declaration. Article 5(1) mandates in broad terms that parents “have the right to organize the life within the family in accordance with their religion or belief,” and that they have a right to expect that government will respect the “moral education in which they believe the child should be brought up.”

The Declaration on Religion states at Article 5(2) that “every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents.” In addition, a child “shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians.”

The Declaration’s protection of parental rights to deciding upon the education of their children is very strong – surprisingly so, given the dominant position many states take in the cultural and religious life of their countries.  

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51 Drinan, God and Caesar, p. 131.
1.6. Convention on the Rights of the Child

The right to choose alternatives to public education can also be found in the Convention, signed in 1989. Article 14 states:

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

Article 28 of the Convention speaks specifically about the child’s right to education, which ought to be free and compulsory. Article 29 clarifies that this right must not interfere with the establishment of private education institutions (wherein homeschooling would be included):

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always... to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

It is interesting to note that this provision repeats Article 13(4) of ICESCR enacted nearly 25 years before, with the exception that the Convention does not mention the right of parents to choose private schools for their children, natural in a convention on the rights of the child. This omission is consistent with the shift in emphasis over the past generation from the rights of parents over their children to the rights of children exercised by parents on their behalf and in their best interests.

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54 Drinan, God and Caesar, p. 131.
Coomans also observes this shift in international law protection from parents to children when he notes that Article 29 is more extensive and specific with regard to the aims of education in relation to the development of a child’s personality. Other authors have suggested that the modern function of parental rights should be viewed as the preparation of children for maturity, and therefore, “as minors come to achieve maturity and to exercise autonomy, the result is not a limitation or defeat of parental control, but a successful discharge of parental responsibility.” 55

That said, according to international law, and indeed the legislation of most countries, parents have the right to act as their children’s proxies until the children attain the age or stage of maturity at which they can personally exercise their rights. Generally speaking, parents act in the best interests of their children and traditionally the state has been reluctant to interfere in the private ordering of family life except in cases where the child’s well being is clearly “at risk.” Naturally, there are exceptions to this general state of affairs and a careful balancing may be required when considering the interface of the rights of children and parents with respect to education. 56

Conclusions

International declarations concerning human rights, drawn from the principles of natural law and based on the dignity of the human person, have progressively defined the scope of the parental rights, to the point that one can argue that parents have, in law, a wide discretion to choose the


56 Smith and Foster, Balancing Rights, p. 55. The dissent in the 1972 Yoder decision foresaw this evolution in international law. Justice Douglas wrote, “On [the] vital and important matter of education, I think the children are entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views... It is the future of the student, not the future of the parents, that is [at issue].” Yoder, pp. 244-45.
education for their children. It is universally recognized that the right of parents to educate their children involves their active participation and includes the power to decide the orientation of their children’s educational program.

Second, parents carry out a true public service when they undertake to educate their children through educational means other than public schools. Recognizing the exercise of natural law rights by parents, states have an obligation to permit alternative structures to the public school system such as private schools and homeschooling, although they retain the right to regulate such schooling.

Third, for the principle of free choice of education to be effective, it is essential that the state protect this right, not only by allowing for the establishment of education institutions where the education that parents desire for their own children is given, but also by financing these institutions with public funds to the same extent as those created by the state. Otherwise, parents are at a financial disadvantage when choosing a school for their children.

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57 Coomans presents a synthesis of freedom of education based on the international declarations, which he labels the “core content”. He identifies the following as its constitutive elements: the right to non-discrimination; freedom of religion, i.e. respect for the religious convictions of parents concerning the choice of education for their children; freedom of association, i.e. freedom to establish schools; and the right to privacy, i.e. free choice of education, without interference by the state. Coomans, Human Right, pp. 72ff.

58 Elton, Derecho de los Padres, p. 20.

59 Elton, Derecho de los Padres, pp. 89-90.

60 Coomans states: “Free choice of education [means] education without interference by the State or a third person... This element would be violated in case a State fails to respect the free choice of parents with regard to the religious instruction of their children. This means, in practice, that a state must ensure an objective and pluralist curriculum and avoid indoctrination.” Coomans, Human Right, pp. 97-99.
Fourth, the shift in emphasis from parents’ rights to children’s rights in international law need not be considered as diminishing the force of the principles contained in the *Universal Declaration* and the Covenants. When parents develop alternative schooling options, whether establishing a private school or a homeschooling program, they can be said to have the best interests of the children in mind.

Homeschooling is one form of parental education choice; international declarations and covenants recognize that parents have a strong legal basis to develop home educational programs that instruct their children according to their beliefs, values and convictions.


**Introduction**

In many ways, the development of international law instruments on education rights went hand in hand with the enunciation of Magisterial teaching emanating from Vatican II\(^\text{61}\) and found its ultimate expression in the *Code of Canon Law* of 1983.

How does the Catholic Church understand freedom in education? Much as we have seen in the international declarations, the Church considers the subject to be intimately linked with religious freedom. Addressing the new Italian ambassador to the Holy See in December 2010, Benedict XVI illustrated this position as follows:

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The State [has] a just desire to ensure that individuals and the Church can fully exercise their religious freedom. This right has dimensions that are not only personal because “[t]he social nature of man, however, itself requires that he should give external expression to his internal acts of religion: that he should share with others in matters religious; that he should profess his religion in community.” (Vatican Council II, Decl. Dignitatis humanae, 3) Religious freedom is, in fact, a right not just of individuals, but of families, religious groups and the Church, and the State is called to safeguard not only believers’ right to freedom of conscience and religion, but also the legitimate role of religion and of religious communities in the public sphere.  

The Catholic Church is interested in the defence of conscience and the role of religion in communities, two areas that are found also in the field of education. The Church sees religious freedom as a freedom from coercion and – stated more positively – as a means of ensuring exercise of worship and education in the faith. The role of the family in providing education in the faith is fundamental, as pointed out by Dignitatis humanae, no. 5:

Parents, moreover, have the right to determine, in accordance with their own religious beliefs, the kind of religious education that their children are to receive. Government, in consequence, must acknowledge the right of parents to make a genuinely free choice of schools and of other means of education, and the use of this freedom of choice is not to be made a reason for imposing unjust burdens on parents, whether directly or indirectly.

The exercise of these basic parental rights is further developed and explicitly protected in the law of the Church.

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62 Benedict XVI, Address to H.E. Mr Francesco Maria Greco, new Ambassador of Italy to the Holy See, 17 December 2010. The Holy Father cites the Vatican II Declaration Dignitatis humanae, December 7, 1965, A.A.S. 58 (1966), pp. 929-946, where the Church set out the rights of the person and of communities to social and civil freedom in matters religious.

63 Herranz, Libertad, p. 29; see also D. Mamberti, “La protezione del diritto di libertà religiosa nell’azione attuale della Santa Sede” Ius Ecclesiae (2008) 20, pp. 55-64.
2.1. Magisterial Teaching on Parental Education Rights

The Catholic Church has consistently enunciated the principle of the primacy of parental rights in the education of their children, beginning with Pius XI’s Encyclical letter Divini illius magistri of 1929. In this document the Pope speaks of the right to educate, which requires that the Church, the family and the State work harmoniously together, all the while recognizing the proper prerogatives and limits of the others.

Illustrating how the Church seeks to work with the State, Pius XI’s defense of the rights of parents recognizes the principles of natural law as expressed in United States jurisprudence:

37. This incontestable right of the family has at various times been recognized by nations anxious to respect the natural law in their civil enactments. Thus, to give one recent example, the Supreme Court of the United States of America, in a decision on an important controversy, declared that it is not in the competence of the State to fix any uniform standard of education by forcing children to receive instruction exclusively in public schools, and it bases its decision on the natural law: the child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the

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64 Pius XI, Encyclical Letter Divini illius magistri, A.A.S. 22 (1930), pp. 49-86 [hereinafter “Divini illius magistri”]. The 1983 Code’s education canons refer to the encyclical 8 times. J. de Groof observes that the document was the first time the Church affirmed the primacy of the family in education: “La mission de l’Église et son système scolaire pour la promotion du droit à l’éducation” in “Ius ad Institutionem Quinquagesimo Expleto Anno a Declaratione Iurium Hominum” Seminarium (1998) 38, n. 3, pp. 583-608 [hereinafter “de Groof, La mission”].

... 

44. Accordingly in the matter of education, it is the right, or to speak more correctly, it is the duty of the State to protect in its legislation, the prior rights, already described, of the family as regards the Christian education of its offspring, and consequently also to respect the supernatural rights of the Church in this same realm of Christian education.

48. However it is clear that in all these ways of promoting education and instruction, both public and private, the State should respect the inherent rights of the Church and of the family concerning Christian education, and moreover have regard for distributive justice. Accordingly, unjust and unlawful is any monopoly, educational or scholastic, which, physically or morally, forces families to make use of government schools, contrary to the dictates of their Christian conscience, or contrary even to their legitimate preferences.

The pre-Vatican II Magisterium located the right of the family to educate in natural law: having given birth to the children, parents are thus vested with the inalienable and inviolable right to educate them according to their wishes and preferences. To achieve this end the family can seek recourse from the state, but continues to hold the prior right to initiate the education of their children, to watch over their rights and to receive assistance from those institutions and persons that share their beliefs and convictions. The right of parents is not despotic, but subordinated to natural and divine law and the ultimate end of the Creator.67

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66 *Divini illius magistri*, no. 37, citing the 1925 Oregon school case, *Pierce v. Society of Sisters*: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations.”

67 Montan, Educazione p. 55.
The Vatican II Declaration *Gravissimum educationis*\(^ {68} \) signaled a new expression of the Church’s teaching on parental education rights. Montan describes the contribution of the Declaration in this way:

The history of the conciliar document illuminates how the Church has gone from a conception of education in which man was considered in an abstract and passive way, to an educational concept that places the human person in the center, an active subject of the educative process.\(^ {69} \)

Rather than the result of new doctrine or norms concerning education, *Gravissimum educationis* reflects the development of the discourse referring to the human person and his fundamental right to education and culture. The Declaration at no. 1 defines education as the formation of the human person towards his ultimate end as well as the common good of society, and continues:

Therefore children and young people must be helped... to develop harmoniously their physical, moral and intellectual endowments so that they may gradually acquire a mature sense of responsibility in striving endlessly to form their own lives properly and in pursuing true freedom as they surmount the vicissitudes of life with courage and constancy... Moreover they should be so trained to take their part in social life that properly instructed in the necessary and opportune skills they can become actively involved in various community organizations, open to discourse with others and willing to do their best to promote the common good.\(^ {70} \)


\(^{69}\) Montan, Educazione, p. 52 (author’s translation).

\(^{70}\) *GE* at no. 1.
In conformity with traditional doctrine of the Church, *Gravissimum educationis* entrusts to parents the role of “primary and principal educators” and underlines their unique role as authors of education:

Since parents have given children their life, they are bound by the most serious obligation to educate their offspring and therefore must be recognized as the primary and principal educators. This role in education is so important that only with difficulty can it be supplied where it is lacking. Parents are the ones who must create a family atmosphere animated by love and respect for God and man, in which the well-rounded personal and social education of children is fostered. Hence the family is the first school of the social virtues that every society needs.

The relationship of paternity-filiation creates the duty to be a “principal educator”, and more specifically, to foster both the personal and social dimensions of their children. The homeschooling movement reflects the parental obligation to be “principal educators”, creating the school wherein the children learn virtue as well as technical subjects.

The Vatican II Declaration, following the teaching of *Divini illius magistri*, affirms the state’s subsidiary role in education, always respecting the wishes of the parents. The supportive role of the state is developed at no. 6 of *Gravissimum educationis*:

Parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools. Consequently, the public power, which has the obligation to protect and defend the rights of citizens, must see to it, in its concern for distributive justice, that public subsidies are paid out in such a way that parents are truly free to choose according to their conscience the schools they want for their children.

In addition it is the task of the state to see to it that all citizens are able to come to a suitable share in culture and are properly prepared to exercise their civic duties and rights. Therefore the state must protect the right of children to an adequate school education, check on the

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71 *GE* at no. 3.
ability of teachers and the excellence of their training, look after the health of the pupils and in general, promote the whole school project. But it must always keep in mind the principle of subsidiarity so that there is no kind of school monopoly, for this is opposed to the native rights of the human person, to the development and spread of culture, to the peaceful association of citizens and to the pluralism that exists today in ever so many societies.

Therefore this sacred synod exhorts the faithful to assist to their utmost in finding suitable methods of education and programs of study and in forming teachers who can give youth a true education. Through the associations of parents in particular they should further with their assistance all the work of the school but especially the moral education it must impart.

This text makes important points concerning the balance of state and parental rights. The three paragraphs each cover a sphere of the educational responsibility: first, the parents, whose right is “inalienable”; second, the state, which is to protect and defend rights; and third, the associations that assist both the parents and the school. The counsel to find “suitable methods of education” gives parents wide latitude to do what they feel is most appropriate for their children.72

If the Church seeks the common good of all (parents and children) the state also has a serious obligation to nurture it. *Gravissimum educationis* makes reference to the principles of distributive justice, to subsidiarity, and to association, without which an “adequate” education cannot be advanced. The state is entrusted with “promoting the school project”, in particular through the enforcement of teacher qualifications: its role is therefore an active one, not merely a passive conferral of subsidies.

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The Declaration goes on to speak of parental duties more explicitly, urging parents to demand assistance that properly advances the formation of their children along moral and religious principles. No. 7 reads:

The Church reminds parents of the duty that is theirs to arrange and even demand that their children be able to enjoy these aids and advance in their Christian formation to a degree that is abreast of their development in secular subjects. Therefore the Church esteems highly those civil authorities and societies which, bearing in mind the pluralism of contemporary society and respecting religious freedom, assist families so that the education of their children can be imparted in all schools according to the individual moral and religious principles of the families.

The Declaration makes clear the primary role of parents and the need for the state to respect their role. While the conciliar text is only a statement of principles, the document has inspired countless educational undertakings, schools and institutions dedicated to defending parental rights. A recent Canadian case on religious instruction cited Gravissimum educationis as standing for the principle of the state’s positive obligation to refrain from interfering in parental choice of religious instruction.73

The educational Magisterium of the pontificate of John Paul II built on the foundation of Gravissimum educationis.74 In particular, the importance of the family’s role in education is reflected in the Apostolic Exhortation Familiaris consortio,75 the Charter of the Rights of the Family,76 and the


74 For a complete exposition of the teachings of John Paul II on the rights and duties of parents to educate their children, see J.M. Zamora Romero, El Magisterio de Juan Pablo II sobre el derecho y el deber de los padres de educar a sus hijos (Rome: Pontificia Universitas Sanctae Crucis, 1999) [hereinafter “Zamora, El Magisterio”].

75 John Paul II, Apostolic Exhortation Familiaris consortio, November 22, 1981, no. 36 reads: “The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving
Letter to Families. 77 John Paul II teaches that the parental right to education precedes every legal regime: that is, it precedes every society, it is not created by the state but rather is recognized, and therefore cannot be limited in its exercise. 78 Moreover, the Pope drew upon the Universal Declaration when affirming that the state must guarantee the rights of parents to choose an education in conformity with their religious faith. In his 1984 address to Catholic educators in St John’s, Newfoundland, he said:

All men and women – and all children – have a right to education. Closely linked to this right to education is the right of parents, of families, to choose according to their convictions the kind of education and the model of school which they wish for their children (Universal Declaration of Human Rights, Art. 26). 79

John Paul II placed more importance on parental duties, rather than rights. Duties require that parents take the initiative in their educational task; rights meanwhile have more to do with necessary aids provided by civil society, the Church and the State so that families can fully accomplish their educational mission. The Pope affirms that it is incumbent on parents, as holders of this “right-duty” and responsibility for their children’s relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others.”

76 Pontifical Council for the Family, Charter of the Rights of the Family, November 22, 1983, Article 5 reads: “Since they have conferred life on their children, parents have the original, primary and inalienable right to educate them; hence they must be acknowledged as the first and foremost educators of their children.” The article sets out six implications of this basic right.

77 John Paul II, Letter to Families (Gratissimam sane), February 2, 1994, no. 16 reads: “Parents are the first and most important educators of their own children, and they also possess a fundamental competence in this area: they are educators because they are parents... To give birth according to the flesh means to set in motion a further ‘birth’, one which is gradual and complex and which continues in the whole process of education.”

78 Zamora, El Magisterio, p. 12.

education, to choose the means and institutions to fulfill this educational function. It corresponds to them to direct and orient the education their children receive inside and outside the home in accordance with their moral and religious convictions.  

John Paul II likewise makes a strong appeal to parental responsibility in *Familiaris consortio*:

> If ideologies opposed to the Christian faith are taught in the schools, the family must join with other families, if possible through family associations, and with all its strength and with wisdom help the young not to depart from the faith.

The Pope’s statement indicates that parental freedom includes the right to remove one’s children from an educational institutional if they consider that the environment is morally inappropriate, as many homeschooling families choose to do.

The most recent expression of the principles concerning parental education rights is contained in a 2009 document produced by the Congregation for Catholic Education, an organ of the Roman curia. In its *Circular Letter to the Presidents of Bishops’ Conferences*, the Congregation provided the following commentary:

> 3. “Among all educational instruments the school has a special importance” (*GE* 5), as it is “the principal assistance to parents in fulfilling the function of education”(*c. 796 §1 CIC*), particularly in order to favour the transmission of culture and education for co-existence. In this educational setting – and *in conformity with international legislation and human rights* – “the right of parents to choose an education in conformity with their religious faith must be absolutely guaranteed” (*Familiaris consortio*, n. 40). Catholic parents “are to entrust their children to those schools which provide a Catholic

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80 Zamora, El Magisterio, pp. 71-72.

81 *Familiaris consortio*, no. 40.

82 In Chapter 2, we will discuss motivations of parents, whether Catholic or not, for homeschooling.
education” (c. 798 CIC) and, when this is not possible, they must provide for their Catholic education in other ways (cf. ibidem).83

While the statement does not specify those “other ways” of satisfying the right-duty to provide a Catholic education, one may consider that homeschooling, properly carried out according to a curriculum of studies, would fulfill the obligation.84

### 2.2. The Code of Canon Law

We will now review the specific provisions of the Code of Canon Law of 1983.85 The natural law right of parents to educate their children is codified in Title III of Book III, the Teaching Office of the Church, “Catholic Education”.86

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85 This thesis uses the official translation of the Canon Law Society of America.

86 Although we will not discuss these provisions here, the Code also speaks of the vocational duties of parents at Canon 226 §2: “Because they have given life to their children, parents have a most serious obligation and enjoy the right to educate them; therefore Christian parents are especially to care for the Christian education of the children according to the teaching handed on by the Church”; and at Canon 1136: “Parents have the most serious duty and the primary right to do all in their power to see to the physical, social, cultural, moral and religious upbringing of the children.” The Code of Canons for the Eastern Churches of 1990, has similar canons beginning at Canon 627.
The analysis will draw largely on the study by Agostino Montan and several scholarly commentaries on the code provisions. It should be noted that the Code reflects the basic principles laid out in *Gravissimum educationis*, rather than presenting a detailed and finished legislation. For purposes of this study of parental education rights as they are manifested in homeschooling, our discussion of the Code will consider only canons 793, 795 and 797.

We begin with canon 793 which codifies the rights and duties of parents contained in *Gravissimum educationis* no. 3:

§1. Parents, and those who take their place, have both the obligation and the right to educate their children. Catholic parents have also the duty and the right to choose those means and institutes which, in their local circumstances, can best promote the Catholic education of their children.

§2. Parents have moreover the right to avail themselves of that assistance from civil society which they need to provide a Catholic education for their children.

This canon contains the fundamental principles upon which this thesis is based. At first sight, canon 793 is identical in spirit to the international declarations previously reviewed, for example article 13 of *ICESCR*, with the

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87 Montan, Educazione.

88 This study consulted both the *Exegetical Commentary on the Code of Canon Law, Vol. III* prepared by the Instituto Martín de Azpilcueta at the University of Navarre (English edition, Montréal: Wilson & Lafleur, 2006) and the *New Commentary on the Code*, J.P. Beal, J. Coriden, and T. Green, eds. (New York: Paulist Press, 2000), in addition to individual canonical experts in Europe and North America.

89 Montan, Educazione, p. 53.

90 Canon 798 will not be considered in this brief review, but also has implications for parental education rights. It reads: "Parents are to entrust their children to those schools which provide a Catholic education. If they are unable to do this, they are obliged to take care that suitable Catholic education is provided for their children outside the schools."
added modifier “Catholic”. However, while the United Nations speaks only of “right”, the Code adds “obligation” and “duty”. This language is less concerned with conferring a benefit (a second-generation human right) and more properly focused on the relationship of paternity-filiation.

Discussing canons 793-94, Montan considers parental responsibility for the educational task as the basic principle of Catholic education. He notes that the original Latin text uses the phrase “obligatione adstringuntur”, thereby creating a strict obligation. The obligation binding parents is founded on their peculiar relationship with their children, to whom they have given life. Chronologically prior to any other person or institution, parents are bound to educate their children. It is on the basis of this notion, the patrimony of all humanity, that the Church enters into dialogue with all societies and cultures to propose its vision of education to every human community.91

Mary Ann Hayes points out that Canon 793 initiates a wider vision of education by its very first word “parents”, who are reminded of their right and obligation to educate their children. 92 Hayes emphasizes the importance of parental choice in discharging their responsibility:

They must choose the most appropriate means to provide for the Catholic education of their children. The focus is a dual one which emphasizes the need to provide education in the faith but also leaves to parents the right to determine the most suitable means to achieve the goal. The wording of the canon implies the existence of options for choice... It is the Catholic education which is important, not the modality by which it is provided. Again, the Code reflects conciliar thinking and debate,... acknowledging the diversity and availability of various instruments for achieving the goal.93

91 Montan, Educazione, p. 67.
93 Hayes, As Stars, p. 421. Emphasis added.
Carlos Errázuriz makes an important insight concerning canon 793:

The right-duty of Catholic parents does not consist of adding to “human” education (which would be the same as any other parent would provide) a specifically Christian education; on the contrary, the “human” education must also be oriented in a Christian way, to the point where there is in reality no “human education” plus “Christian education”, but rather a single educational process that should be fully Christian, in both its human aspects and its specifically religious aspects.94

This commentary clarifies the importance of an integrated education, that is Christian in all respects, not merely instruction in doctrinal and moral issues in addition to the technical subjects required for social or professional development. Parents will need to decide how this educational process is best achieved, and may conclude that schooling offered in institutions, whether public or private, lacks this essential condition.

Davide Cito observes that the primary role of parents is irreplaceable and inalienable, since it cannot be legitimately usurped or delegated in full to others. Parents, more than anyone else, must ensure, though promotion, management or involvement in initiatives, an educational project that is consistent with the Gospel and their own convictions.95 The natural law protects the parents’ role from illegitimate interference by others, so they can choose, without external constraints, the education for their children according to the dictates of their conscience. That said, Cito finds two internal limits to parental rights under 793: first, a child’s right to receive a genuine education; and second, the growing role of educators in the schooling process.96


Referring to the direct connection between Vatican II teaching and the 
Code, Edward Peters notes that the deliberate decision by the Code drafters 
to open the Church’s own canons on education with the word “Parents” 
(Canon 793) and deciding in the same breath to change the title of the 
entire section from “Schools”, which it was under the 1917 Code, to less 
restrictive and indeed much more fundamental “Catholic Education”...
[shows] how far the Church will go in recognizing the right of Catholic 
parents to choose the options which they feel will best serve their 
children’s education.⁹⁷

In this respect, Sharon Euart observes the connection between canon 
793 and homeschooling:

The first paragraph, based on GE 3 & 6 focuses on the rights and 
obligations of parents to 1) educate their children and 2) select the 
most suitable means and schools for the Catholic education of their 
children... Often identified as a foundational canonical provision in support for home schooling, canon 793 §1 recognizes the primary 
educational role of parents within the broad framework of Catholic 
education, and suggests, as does the title of this section, that not all 
education that is Catholic need take place within the school setting.”⁹⁸

Euart’s point is instructive: parents are not duty bound to send their 
children to the local Catholic school if they decide that more “suitable 
means” would be to provide a Catholic education in the home or otherwise.

Citing the compelling language of canon 793, Benedict Nguyen advocates 
strongly in favour of homeschooling:

[B]efore examining the role of schools or pastors or even bishops in 
Catholic education, [canon 793] begins the section with a forceful 
reminder: “Parents and those who take their place are bound by the 
obligation and possess the right of educating their offspring...”

⁹⁷ E.N. Peters, “A Canon Lawyer Looks at Home Schooling” in Catholic Dossier [hereinafter “Peters, Canon Lawyer”].
Under this canon, the right of Catholic parents to opt for home schooling as the means to provide for the Catholic education of their children is clearly protected. The canon declares that Catholic parents have the duty and the right to determine not only which institutions can help to provide for their children’s Catholic education, but first and foremost, which means are the best means by which to accomplish this task. Catholic parents are well within their canonical rights to choose the institution of the family instead of the institution of the school to achieve this goal.  

Although the educational duty is primarily incumbent upon parents, it also involves all the components of society. Canon 793 §2 codifies the natural law teaching concerning the state’s role contained in Gravissimum educationis no. 3 whereby the public authority must ensure the availability of public subsidies to parents so they can truly and freely exercise their right-duty to educate their children. The parents ought not to be obliged to sustain, directly or indirectly, supplementary expenses that impede or limit unjustly the exercise of their freedom.

Canon 793 §2 emphasizes the social dimension of education, underlined by Vatican II, that endeavouring to obtain a Catholic education for one’s children is a genuine civil right, the same as the right held by members of other religious confessions. The paragraph does not specify concrete ways in which civil society should provide assistance to families to enable them to fulfill their educational duty. The issue will depend largely on each country’s juridical system. Euart notes that while 793 §2 “lacks specificity as to the responsibilities of the State or the nature of the assistance, it considers religious education as an integral and essential component of Catholic education.”

We now consider canon 795 which specifies the kind of education children must receive. It reads:

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100 Euart, Commentary on canons 793-814, p. 954.
Since true education must strive for complete formation of the human person that looks to his or her final end as well as to the common good of societies, children and youth are to be nurtured in such a way that they are able to develop their physical, moral, and intellectual talents harmoniously, acquire a more perfect sense of responsibility and right use of freedom, and are formed to participate actively in social life.

Montan views canon 795 as a pragmatic interpretation of “the concept of education”. Here the Church sets forth the contents of an integral formation: harmonious development of one’s talents, a sense of responsibility, the proper use of freedom, the recognition of and respect for the rights and duties of others, and lastly, active participation in social life.101 Cito observes that canon 795 expresses the philosophy behind Gravissimum educationis:

Conciliar thinking made it possible to offer a concept of education that is remarkably richer and which encompasses all aspects (physical, moral and intellectual) of the overall maturity of a person. This makes possible a more harmonious, unified vision of the educational process.102

Euart describes canon 795 as a “holistic undertaking” and points out that “this canon reiterates the goals of education in the process of human formation and the individual’s right to an education.”103

José María González del Valle, points out a crucial difference between education and formation implicit in canon 795:

In education, whether religious or secular, two facts must be distinguished in their turn: education and formation. Education is directed towards the systematic learning of a bank of knowledge and both religious and secular education usually have three levels: primary, secondary and higher or university. Formation, on the other hand, refers to the instilling of standards and habits of behaviours and

101 Montan, Educazione.
103 Euart, Commentary on canons 793-814.
action and is directed towards the person as an individual not towards a group or class, and does not entail the granting of certificates or diplomas. Religious formation as opposed to religious education, is intended directly for the practice of religion. A civic formation is also necessary in the non-religious sphere.\(^{104}\)

It is unclear whether González del Valle’s insight can be applied to homeschooling, to the extent that it unites both education and formation in the home. The proper formation of the child may at times require removal from negative or even aggressive environments, that unchecked, can undo parental efforts and instill values diametrically opposed to the family’s identity and belief system. Would not homeschooling defend the child from two extremes that could have adverse repercussions on his proper formation? First, inclusion within a school system that indirectly or directly opposes family identity and beliefs; and second, an indifferent or negligent attitude on the part of parents that functions as an implicit delegation of their educational responsibility to schools of whatever kind.

Finally, canon 797 codifies the natural law right to “choose schools” and have access to the financial and legal means to affect real choices:

Parents must possess a true freedom in choosing schools; therefore, the Christian faithful must be concerned that civil society recognizes this freedom for parents and even supports it with subsidies; distributive justice is to be observed.\(^{105}\)

Cito notes that Canon 797 upholds the parental right to true liberty in choice of schools (the principle contained in GE no. 6), and gives meaning to the exhortation contained in 793 §2 that parents seek the assistance of


\(^{105}\) The translation of canon 797 by the Canon Law Society of Great Britain and Ireland is more literal and closer to the arguments of this study: “Parents must have a real freedom in their choice of schools. For this reason Christ’s faithful must be watchful that the civil society acknowledges this freedom of parents and, in accordance with the requirements of distributive justice, even provides them with assistance.” Emphasis added.
civil society to fulfill their education task. Moreover, Cito observes that canon 797 touches upon three crucial areas related to “freedom in their choice of schools”. First, choice is an immediate consequence of parents’ basic right to educate their children and of the subsidiary role of schools. Second, the content of this right is the actual possibility of freely choosing a school with an educational program consistent with their convictions. This both entails an acknowledgement that citizens and intermediate groups may set up and run schools with a specific educational curriculum, and precludes — as contrary to natural law— any attempt by public authorities to establish a monopoly on education. From these two points follows the third, that is, that the faithful – especially the laity, by virtue of their status as citizens and baptized persons – have the duty to persuade civil society to recognize parental freedom in education. Each of the faithful has the freedom to determine concrete ways of doing so; no one is obliged to pursue any particular technical or political option.

Euart views canon 797 as “a strong affirmation of the true freedom of parents” in the selection of schools for their children. She notes that the canon admonishes the faithful to ensure that civil governments recognize, promote and safeguard the genuine freedom to choose suitable schools. Public subsidies are necessary so that parents are not penalized in exercising their rights to select schools for their children in accord with their conscience.

It bears repeating that canon 797 expresses the truth that the Magisterium’s authority is not limited to supernatural revelation, but also encompasses precepts of natural law. As a result, the Church, although a religious body, sanctions rights in its law that are primarily exercised in civil society. This canon illustrates the close harmony —fully compatible

107 Cito, Catholic Education, p. 207.
108 Euart, Commentary on canons 793-814, states that canon 797 mirrors the teaching of Dignitatis humanae, no. 5.
109 Euart, Commentary on canons 793-814, p. 254.
with the autonomy of the temporal declared by Vatican II—that exists between the temporal order and the religious order. The Church adheres to no specific technical solution and limits herself to her sphere of competence, the principle of natural law, declaring that parents and civil authorities are obliged to find satisfactory practical solutions, which may differ greatly from each other and at the same time be equally effective, provided the outcomes respect human dignity.110

Taking up this point, Peters emphasizes the laity’s responsibility under canon 797. He notes:

[T]he 1983 Code takes a marked step beyond the Council’s admonition to the state that it recognize the educational rights of parents, and through Canon 797 explicitly directs the faithful themselves to engage the government in its duty to respect parental rights. In so doing, the Code departs from its usual practice of refraining from directives which carry civil implications and at the same time widens the ecclesiastical responsibility for civil educational policies from just parents, teachers, and Church leaders, and places it in the entire Christian community.111

To link back to our earlier discussion, protection of parental choice found in international declarations expresses the natural law as much as the language of canon 797. Moreover, the Catholic faithful must give content to these rights by achieving true recognition by civil authority. Otherwise, parental freedom to educate is effectively compromised or even negated.112

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110 Cito, Catholic Education, p. 207.
112 Montan, Educazione.
2.3. Homeschooling and the Church’s Teaching on Education

We now turn our attention to how Church teaching on education treats homeschooling in practice.

In his book *Homeschooling and the New Code of Canon Law*, Peters advances the position that Church law favours the movement:

Those Catholic parents who, after sufficient reflection and preparation, choose to educate their children at home, even in the presence of generally acceptable Catholic schools, do so with ample support and encouragement from the revised (1983) Code of Canon Law.

Peters bases the synchronicity between homeschooling and Code principles on three ideas: first, the Church’s rich tradition on parental rights and duties in educational matters; second, the high compliance of homeschooling material and content with approved Church teaching; and third, the obvious success of homeschooling in almost every context in which it has been tried. His canonical review of homeschooling concludes: “the Code of Canon Law has taken great care to protect parental primacy in seeing to the education of children, whether that parental right and duty is legitimately entrusted to others, or whether it is directly exercised by those who will most immediately answer to God for the raising of their children.”

Nguyen meanwhile focuses on the repeated references in the Code to the primacy of parents in determining the education of their children, not only in religious formation, but also in their physical, social, and cultural education. He observes:

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114 Peters, Homeschooling and the Code, p. 46.


J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection
Parents must look for the ways in which all of these aspects are provided for as best they can. If the parents decide to accomplish this formation through home schooling, then they must be certain, at least to the best of their ability, that this is the best way to fulfill the duty. 116

As the parents are the first educators to whom the child is exposed, they not only have a relational influence over the child that cannot be replaced, but also, and just as importantly, it is they who must make the determination of whether or not to delegate part of this child’s formation to others – and, if so, to whom and how much. Based on these considerations, Nguyen concludes:

Thus home schooling parents are on firm ground to invoke the principle of “primary educators” not because it allows them to be the “only” educators — it does not — but rather because it affirms the fact that they are the most important educators who must decide the course of the child’s education. They are “primary” because it is they who must decide, prayerfully and reasonably, the proper means of education for their child under Canon 793 §1.117

Canon law requires parents to live up to their obligations and to determine the best means to transmit a Catholic education to their children. In this context, Nguyen considers that:

If the parents can best accomplish this through home schooling, then home schooling is not only a legitimate means, it is a laudable labor of love for parents who are trying to take seriously their vocational duties... [A]mong the various ways, home schooling is a legitimate and proper expression of the vocational duty of parents in the education of their children even when other means are available, including the existence of Catholic schools.118

116 Nguyen, Home Schooling.
117 Nguyen, Home Schooling.
118 Nguyen, Home Schooling.
Conclusions

This overview of Magisterial teaching and the education canons of the Code of Canon Law demonstrates the primary role of parents and their right to the “most suitable” means with which to provide a Christian education to their children. The Vatican II Declaration Gravissimum educationis brought about an important shift in perspective, widening the concept of education and focusing on the integral development of the human person. This deepening of the educative philosophy of the Church in turn influenced the preparation of the Code of Canon Law. The code assigns the primordial educational role to parents, while indicating a subsidiary role to the state and the Church to assist harmoniously within the educational process. From procreation there arises a natural right-duty in the parents to carry out the education of their children. They have a unique responsibility in the education process, as manifested in the capacity to direct the formation of their children without external constraints, and which constitutes their freedom of education.

To ensure a proper education in the faith, parents have the right to choose those means that will best further this objective. Civil authority, meanwhile, has the responsibility to assure that the necessary means are available, and to guarantee the natural freedom to educate, with minimal interference. One of the principal means to achieve these objectives is the effective parental freedom to choose the most suitable means, that is, the real possibility to choose freely a school that has an educational project in conformity with their own convictions, and more generally, with their own and legitimate educational preferences. The Magisterium’s principles based upon the natural law and the resulting Code provisions give wide scope for parents to promote and sustain a variety of private educational undertakings, including homeschooling. As we shall see in Chapter 2, the homeschooling movement represents a particular choice by parents for the education of their children.
Chapter II. **The Social Phenomenon of Homeschooling**

*Introduction*

North American parents long for their children to receive the best education available, but there are differing views on how to attain this end. While some parents believe that the most productive learning environment is in the traditional classroom, a significant number of parents are convinced that their children’s interests in education are better served in a homeschool setting, where the child can receive individualized instruction in a controlled environment.

The homeschooling movement, “one of the most significant social trends of the past half century,” 119 is a specific example of parental choice in education that has succeeded in establishing a dynamic and highly prolific network of thousands of families who daily turn their homes into schools. 120

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Patricia Lines notes that “the reemergence of what is in fact an old practice has occurred for a distinctly modern reason: a desire to wrest control from the education bureaucrats and reestablish the family as central to a child’s learning.” She underlines the fact that homeschooling is almost always a matter of choice: that is, schools are generally available, but homeschooling families have chosen not to use them. For a number of different reasons, parents have lost faith in the classroom, and homeschooling has become a serious, and growing, alternative.

Lines points out that private schools have traditionally provided a refuge for those who dissent from the public school curriculum. The rise of homeschooling has thus impacted most heavily upon private schools. Surveys suggest that among homeschooled children who previously attended a school, a disproportionate number attended a private school.

This chapter will begin by chronicling a series of events that helped give a start to the homeschooling movement. Additionally, it will attempt to answer the obvious question: “why do parents choose homeschooling?” by reviewing the wide-ranging, and at times surprising, motivations that lead parents to undertaking the arduous task of homeschooling. The rapid success of the phenomenon and the controversy stirred by the press and the public school system have resulted in a large body of social science literature that assesses the academic and social outcomes of children who have received their education only in the home, outside the socializing influence of the institutional school.

121 P.M. Lines, “Homeschooling Comes of Age” The Public Interest 140 (Summer 2000), pp. 74-85 [hereinafter “Lines, Homeschooling Comes of Age”].

122 Lines, Homeschooling Comes of Age.
1. The Definition of Homeschooling

Before describing the various facets of the movement, it will be useful to clarify what is the definition of homeschooling. This study has encountered several well-reasoned responses, which are set out below.

Sociologist Edward Collom: Home schooling is both a means of educating children according to parental standards and an alternative social movement embracing a unique set of cultural norms and values... Alternative social movements create their own social space to defy mainstream institutions... Home schooling is a growing, heterogeneous movement of organizations and individuals acting collectively in an effort to better their children’s lives. This alternative is becoming more and more publicly acceptable.123

Canadian Federal Agency Statistics Canada: Home schooling occurs when a child participates in his or her education at home rather than attending a public, private or other type of school. Parents or guardians assume the responsibility of educating their child and may develop their own curriculum guidelines using the support of local and virtual education resources as they see fit.124

Homeschooling author Patricia Lines: Homeschooling is the education of school-aged children under their parents' general monitoring, and it replaces full-time attendance at a campus school. Some homeschooling children enroll part time at a campus-based school, or share instruction with other families, but most of their educational program is under the direct oversight of parents. While many activities take place in the home, parents often draw on their community, neighboring institutions, and travel opportunities to complete the program.125

123 Collom & Mitchell, Social Movement, p. 274.
Legal advisor to homeschoolers Christopher Klicka: Home schooling is exactly what the name implies: a school in the home. The teachers in a home school are the parents, and these parents have a commitment to make the necessary career sacrifices in order to personally provide an education for their children. For the majority, their primary reason to home school is to teach their children Christian principles and give them a thorough education – a reaction to the steady academic and moral decline in the public schools. And home schooling works.\(^{126}\)

Academic expert in civil and canon law Ernest Caparros: Teaching in the home or school in the home: Parents, in the face of a public educational system that does not respect their convictions and in the absence of private institutions that respond to their expectations, decide to take on themselves the education of their children in their own home. Frequently they are large families, with profound religious convictions and great generosity. Normally, the mothers play a determining role in these schools.\(^{127}\)

These definitions come from varied sources and in large measure reflect how the phenomenon of homeschooling has been understood differently: whether as an educational movement pursuing change, a statistical novelty, a response to rigid legal factors, or a personally fulfilling experience. Although the words “freedom”, “right”, and “choice” which we encountered in the international declarations analyzed in Chapter 1 are not mentioned explicitly by these sources, the notion of parental freedom is understood in phrases such as “assume responsibility”, “commitment”, or “decide to take on themselves”.

If one were to posit a single comprehensive definition of homeschooling, it might run as follows: homeschooling is the result of parents’ preference to bypass the institutional school and educate their children themselves, that is, to exercise their role as educators directly and not through the vehicle of


the traditional school environment.

2. The Origins of Homeschooling

Parents have always taught their children at home; institutional schooling on the other hand, is a product of modernity. In “the broad sweep of time, universal, compulsory, and comprehensive schooling is a relatively new invention.” Until the mid-19th century, homeschooling was the only option available to most families in North America for educating their young, and apprenticeship was the most common form of instruction. The home, the workshop and the field were the primary places where one generation passed on knowledge to the next.

Throughout the United States and Canada, education remained informal until the 1850s, when the common school movement led by Horace Mann and other reformers brought about the widespread availability of free public schools. State and provincial legislatures began requiring local governments to build schools and obliging parents to enroll their children. Over time, compulsory school attendance and the training of

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128 Lines, Homeschoolers.
131 Modern compulsory attendance laws were first enacted in Massachusetts in 1853 followed by New York in 1854. By 1918, all states (and Canadian provinces) had compulsory attendance laws. According to C. Higgins, the public school was the
professional educators “coalesced to institutionalize education in the physical environment that today we recognize as school.” 132 An important factor in the establishment of the public school system was the development of the doctrine of parens patriae, whereby the state was deemed the ultimate parent of the child. 133

Although homeschooling did continue in a limited fashion after the 1870s,134 it was not until the 1960s that this educational practice received renewed attention and interest from parents and educators.135

The intellectual seeds of what has grown into the modern-day North American homeschooling movement were planted by two unrelated sources about 50 years ago.

Dr Raymond Moore, a United States Department of Education analyst, and his wife Dorothy, a former elementary school teacher, began

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134 One of the earliest advocates of homeschooling, Charlotte Mason, published a series of books on the subject in the early 1900s. Her books stressed the importance of a liberal education, biblical study, and the influence of the home. Her seminal works are considered to be the founding documents of the modern homeschooling movement. Cited by Higgins, Pilot Study.

researching the institutionalization of children’s education in 1969.\textsuperscript{136} Two of the questions the Moores set out to answer were: “Is institutionalizing young children a sound educational trend?” and “What is the best timing for school entrance?” For this purpose, they sought advice from over 100 family development specialists and researchers.\textsuperscript{137}

In the process of analyzing hundreds of studies, the Moores began to conclude that developmental problems such as hyperactivity, nearsightedness and dyslexia were often the result of prematurely taxing a child’s nervous system and mind with continuous academic tasks, like reading and writing.

The Moores’ primary conclusion, disseminated in their publications *Home Grown Kids* and *Home-Spun Schools*, was that a child’s entry into formal education should be delayed until ages 8-12. They explained further:

> These findings sparked our concern and convinced us to focus our investigation on two primary areas: formal learning and socializing.

> Eventually, this work led to an unexpected interest in homeschools.\textsuperscript{138}

As a method of education, the Moores advocated a firm but gentle approach to home education from a Christian perspective that balances study, chores, and work outside the home in an atmosphere geared toward a child’s particular developmental needs.

The second origin of homeschooling has its theoretical roots in the libertarian approach found in the writings of John Holt. During the 1960s, Holt called for educational decentralization and greater parental autonomy,


\textsuperscript{137} Lyman, Homeschooling. Overall, the experts recommended “a cautious approach to subjecting [the child’s] developing nervous system and mind to formal constraints.” Psychologist Urie Bronfenbrenner of Cornell University maintained that subjecting children to the daily routine of elementary school can result in excessive dependence on peers.

\textsuperscript{138} Lyman, Homeschooling.
an idea sometimes known as “laissez-faire homeschooling”, and popularly referred to as “unschooling.”

An Ivy League graduate and a teacher in alternative schools, Holt decried the lack of humanity towards schoolchildren, even in the most compassionate school settings; he was also a critic of the compulsory nature of schooling. Holt, who had long advocated the reform of schools, became increasingly frustrated that so few parents were willing to work toward change within the system. Consequently, after his own years as a classroom teacher, he observed that well-meaning but overworked teachers, who program children to recite the “right” answers and discourage self-directed learning, often hold back children’s natural curiosity. His central thesis was that the most civilized way to educate a child was to homeschool him.

139 A small minority – approximately 7% – of homeschoolers follow the “unschooling” approach, which does not adhere to a structured curriculum, allowing students to learn at their own pace and according to their own interests. See C. Kleiner, “Home School Comes of Age”, U.S. News & World Report, Oct. 16, 2000, p. 52, where Kleiner explains that unschooling is “based on the idea that education should be a natural process. There is no structure and no set curriculum; parents simply allow their children to determine what they want to study and when, offering guidance only when necessary.”

140 Ivan Illich’s Deschooling Society (1971) further radicalized Holt. He studied and corresponded with Illich at length, and was deeply influenced by Illich’s analysis, particularly with his idea that school serves a deep social function by firmly maintaining the status quo of social class for the majority of students. Moreover, schools view education as a commodity they sell, rather than as a life-long process they can aid, and this, according to Illich, creates a substance that is not equally distributed, is used to judge people unfairly, and based on their lack of school credentials prevents people from assuming roles they are otherwise qualified for. P. Farenga, John Holt and the Origins of Contemporary Homeschooling (New York: Paths of Learning, 1999) [hereinafter “Farenga, John Holt”].

141 Farenga, John Holt. Holt says: “To return once more to compulsory school in its barest form, you will surely agree that if the government told you that on one hundred and eighty days of the year, for six or more hours a day, you had to be at a particular place, and there do whatever people told you to do, you would feel that this was a gross violation of your civil liberties.”
To propagate his ideas, Holt wrote the highly controversial books *How Children Fail*[^142] and *Teach Your Own*.[^143] In another work, *Instead of Education: Ways to Help People Do Things Better*,[^144] he proposed removing children from school as an act of civil disobedience. While the education establishment paid little attention to the book, a number of parents found common cause and initiated contact with Holt. Finding that rural families, city dwellers, others in communes were teaching their children outside the school setting, Holt began publishing a newsletter in 1977 entitled *Growing Without Schooling* to network these people.[^145] He described his constituency in these words:

> Those who read *Growing Without Schooling*, and want to take or keep their children out of schools, may have very different, in some cases opposed reasons for doing this. Some may feel that the schools spend too much time on what they call the Basics; others that they don’t spend enough. Some may feel that the schools teach a dog-eat-dog competitiveness; others that they teach a mealy-mouth Socialism. Some may feel that the schools teach too much religion; others that they don’t teach enough, but teach instead a shallow atheistic humanism. I think the schools degrade both science and religion, and do not encourage either strong faith or strong critical thought.[^146]

Holt believed that children had a natural proclivity for learning and learned best when they were encouraged to pursue their own interests rather than being forced to follow an established curriculum as in traditional schools.[^147] In summary, he espoused a philosophy of home-


[^145]: Farenga, John Holt.

[^146]: Farenga, John Holt.

based education that he called “learning by living”, and created the word “unschooling” to describe a pedagogy which requires neither classrooms nor teachers.148

The constituencies that the Moores and John Holt individually attracted reflected their backgrounds and lifestyles. Dr Moore, a former Christian missionary, earned a sizable following among parents who chose homeschooling primarily to impart traditional religious teaching to their children. Holt, a humanist, became a cult figure to the wing of the homeschooling movement that encompassed New Agers, ex-hippies and homesteaders – the countercultural left. The two men earned national reputations as educational pioneers, working independently of one another, eloquently addressing the disillusionment of a diverse group of parents with the modern educational system – a system which, in their view, does not serve the developmental needs of children. Through media, legislative consultations and speeches to sympathetic communities, Holt and Dr Moore delivered the message that homeschooling is a good, or even a superior, way to educate children and that in some way this method hearkens back to the preindustrial era, when families worked and learned together instead of apart.149

In the 1970s the countercultural left comprised the majority of homeschooling families. By the mid-1980s, however, most homeschooling parents could be accurately described as part of the Christian right, a trend that would change the nature of homeschooling from a crusade against “the traditional schools children’s capacity for learning “is destroyed, and more than by any other thing, by the process we misname education... We adults destroy most of the intellectual and creative capacity of children by the things we do to them or make them do. We destroy this capacity above all by making them afraid, afraid of not doing what other people want, of not pleasing, of making mistakes, of failing, of being wrong.”

148 Although Holt used the terms “unschooling” and “homeschooling” interchangeably in his writing, he eventually felt that homeschooling was the term most people would use when discussing the idea that one can learn without going to school.

149 Farenga, John Holt.
establishment” to a crusade against the secularization of modern society. By the turn of the century, 75% of North American homeschoolers were practicing Christians, although it should be noted that the growth in homeschooling is not restricted to religiously motivated parents, for many homeschoolers are simply people dissatisfied with public and private school options and seeking quality education for their children.150

The vigorous growth in the Christian homeschooling movement in the past three decades is due mainly to the leadership of the Homeschool Legal Defense Association (HSLDA).151 The HSLDA has orchestrated a number of legislative and judicial victories on behalf of parental education rights to homeschool. The organization has made possible, in both the United States and Canada, a steady expansion of parental rights across all states and provinces in support of Christian families who wish to protect their children from what they see as harmful secular social values propagated by the public school system.152

Motivated by its strong convictions in defense of parental education rights, in the United States the HSLDA has successfully opposed

150 Basham et al., Extreme to Mainstream, p. 8. For the diversity in backgrounds of homeschoolers, see also M.L. Stevens, Kingdom of Children: Culture and Controversy in the Homeschooling Movement (Princeton, NJ: Princeton University Press, 2001). Secular homeschoolers have founded organizations, such as Clonlara Home Based Education, based in Michigan, to offer support to parents seeking home educational solutions.

151 Founded in 1983, the organization provides homeschooling-related legal services for member families and in large part defines the legal and political agenda for Christian homeschoolers. Michael Farris, a founder of the HSLDA, has written, “[t]he right of parents to control the education of their children is so fundamental that it deserves the extraordinary level of protection as an absolute right.” M. Farris, Homeschooling and the Law (Front Royal, VA: HSLDA, 1990), p. 148 [hereinafter “Farris, The Law”].

152 According to Farris, public schools have been “promoting values that are questionable or clearly wrong: the acceptability of homosexuality as an alternative lifestyle; the acceptability of premarital sex as long as it is 'safe'; the acceptability of relativistic moral standards.” Farris, The Law, p. 53.
government oversight and regulation of homeschooling in a number of instances. In 1994, the HSLDA intervened to defeat a proposed amendment to the *Elementary and Secondary Education Act* that would have required homeschooling parents to be certified teachers. Its members placed hundreds of thousands of calls to members of Congress and made personal visits to every Representative, explaining their opposition to the amendment. The amendment failed, and a disclaimer was added to the Act stating explicitly that the legislation did not authorize any federal control over homeschools. In 2001, when legislation was introduced into the Michigan State Senate requiring all homeschoolers to be registered with the state and take a standardized test, HSLDA members placed more than 100 calls a day opposing the legislation. As a result, state senators withdrew their support, and the legislation died in the House Education Committee.

In addition to preventing the passage of new state laws regulating homeschooling, HSLDA has been effective at challenging existing legislation. As we shall see in Chapter 3, largely due to HSLDA’s work, over the past 30 years state laws regulating homeschooling have become increasingly favourable to parental choice.

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153 K. Yuracko, “Education Off the Grid: Constitutional Constraints on Homeschooling” (2008) 96 *Cal. L. Rev.* 123 [hereinafter “Yuracko, Education Off the Grid”]. Homeschoolers have also lobbied on behalf of federal legislation assuring equal treatment in access to federal loans and grants for postsecondary education. Yuracko cites former U.S. Representative Bill Godling from Pennsylvania, the former chair of the House Committee of Education and the Workforce, as saying that homeschoolers are “the most effective education lobby on Capitol Hill”, pp. 108-09.

154 Yuracko, Education Off the Grid, p. 109.
3. Homeschooling by Numbers and Social Groups

Now that we understand where homeschooling has come from and how it has established itself as an educational option, let us consider its rapid spread in both the United States and Canada.

Figures from 2006 estimated the total number of homeschoolers in the United States as between 1.5 and 2 million.\(^{155}\) Given that the United States has 55 million students attending 96,000 public schools and 30,000 private schools, as a group homeschoolers thus comprise between 3.3% and 3.8% of the school-aged population.\(^{156}\)

Over the past three decades, the surge in numbers has been impressive. Starting from a base of only 50,000 American homeschooled children in 1985, there were 300,000 homeschooled children in 1992.\(^{157}\) The United States Department of Education estimated in 1995 that the number stood between 500,000 and 750,000. Department estimates in 1999 were 850,000 students being homeschooled, and in 2003, 1.1 million. From

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\(^{155}\) The range of the estimate is so large because several states do not require homeschooling parents to notify the state of their intention to homeschool, and many homeschoolers living in states that do require notification do not comply. Lines, Homeschooling Comes of Age, pp. 77-78. Lines discusses problems with accessing reliable data on the actual number of homeschooled students.


\(^{157}\) Basham et al., Extreme to Mainstream.
these figures, the Department calculates a rate of growth of 29%,\textsuperscript{158} although other studies place the rate of growth considerably lower.\textsuperscript{159}

Lines characterizes the typical homeschooling family as “religious, conservative, white, middle-income, and better educated than the general population.”\textsuperscript{160} This compares quite closely to the following observations from the United States Census Bureau:

- 75% of homeschoolers were white as compared to 65% of non-homeschoolers;
- 80% of homeschooled students lived in two-parent families, as compared to 66% of non-homeschooled students;
- 62% of homeschoolers, but only 44% of non-homeschoolers came from families with three or more children;
- 60% of homeschooled children have a non-working adult in the home, compared with 30% of other children.\textsuperscript{161}

The last statistic is probably the strongest indicator of parental choice to homeschool, and best captures the reality of the sacrifices families make to

\textsuperscript{158} United States Department of Education, _Homeschooling in the United States: 2003_.

\textsuperscript{159} Lines, _Homeschooling Comes of Age_, p. 75, estimated growth at 15-20% per year. See also Butler & Robson, Reassessing Education, who put forward a 17% and 12% increase in the United States and Canada, respectively, citing K.M. Nemer, _Schooling Alone: Homeschoolers, Individualism, and the Public Schools_, Ph.D. Dissertation, 2005.

\textsuperscript{160} Lines, _Homeschooling Comes of Age_, p. 78.

accomplish the objective of alternative education. The mother typically assumes the largest share of the teaching responsibility, although fathers almost always participate, and in as many as one out of ten families, the fathers take the primary responsibility.162

Demographic data on income suggests that homeschooling parents are likely to be at or slightly above the national mean in terms of household wealth and parental education.163 But these families are not as well off as those that choose private schooling for their children.164

Research on parental occupations shows that the top three occupational groups for homeschooling fathers were accountant or engineer (17.3%); professor, doctor, or lawyer (16.9%); and small-business owner (10.7%).

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163 L. Rudner, “Scholastic Achievement and Demographic Characteristics of Home School Students in 1998” Education Policy Analysis Archives (1999) Vol. 7 [hereinafter “Rudner, Scholastic Achievement”]; C.R. Belfield, Home-Schooling in the U.S., Occasional Paper No. 88, (New York: National Center for the Study of Privatization in Education, Columbia University, 2004) which found that homeschooling families tend to be in the middle range socially in terms of education and income. Approximately 30.9% of homeschooling families have annual household income of $25,000 or less; 32.7% is between $25,000 and $50,000; 19.1% is between $50,000 and $75,000; and 17.4% is over $75,000.

164 Higgins, Pilot Study, p. 15: 38% of private schooling families have incomes in excess of $75,000; for homeschooling families, the figure is much smaller (17.4%). For further comparison of homeschooling and private school profiles, see D. Princiotta, S. Bielick & C. Chapman, Homeschooling in the United States: Statistical Analysis Report (Washington DC: National Center for Education Statistics, U.S. Department of Education, 2006) [hereinafter “Princiotta, Statistical Analysis”].
According to the same study, 87.7% of mothers who have chosen to stay at home and teach their children list “homemaker” as their occupation.\footnote{B.D. Ray, \textit{Home Education across the United States} (Front Royal, VA: Home School Legal Defense Association, 1997), p. 12.}

Homeschooling parents have above-average levels of education. Among American parents who homeschool, 75\% have studied beyond high school compared with 56\% of parents nationwide.\footnote{United States Department of Education, 2005. See also United States Census Bureau, Population Division, Education & Social Stratification Branch, 2006.} That said, United States Department of Education statistics show that between 1999 and 2003 the proportion of homeschooled students taught by parents whose highest educational attainment was at most a high school diploma increased substantially, while the percentage of those whose parents had more formal education decreased in every category.\footnote{Princiotta, Statistical Analysis, p. 6, showing that the largest percentage increase in homeschoolers came from households in which both parents’ highest educational attainment was a high school diploma or less.}

A further way in which homeschool children in the United States differ from their peers is geographic location. Homeschoolers are more likely to be located geographically in places that have been destinations for internal migration. Using a division of the country according to migration patterns,\footnote{W.H. Frey, “Regional Shifts in America’s Voting Aged Population: What do they mean for National Politics?” \textit{Population Studies Center Research Report 00-459} (Ann Arbor, MI: Institute for Social Research, University of Michigan, 2000).} homeschoolers are more likely to be located in rural and suburban areas of the West which have been the recipient of migration from California and other immigration gateway states. Many of these areas have experienced high rates of population growth.\footnote{Bauman, Education Policy. He comments that homeschooling in the United States is tied to a broad social trend of internal migration that continues to this day.}

In Canada, the numbers and the extent of the phenomenon are smaller: estimates for 2005 were 90,000 children educated at home, representing
1.2% of the school age population.\textsuperscript{170} Though less dynamic than in the United States, the rate of growth in Canada has nonetheless been impressive. In 1979, just 2,000 Canadian children were homeschooled.\textsuperscript{171} By 1996, the respective provincial ministries of education put the number at 17,523, or 0.4% of total student enrollment; Canada’s homeschooling associations claimed a much higher figure, between 30,000 and 40,000. In 2000, it was estimated that there were more than 80,000 homeschooled children.\textsuperscript{172}

While all the statistical evidence suggests that homeschooling is here to stay, has its growth peaked? In the first place, large families are the mainstay of homeschooling, and they are generally in short supply. However, as we will see in Chapter 3, the legislation and policy adopted in United States and Canadian jurisdictions are both favourable to more expansion throughout North America.

Nevertheless, to properly gauge the future of homeschooling, one must also consider the level of public support. A study reported by Lines discovered that 95% of homeschoolers say they relied upon “encouragement from family, friends, church, and community.” In the 1980s, most Americans expressed serious reservations and indeed opposition to the movement. In 1985, only 16% thought that homeschooling was a “good thing”; while 73% thought it was a “bad thing.” By 1988, 28% rated it a good thing and 50% rated it a bad thing. In 1997, the approval rating had grown to 36% and the disapproval rating edged down to 57%.\textsuperscript{173} These figures indicate that homeschooling has slowly entered into the mainstream as an acceptable educational choice, although the majority of parents continue to express reservations.

\textsuperscript{170} Butler & Robson, Reassessing Education, citing Kranzow.
\textsuperscript{171} Luffman, Parents Replace Teachers.
\textsuperscript{172} See Basham et al., Extreme to Mainstream, p. 9.
\textsuperscript{173} Lines, Homeschooling Comes of Age.
4. Why do Parents Choose Homeschooling?

As discussed in Chapter 1’s review of parental education rights protected in international declarations and the Church’s magisterial teaching, homeschooling provides an alternative to compulsory attendance at a school: it is a true contribution to schooling options, which gives parents further choice. This is explicitly recognized by government officials, as can be seen in the Saskatchewan Provincial Ministry pamphlet on homeschooling:

Parents choose to home-school because of sincere religious or philosophical beliefs regarding the education of their children. Home-educating parents are usually highly motivated and have positive reasons for providing educational opportunities for their children at home.174

On the other hand, the media promotes the view that homeschooling parents oppose the state-sponsored educational system on religious grounds and want to shelter their children.175 In response, an American homeschooling parent commented:

Not every home schooler is part of a middle-class Christian Republican family. The decision to home school is not made solely on the basis of conservative political or religious views. Many people make this


decision because of the difficulties with our current school system, [or] because their children have differing learning styles.\textsuperscript{176}

These contrasting positions provide an introduction to the discussion of why parents choose homeschooling. Social science research has developed the following comprehensive general listing of reasons common to both the United States and Canada.\textsuperscript{177}

- The opportunity to impart a particular set of values and beliefs;
- Higher academic performance through one-on-one instruction;
- The opportunity to develop closer and stronger parent-child relationships;
- The lack of discipline in public schools;
- The opportunity to escape negative peer pressure (e.g., drugs, alcohol, and premarital sex) through controlled and positive peer social interactions;
- The unaffordability of private schools;
- A physically safer environment in which to learn; and
- Special education needs.

Most recently, the safety issue in particular has spurred widespread interest in homeschooling.\textsuperscript{178} This may reflect the fact that one in four American public school students has been a victim of violence at or near their school,\textsuperscript{179} as well as the heightened interest in safer schooling immediately following the April 1999 shootings at Columbine High School in Littleton, Colorado and subsequent copycat incidents in both Canada and the United States.\textsuperscript{180}

\textsuperscript{176} Basham et al., Extreme to Mainstream, p. 10.
\textsuperscript{177} Basham et al., Extreme to Mainstream, pp. 10-11.
\textsuperscript{180} Richman, State and School.
Surveys also indicate that cheaper computers, software programs, easy access to the Internet and the increased amount of educational material available online have encouraged more parents to keep their children at home rather than sending them to school. One concrete example of the Internet’s ability to facilitate educational inquiry is “E-Bus”, a government-subsidized program in British Columbia which provides each school board with approximately $4,000 per interested homeschooling family so that the school board may, in turn, provide each of these families with a computer, a CD-ROM, Internet access, a selection of software, and ongoing on-line assistance. In return, the students must demonstrate that they are performing at the level of their classroom peers and submit their work to an on-line instructor for grading.\textsuperscript{181}

4.1. Official Government Studies

In order to critically assess why parents decide to organize a school in the home, we will review research conducted over the past two decades by the National Center for Education Statistics, through its National Household Education Survey (NHES), to demonstrate the consistency of homeschooling motivations.

4.1.1. 1996\textsuperscript{182} and 1999\textsuperscript{183} NHES Surveys

In 1996 and 1999 NHES asked parents their reasons for undertaking homeschooling, with 16 possible responses. The most frequent response was the issue of educational quality. The parents of 49% of the

\begin{footnotesize}
\begin{enumerate}
\item Richman, State and School.
\item Bielick et al., Homeschooling.
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homeschoolers in these surveys were motivated by the idea that home education is better education. A large share also viewed the issue in terms of shortcomings of regular schools: the parents of 26% of homeschoolers felt the public school had a poor learning environment, 12% objected to what the school teaches, and another 11% felt their children were not being challenged at school. Religion was cited by 33% of parents. Practical considerations (transportation to school, the cost of private school) seemed of relatively minor importance. We set out the results of the NHES 1999 Survey in pictorial form.

| Table 2: Number and Percentage of Home Schooled US Students by Reason for Home Schooling |
|--------------------------------------------|---------------------------------|--------|--------|
| Reason for Home Schooling                  | Number of Home Schooled Students | Percent | Standard Error |
| Better education at home                   | 415,000                          | 48.9   | 3.79     |
| Religious reasons                          | 327,000                          | 38.4   | 4.44     |
| Poor learning environment at school        | 218,000                          | 25.6   | 3.44     |
| Family reasons                             | 143,000                          | 16.8   | 2.99     |
| Develop character/morality                 | 126,000                          | 15.1   | 3.59     |
| Object to what school teaches              | 100,000                          | 12.1   | 2.11     |
| School does not challenge child            | 96,000                           | 11.6   | 2.39     |
| Other problems with available schools      | 96,000                           | 11.5   | 2.20     |
| Student behavior problems at school        | 76,000                           | 9.0    | 2.40     |
| Child has special needs/disability         | 69,000                           | 8.2    | 1.89     |
| Transportation/convenience                 | 23,000                           | 2.7    | 1.48     |
| Child not old enough to enter school        | 15,000                           | 1.8    | 1.13     |
| Cannot afford private school               | 15,000                           | 1.7    | 0.77     |
| Parent's career                            | 12,000                           | 1.5    | 0.80     |
| Could not get into desired school           | 12,000                           | 1.5    | 0.99     |
| Other reasons*                             | 189,000                          | 22.2   | 2.90     |

*Parents home school their children for many reasons that are often unique to their family situation. Some of the "other reasons" parents gave for home schooling in the Parent-NHES: 1999 study were: it was the child's choice, to allow parents more control over what their children were learning; flexibility; and parents wanted year-round schooling.

Note: Standard error excludes students who were enrolled in school for more than 25 hours and students who were home schooled due to a temporary illness. Percent do not add to 100 percent because respondents could choose more than one reason.

CHAPTER II

J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection

Based on these attitudinal responses, homeschooling appears not to be primarily a religious phenomenon, although religion is important. Families participating in homeschooling did not cite cost as a barrier, even though one might presume that private schools could respond to their academic and moral concerns.

4.1.2. 2003 NHES Survey

In the 2003 version, parents were presented with a series of questions asking them whether particular reasons for homeschooling applied to them. Parents were then asked which of those applicable reasons was their most important reason for homeschooling. Concern about the environment of other schools and to provide religious or moral instruction were the top two responses. We reproduce the table of responses.

![Figure 2. Percentage of homeschooled students, ages 5 through 17 in kindergarten through 12th grade, whose parents reported various reasons as their most important reason for homeschooling: 2003.](image)

As can be observed, 31% of homeschooling parents indicated that the most important reason for homeschooling was concern about the environment of other schools, such as safety, drugs, or negative peer pressure. 30% said the most important reason was to provide religious or moral instruction. The next reason was given only about half as often; 16% of homeschooled students had parents who said dissatisfaction with the academic instruction available at other schools was their most important reason for homeschooling, and all other reasons (including health problems and special needs) amounted to less than a quarter of the total.

4.2. Two Classes of Homeschooling Parents?

There is a commonly-held idea that homeschooling parents can be divided into two categories: pedagogues and ideologues. This section will review the academic literature underpinning the theory, as well as recent critiques.185

4.2.1. Origins of the Theory

The origin of the pedagogues/ideologues distinction can be traced to a 1989 study by Mayberry and Knowles186 which observed that, in general, parents who homeschool either do not accept the content of the school’s curriculum or are unhappy with the institutionalized structure of schooling.

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Using Van Galen’s theoretical framework, Mayberry and Knowles identified parents opposed to the content of public school curricula as “ideologues”, that is, parents who embrace an ideology different from the one expressed in the curricula. The second group of people opposed to the institution of schooling were described as “pedagogues”, because these parents believe that the structure of public education is pedagogically unsound. Both Van Galen and Mayberry and Knowles reported that categorizing people as either ideologues or pedagogues was useful in understanding parents’ motivations for homeschooling.

Mayberry and Knowles reported diversity in the precise sources of ideologues’ dissatisfaction with the curricula. In some cases, these parents’ discontent was based on religious grounds. Many reported that public schools did not provide either enough, or the right kind of, religious education; several parents stated that the liberal humanism of public schools was incompatible with their religious faith. Homeschooling, for these people, was a way to ensure that their children were educated in a manner consistent with their belief system.

Mayberry and Knowles reported that “negative socialization” concerned the majority of pedagogues. These parents believed that the incessant teasing, pranks, and exclusionary behaviour, especially during unsupervised times, for example, recess, lunch hour, and after school, could be extremely damaging to their children’s sense of self. They usually

188 Van Galen defined the pedagogues as those who teach their children themselves primarily because they dislike the professionalization and bureaucratization of modern education. These parents “come to their decision to home school with a broader interest in learning – they have professional training in education, they have close friends or relatives who are educators, they have read about education or child development, or they are involved with organizations that speak to the issue of childrearing.” Van Galen, Ideology, p. 71.
189 Arai, Reasons, p. 205.
weighed this risk against the many positive aspects of class time, but decided that in the end, the only way to preserve their children’s self-concept and confidence was through homeschooling. For other parents with pedagogical objections to public schooling, the very idea that people can and in fact must learn in a highly structured environment is at odds with their belief about learning. Many of them reject the hierarchical learning situation in schools where the teacher is the possessor of knowledge and students are merely receptacles. These people believe that institutionalized learning—which requires students to learn particular subjects in particular ways at particular stages in their educational career—stifles creativity and can actually destroy the desire to learn.190

4.2.2. Limitations of the Pedagogues/Ideologues Distinction

In his 2000 critical study of the Mayberry and Knowles theory, Arai found a major weakness in the fact that similar reasons for homeschooling may be seen among both the ideologues and the pedagogues.191 He identified five major similarities. First, Mayberry and Knowles192 themselves pointed to family unity or strengthening the bonds among family members as a very important reason for homeschooling. By keeping their children at home, most parents felt they could produce a more closely knit, loving family. Nearly all of the parents interviewed by Mayberry and Knowles reported that this was an extremely crucial factor in their decision to teach their children at home.

191 Arai, Reasons, p. 204.
Second, Mayberry and Knowles and Van Galen suggested that many parents, regardless of whether they object to the ideological or the pedagogical dimensions of public schooling, view homeschooling as a way to practice an alternative lifestyle, particularly by resisting the modernizing and urbanizing influences of contemporary societies. A common complaint of these parents is that materialist and consumerist values, so prevalent in the dominant society, have seeped into the classroom and they do not want their children to have to conform to those values.

A third major reason for homeschooling among American parents, regardless of whether they are ideologues or pedagogues, is unpleasant memories of school. Parents in the Mayberry and Knowles study said that school was a waste of time, or they had felt different, singled out, or picked on at school. Many of these parents had also had positive experiences of learning outside of school, and they wanted to reproduce these experiences for their children.

Fourth, not only people with religious convictions object to the public school curricula. Other parents, particularly those with gifted or bright children, consider the regular school curricula not demanding enough to challenge their daughters or sons. These parents complained that the lack of challenge would be very damaging to their children if they came to dislike school because it was boring; rather than risk jeopardizing their children’s abilities, they decided to provide sufficient mental challenges at home.

Lastly, and of greatest relevance for this thesis, the studies all found that parents used homeschooling to assert their responsibility for their children’s education. Many of these parents claim that they have a right and a responsibility to protect their children from harmful influences. The parents believe that they are the ones who should determine what is

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harmful, whether that harm comes in the form of secular humanism, school violence, consumerism, or something else.\textsuperscript{195}

\subsection{More Accurate Family Characteristics}

Arai's research found that parents engaged in homeschooling are highly diverse, with differing educational and class backgrounds. Among the parents he interviewed, a few had not completed high school, most had a high school diploma or more, and some had postgraduate degrees. None of the parents in this study was currently employed as a teacher, although several possessed a degree in education and all parents knew of at least one other family that was currently homeschooling in which one or both parents were teachers. Nearly all participants expressed a strong spiritual or religious commitment, but only half said this commitment was an important factor in their decision to teach at home. Several families were affiliated with fundamentalist Christian churches, but most were members of Catholic or other Protestant churches. Arai concluded that there was no clear connection between religious fundamentalism and religious rationales for homeschooling.\textsuperscript{196}

\subsection{The Decision to Homeschool}

For most participants in the Arai study, the decision to educate their children at home was not precipitated by a specific incident; rather, the decision took months and sometimes years to mature. Typically, the process began with a general dissatisfaction with some element of the public school, which led to an investigation of alternatives, usually private school. Most families reported that at this point they were not even aware of

\textsuperscript{195} Arai, Reasons, p. 207.

\textsuperscript{196} Arai, Reasons, p. 209.
homeschooling as an option. However, in several cases parents opted for homeschooling before their children even attended school.  

The study also found that concerns about a poor school environment, low academic standards, or moral and religious conflicts prompted some parents to take their children out of school initially, but many parents found that the positive changes in their children and the strengthening of the family unit that resulted from homeschooling would prevent them from sending their children back to public school even if problems were resolved to their satisfaction.

Most parents interviewed by Arai mentioned that homeschooling had helped strengthen the bonds among family members. This finding partially replicates that of Mayberry and Knowles and other researchers about the importance of family unity, but for many families in this study, family unity was an unexpected benefit of the practice, not an initial motivation.

197 Arai reproduces a comment from a parent who made the decision to homeschool early in the child’s life, p. 210: “When my oldest was about six months [old], I knew someone who was home schooling. So we just started to do some research on it, read some books, talked to other people and when we made the final decision [about 1 year later] we just knew we were going to home school our children. It wasn’t like they were in school and we had problems and we pulled them out.”

198 Arai, Reasons, p. 211. One parent noticed a change in her eight-year-old daughter after a few months of homeschooling: “Before, I was scared of my own daughter. Do you know how awful that feels, to be scared of your own daughter? But now, with home schooling, we’ve grown so much closer.” Another parent talked about the change she saw in her teenage son as a result of homeschooling him for over two years: “Before we started [homeschooling] I didn’t like [him] very much. He was rude, he was hostile, and I really didn’t like to be around him. But now he’s a completely changed person, and now I prefer his company to almost anyone else’s.”

199 Arai, Reasons, p. 211, notes comments from many parents that “we’re much stronger as a family now” and “home schooling has really brought all of us together as a family.”
Finally, some parents felt quite strongly that homeschooling was part of living an alternative lifestyle. These parents, some of whom were recent homeschoolers whereas others were homeschooling veterans, thought that homeschooling complemented their other values, which included belief in the benefits of herbal medicines and vegetarianism, and concern for the environment and social justice.200

An interesting discovery by Arai concerned the attitudes to public schooling. His research showed that parents do not object to public education as a whole but rather to specific parts of the system. Moreover, it is also not the case that all homeschooling parents believe homeschooling is a better option than public school, even for their own family: two mothers explicitly said that public schooling is preferable to homeschooling, if it is done properly.201 So even among those who practice homeschooling there is a diversity of opinion about whether public education is in principle a better or worse choice. Many parents who teach at home have quite favourable opinions about certain aspects of public education.

4.2.5. New Findings

Contrary to findings from previous research, the families in the Arai study expressed a mixture of both ideological and pedagogical reasons for practicing homeschooling, and family unity was more a consequence of homeschooling than a reason to undertake it in the first place.

Arai raises a plausible explanation for the differences in his findings from previous researchers: that an important shift has occurred in the homeschooling movement. As the legal and philosophical battles have been won, homeschooling may be appealing to a larger segment of the population than in the past. These parents may view homeschooling as one educational option among many, rather than as a radical alternative to

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200 Mayberry & Knowles, Family Unity.
201 Arai, Reasons, p. 212. One parent commented: “School is the best place for my children, for all children, when it’s working properly. But it isn’t working properly now and that’s because of the teachers and their unions”.
contemporary public schooling. The more parents choose homeschooling, the more legitimate it becomes as an educational option, and this growth may encourage still more parents to take it up.

A second area that Arai noted is the evolution of cooperation between home and school: during the 1990s cooperation with local schools increased substantially in the United States. The development of virtual schools in some jurisdictions in Canada indicates similar cooperation.203

The ideologues/pedagogues dichotomy does not appear to capture very well the different reasons that people gave for starting homeschooling. Parents chose to teach their children at home for a variety of reasons, and many have both pedagogical and ideological objections to public schooling.204

It may be worthwhile to conclude by noting a 2007 study that assessed the type of parent who homeschools.205 The study correlated the decision to

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202 Lyman, Homeschooling, gives the example of a Florida Department of Education survey sent to homeschooling families for over a decade. Until 1994-95, the majority of families named “religion” as the main reason why they chose homeschooling. This shifted in 1995 when, for the first time, the single most important reason for homeschooling (37%) became “dissatisfaction with the public school instructional program”. Only 29.6 % cited “religious reasons”. In 1995-96, 42% of families cited dissatisfaction with the public school environment (especially safety, drugs, and adverse peer pressure); religious reasons trailed at 27%, dissatisfaction with public school instruction at 16%, and “other reasons” at 15%. Office of Nonpublic Schools and Program Support, Florida Department of Education, Statistical Brief, 1996.


204 Previous to this study, Arai had expressed criticism of homeschooling, stating that the worldview children receive in public schools is “reality” and not the “distorted or erroneous view of the world” offered by homeschoolers: see “Homeschooling and the Redefinition of Citizenship” Education Policy Analysis Archives (1999) Vol. 7, available at http://epaa.asu.edu/epaa/v7n27.html (last visited June 21, 2011).

homeschool with parental psychological factors such as belief in their own teaching efficacy and their ability to foster strong role-construction. The study confirmed that homeschooling parents scored higher on scales related to belief in personal teaching efficacy, the encouragement of strong role-construction, and belief in the necessity of strong parental involvement in education. Additionally, many parents cited dissatisfaction with the public schools’ ability to teach core values such as character development, and approach to special needs.

4.3. Canadian Homeschooling Motivations

Like their equivalents in the United States, Canadian homeschoolers in Ontario and British Columbia do not seem to differentiate clearly between ideological and pedagogical objections to schooling. Many families are concerned that the overall environment of schools is detrimental to their children’s well-being; over-crowded classrooms and a lack of individual attention are noted, as well as concerns about problems outside the classroom.206

A survey of homeschooling families in Québec found similar motivations for Québec home educators. It found that “no religious, philosophical, or anti-state viewpoint” dominates decision-making, but that parents’ main motivations are “a desire to pursue a family educational project; an objection to the organizational structure of the school system; a desire to offer curriculum enrichment; and a preoccupation with their children’s socioaffective development.”207

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206 Higgins, Pilot Study.

A study that considered a variety of sources from Ontario and the rest of Canada found that as homeschooling has become more mainstream, more homeschoolers share in “a burgeoning culture of ‘pedagogical individualism’ that prizes educational alternatives tailored to the needs of each unique child.”

Interestingly, against the commonly-held myth of the “religious Right”, a 1990 Canadian survey found that, although 75% of homeschooling parents described themselves as religious, families aligned themselves evenly among the three major political parties.

4.4. Catholic Homeschooling

Following the discussion in Chapter 1 on the support for homeschooling in the Code of Canon Law, the question may be raised as to whether there are separate reasons for Catholic parents undertaking to homeschool their children.

Edward Peters notes that hundreds of Catholic elementary and secondary schools in the United States have closed during the post-conciliar period, “making Catholic school-based education literally nonexistent in many places.” In addition, Peters states that the growing dissatisfaction...
of parents with the lack of orthodox catechesis in many parochial and diocesan high schools has been responsible for an increasing number of Catholic parents joining the homeschooling movement.

When Catholic parents choose homeschooling, they exercise their belief that parents have not only the responsibility but also the right to direct and control the educational development of their children, even if ecclesiastical alternatives exist nearby. These parents in particular may be concerned with the lack of teaching or living the faith in those schools. Other concerns with Catholic schools that have been noted are non-Catholic teachers, the lack of daily Mass or prayers, the use of secular books and an inconsistency in discipline. *Catholic Home Schooling* states that 90% of homeschooling Catholic parents chose to educate in the home in order to protect their children from negative or immoral influences in the schools.\(^{211}\)

### 4.5. Christian Fundamentalist Homeschooling\(^{212}\)

The main reason Fundamentalist Christian parents choose to bypass the public schools is their perception that the “secularization of public schools...  

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denies their right to oversee the upbringing of their children as they see fit”. Additionally, Fundamentalist Christian educators seek to isolate their children from what they perceive to be a “breakdown” in the public education system. Fundamentalists undertake home education to provide an alternative to secularist values and permissive mores, in many ways contrary to the traditional family structure. The interpretation of certain Biblical passages are considered supportive of Christian Fundamentalist homeschooling. In some cases, parents have explicitly adopted scriptural texts from the Bible as a model for their educational program.

213 Devins, Fundamentalist, p. 820. He cites the following examples of secularization of public schools: the Supreme Court’s prohibition of school prayer, Bible reading, the teaching of Biblical creation, and the posting of the Ten Commandments in public schools.


217 C. Nichols, Families Find New Allies in Homeschooling, Florida Baptist Witness, VI32004, available at: www.floridabaptistwitness.com/2665.article (last visited June 21, 2011). The parents described in the article adopted Deuteronomy 11:19 as their model: “Teach [words of God] to your children, talking about them when you sit at home and when you walk along the road, when you lie down and when you get up.”
5. Academic Methods and Outcomes of Homeschooling

5.1. How do Parents Teach at Home?

Homeschooling parents have access to a rich variety of learning materials and opportunities. In addition to complete curricula from a wide spectrum of religious and secular sources, online resources help parents find, for instance, virtual biology labs and materials from leading scientific institutions such as NASA.\textsuperscript{218} Local support groups share experiences, meet for common activities, and help newcomers get started. Homeschooling associations provide advice and information, run conferences on legal, philosophical, and pedagogical issues, and review educational materials at exhibition booths. Electronic homeschool discussion groups abound. Parents also find guidance in books, magazines, and newsletters: topics range from legal issues to advice on learning disabilities and how to avoid burnout.\textsuperscript{219}

The NHES 2003 survey\textsuperscript{220} found that 41% of children taught at home received some form of long-distance learning. Approximately 20% of homeschooled students took a course or received instruction provided by television, video or radio. A further 19% followed a course or received instruction provided over the Internet or email. An estimated 15% of homeschooled students took a correspondence course by mail designed specifically for homeschoolers.

\textsuperscript{218} See for example \textit{Homefires} “The Journal of Homeschooling Online” which provides listings of curriculum, available at: www.homefires.com/gateway (last visited June 21, 2011); or \textit{AtoZ Home’s Cool}, Distance Learning Programs, providing a listing of online resources, available at: http://homeschooling.gomilpitas.com/methods/DLPs.htm (last visited June 21, 2011).

\textsuperscript{219} Arai, Reasons.

\textsuperscript{220} NCES, Issue Brief.
The NHES further found that homeschooling parents relied on a wide array of resources for curriculum, including public libraries (77.9%), homeschooling publishers (76.9%), retail bookstores or other stores (68.7%), education publishers not affiliated with homeschooling (59.6%), religious organizations (36.5%), local public schools or districts (22.6%), private schools (16.8%), and other sources (26%).221 As a result, there are few academic resources or types of specialized instruction available to a conventionally-schooled child but not to a homeschooled child.

Homeschooling allows for flexibility in approach, materials, pacing, scheduling and activities not readily available in institutional schools that can greatly improve a child’s education. Children can spend more time studying subjects in which they have a strong interest than they could in a conventional classroom.222 Similarly, for children whose needs are not met by traditional institutions, homeschooling can increase the chances that they will receive an appropriate education.223

A 2007 study224 explored the teaching styles used by homeschooling parents and placed them along a continuum from traditional, classical, eclectic, and “unschooling”. Traditional homeschooling essentially duplicates the public school experience at home, including lectures,


textbooks, and often a particular grade-level curriculum. Classical homeschooling includes many of the same instruments and teaching methods used by the public schools, but it is geared toward the individual child’s level of development and unique skills. Eclectic homeschooling uses traditional instruments, while including opportunities for child-led learning. Unschooling is entirely student-direct and paced, and learning is initiated by the child with the parent-teacher as a facilitator. The study found that overall, the majority of respondents (69.5%) preferred the eclectic approach. Protestant and Catholic respondents were more likely to use traditional methods than those indicating their religion as “other.” Respondents in the “other” religion category were more likely to unschool than Protestants or Catholics. The geographical region in which the families lived was not related to the home education methods they used.\(^{225}\)

As families gain confidence in their homeschooling abilities, they may opt for a less structured approach and rely on homemade materials or borrow heavily from local libraries. Tutors may be sought to teach particular skills such as a foreign language or a musical instrument, and older children are sometimes recruited to teach younger siblings a particular academic discipline or task. A study of teaching approaches found that 71% of respondents said they custom design their curriculum to suit their child’s needs and 83% said that their children use a computer in their home.

Homeschooling families are also able to engage in many types of “real world” learning that are not readily available to other students. Examples include volunteering, working under mentors in fields of interest and traveling or going on field trips during usual school periods. Homeschooled children also participate in learning co-ops with other homeschooled students or even take courses at a day school or community college.

The cost of delivering a homeschooling program can vary somewhat, depending on the instruction materials and the extent of learning outside the home on field trips and other study experiences. A 2006 study of what it

\(^{225}\) Higgins, Pilot Study, p. 12.
costs to homeschool found that a family will spend less than $4,000 a year, a figure that includes multiple children. In terms of a cost comparison with public education, state-run schools in the United States spent an average of $9,644 per student (pre-kindergarten through the 12th grade) during school year 2002-2003. From these figures, it is apparent that the direct costs of public schooling in the United States are much higher than what home education families typically spend; Canadian numbers are unavailable, but one would expect a similar comparison.

5.2. Academic and Social Outcomes

When people ask “How well do homeschoolers do?”, they usually want to know about test scores. Of course, many homeschoolers reject this criterion, since their mission is to impart not simply skills but a particular set of values.

That said, virtually all of the reported data show that homeschooled children score above average, sometimes well above average. Arai provides a “report card” for homeschooling, though noting that even where state law requires testing, substantial numbers of homeschoolers do not comply. Still, the available evidence suggests steady success. For example, Alaska, which has tested children in its homeschooling program for several decades, finds them, as a group, above average.

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In 1998, the University of Maryland carried out a comprehensive study of American homeschooling, finding that the median scores for homeschool students were well above their public or private school counterparts. The homeschoolers’ average score was between the 82nd and the 92nd percentile in reading, and reached the 85th percentile in math. Overall, test scores for homeschoolers were between the 75th and 85th percentiles. Public school students scored at the 50th percentile, while private school students’ scores ranged from the 65th to the 75th percentile. The study concluded that “those parents choosing to make a commitment to homeschooling are able to provide a very successful academic environment” and stressed that the homeschooling environment includes significantly lower levels of television viewing.

Social science research demonstrates that homeschooling promotes educational advancement and prepares students to become productive citizens. A 2010 study focused on homeschoolers now in university, finding that they score higher on entrance exams, earn higher grade point averages, and have higher graduation rates when compared to the overall population.

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229 Rudner, Scholastic Achievement. On average, 40% of American fourth-graders watch over three hours of television a day, but Rudner found that only 1.6% of homeschooled children take in comparable amounts of television. See also Christian Home Educators of Colorado, “Homeschool Students Score Better Academically and Socially”, available at: http://homeschoolinformation.com/homeschooling/homeschool_statistics1.htm (last visited June 21, 2011).

230 M. Cogan, “Exploring Academic Outcomes of Homeschooled Students”, conference paper, AIRUM 2009, University of St. Thomas. The study was based on a medium sized college located in the upper Midwest with 11,000 students.
5.3. Socialization of Homeschoolers

How do homeschooled children meet others? This question is usually asked of homeschooling parents when they are asked to explain their lifestyle.

The most frequent concern with the movement is that homeschooled children are not well socialized and will not be properly integrated into society. Typically, homeschooled children engage in a variety of activities outside the home – sports teams, scouting programs, church, community service, or part-time employment. A survey of empirical evidence by Stetson University concluded that homeschooled students score as well as or better than traditionally-schooled children on widely-used measures of social development, and noted that homeschoolers rely heavily on support groups as a resource for planning field trips and maintaining personal contact with like-minded families.231

A study by the University of Florida challenged the notion that youngsters educated at home lack social development. The study videotaped 8- to 10-year-old children at play and their behaviour was observed by trained counselors who did not know which children went to regular schools and which were homeschooled. Researchers found no noticeable difference between the two groups of children in self-concept or assertiveness, as measured by social development tests. Interestingly, the videotapes showed that youngsters who were taught at home by their parents had consistently fewer behaviour problems.232

Homeschooling advocates advance the argument that homeschooled students are active leaders and community participants, as well as desirable employees. Quality education not only supports market and social success,


they say, but also promotes civic involvement. Empirical studies demonstrate that homeschooled students are well prepared to be active participants in society and valuable contributors to the economy. A nationwide study of homeschooled adults found that – across every measure – these adults were more likely to be involved in civic activities than adult of the same ages in the general population. 233 These adults were also found to be more likely than the general population to be members of social organizations (for example community groups, churches, synagogues, or unions). 234

Moreover, there is evidence that homeschooled adults are more involved in the political life of the community. For example, homeschooled adults are substantially more likely to work for a political candidate or cause, attend public meetings, participate in democratic protests, and vote in elections. 235 Of particular interest, among 18-24 year olds, 74% of the homeschooled adults had voted in the last 5 years while only 29% of the general population had done so. 236 Studies also show that homeschooled students excel in leadership. In an evaluation of the college performance of three matched sets of 60 students each (one set of homeschooled students, one set of privately schooled students, and one set of publicly schooled students), the homeschooled students scored first in 42 of 63 performance indicators, including positions of leadership. 237 The study author concluded

233 71% of adults who had been homeschooled were involved in an ongoing community service activity (e.g., coaching a sports team, volunteering at school, or working with a neighborhood association) compared to only 37% of the general United States population. B.D. Ray, Home Educated and now Adults: Their Community and Civic Involvement, Views about Homeschooling, and Other Traits (Salem, OR: National Home Education Research Institute, 2004), p. 37 [hereinafter "Ray, Home Educated"].

234 Ray, Home Educated. While 88% of adults who were homeschooled belonged to such organizations, only 50% of similar aged adults did so.

235 Ray, Home Educated, p. 53.

236 Ray, Home Educated, p. 75.

237 Medlin, Socialization, p. 177.
that the homeschooled students “were readily recognized for their leadership abilities.”

A meta-analysis conducted on 25 studies regarding homeschool achievement found only one negative correlation between homeschooling and achievement, which suggests that most research concerning homeschooling is consistent.

The outcomes of homeschooling go hand in hand with the professional approach to learning taken by homeschooling parents. It may occur that parents who withdraw their child from public school do not teach a demanding curriculum or fail to adequately supervise their child’s learning. Children in this environment often play video games all day or learn information relevant to schooling when they feel like it. Limited accountability may allow some parents to use homeschooling as an excuse to keep the child at home with limited social interaction.

5.4. Canadian Performance

There is less Canadian research data to examine, but the academic performance of Canadian homeschooled students appears to be comparable to that in the United States. Achievement studies found that on average, Canadian homeschoolers scored at the 80th percentile in reading, at the

238 Medlin, Socialization.


241 Lubienski, Critique.
76th percentile in language, and at the 79th percentile in mathematics. The study also reported that students whose parents are certified teachers perform no better than other students and that neither parental income nor parents’ educational background has a significant impact on student performance. A more recent survey found that, based on Canadian Achievement Test results, home educated students perform above the Canadian norm for their levels. At the 9th to 12th grade levels, home educated children averaged mean percentile ranks of 85th in reading, 84th in language, and 67th in mathematics.

A crucial factor for this academic success is the significantly lower amounts of television watched by homeschoolers.

**Conclusions**

We have seen that homeschooling has developed largely in opposition – for both secular and religious reasons – to the established public school system. Parents have exercised their freedom to choose the option they consider best for the education of their children, not only in technical matters but above all in social and moral values. For the majority of homeschooling parents in the United States and Canada, the choice is also a manifestation of their religious freedom. Because the public school system

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242 B.D. Ray, *A Nationwide Study of Home Education in Canada: Family, Characteristics, Student Achievement and Other Topics* (Salem, OR: National Home Education Research Institute, 1994). The Canadian average for all public and privately educated students is the 50th percentile.


244 Van Pelt, Home Education, p. 59.

245 Van Pelt, Home Education, found that 75.8% of home educated students watched less than two hours of television on an average weekday. Over one quarter of them watched no television.
acts as a powerful instrument for the transmission of secular values, parents decide to attend exclusively to the formation of their children’s consciences at home.

Public schools generally have wide authority to introduce young children to sensitive topics that are better left for parents (the most obvious example being sexual education). When a public school presents a particular message that conflicts with parental teaching at home, this undermines the parents’ ability to direct their children’s upbringing, for messages coming from a state or “official” source have strong persuasive force. Hearing divergent messages from parents and teachers can sow confusion as to the legitimacy of parental authority, especially in the minds of young children.246

Social science research has helped understand the motivations and assess the outcomes of the movement in its first three decades. Both religious and secular rationales for homeschooling aim in great measure at conserving the family’s identity, a legitimate objective of education. Many families have chosen to educate their children at home to help their children be more critical and independent of societal opinions – abilities which also strengthen family cohesion and identity.

While there is greater public acceptance of the movement, perhaps what will ultimately determine the continued expansion of homeschooling is the state of public and private schooling. As long as the mainstream schooling options are secularist, bureaucratic or undisciplined, one can expect homeschooling to attract adherents from all philosophical and religious viewpoints.

The parental right to choose homeschooling is currently well-protected by legislation and public policy, as we shall see in Chapters 3 and 4, although there exist varying levels of regulation across United States and Canada jurisdictions which place certain limits on parental homeschooling.

In a prescient commentary on the growth of homeschooling, the United States Census Bureau describes the movement as “an attempt by parents to reclaim the schooling process – to make schooling valuable in ways that are understandable to them through the cultural means at their disposal.” After a century of heavy institutionalization of education, it may be that homeschooling represents a return to a traditional model that preserves a more colourful cultural and social identity in an increasingly monochrome world.

247 Bauman, Education Policy. Bauman also notes: “Schools seem to have lost some of their legitimacy as they have lost a clear functional role in preparing youth for their role in the larger economic system.” He concludes: “There is a true tension between home educators and the school standards movement, just as there is between home schooling and the increasing demand by employers for occupationally-specific training and credentials. What these movements have in common is not a conservative agenda but an attempt by each sector with an interest in schooling to gain greater control over the system.”
Chapter III. THE LEGAL STATUS OF HOMESCHOOLING IN THE UNITED STATES

Introduction

As we have considered the basis of parental educational rights in Chapter 1 and their expression in the homeschooling movement in Chapter 2, we will now review the legislative regime that applies to homeschooling in the United States. The aim of this Chapter is more than a summary of legislative provisions, as we will categorize the laws of each state jurisdiction according to a scale of lesser to greater restrictivity.\textsuperscript{248}

We will also consider the recent academic debate over the compelling state interest to intervene further and introduce regulation to ensure a “liberal” education across cultural and religious lines. A number of law review articles have been published in the past decade making strong arguments in favour and against the regulation of homeschooling. It may be that the pendulum is swinging towards greater state intervention after several decades of passive legislative support of parental choice of home education.

\textsuperscript{248} For legal citation of United States legislation, we follow The Bluebook: A Uniform System of Legal Citation, 19th ed. (Cambridge, MA: Harvard Law Review Association, 2010).
1. The Federal Constitution and Education

As is well known, the Constitution of the United States in its First Amendment contains two important clauses. The first is known as the non-establishment clause and decrees that the government cannot establish or support a religious confession openly. The second clause is the “free exercise” clause and refers to the unrestricted practice of religion by citizens. We will not consider the First Amendment directly until Chapter 5, where we review several Supreme Court cases that adjudicated on religious-based homeschooling.

By its silence on the matter, the United States Federal Constitution assigns power over education to the individual states. There are, however, federal laws that impact education directly. To cite one example, the No Child Left Behind Act, passed by the second Bush administration, imposes stringent test performance requirements on public schools. Interestingly, this law does not impose any substantive obligations on homeschoolers and explicitly exempts them with the following language:

Nothing in this Act shall be construed to affect a home school, whether or not a home school is treated as a home school or a private school.


250 The History of the Formation of the Union under the Constitution, published by the United States Constitution Sesquicentennial Commission, under the direction of the President, the Vice President, and the Speaker of the House in 1943, contained this exchange in a section titled “Questions and Answers Pertaining to the Constitution”: Q. Where, in the Constitution, is there mention of education? A. There is none; education is a matter reserved for the states.
under state law, nor shall any student schooled at home be required to participate in any assessment referenced in this Act.\textsuperscript{251}

\section*{2. State Regulation of Homeschooling Education}

\subsection*{Introduction}

As Chapter 2 has illustrated, the rapid spread of homeschooling across the United States from humble beginnings in the 1960s to the current situation of nearly 2 million children being home educated resulted in large part from the legislative and judicial victories brought about through the advocacy of the HSLDA. One need only consider the following fact to capture the complete triumph of the homeschooling movement in such a brief period of time: in 1980, homeschooling was considered \textit{illegal} in 30 states, that is, unacceptable for satisfying state compulsory education requirements, but by 1993 it had become \textit{legal} in all 50 states.\textsuperscript{252}

State legislation across the country constitutes a patchwork of regulations. At a minimum, a family must file some basic information with either the state or local education agency. That said, some states do not require parental notification of the respective educational authority that they wish to begin to homeschool, while other jurisdictions impose state approval of the homeschool curriculum, the administration of standardized tests, and teacher certification of homeschooling parents. Many homeschooling families still stay “underground”, that is, unknown to school

\textsuperscript{251} 107 PL 110,9506; 20 USC § 7886(b) (2006).

\textsuperscript{252} Basham et al., Extreme to Mainstream. The early pioneers of the homeschooling movement often stayed “underground”, and those who were discovered often faced fines or even jail sentences.
officials or state regulators, out of fear that the legal environment will change again or because they disagree with particular regulations.

As we also noted in Chapter 2, the Christian homeschool movement has sizeable political clout, which has translated into a trend away from rather than toward state oversight and regulation of homeschooling. States are, to an increasing degree, not only looking the other way when homeschoolers do not comply with state laws, but actually changing their laws so as to authorize homeschooling families to operate in whatever ways they consider best.

Before entering into specific discussion of legislative provisions, we will set out an overview of the situation in the United States. Homeschooling laws can be divided into three general categories.

1. In some states, homeschooling requirements are treated as a type of private school (i.e. California, Indiana and Texas). In those states, homeschooled are generally required to comply with the same laws that apply to other (usually non-accredited) schools.

2. In other states, homeschool requirements are based on the unique wording of the state’s compulsory attendance statute without any specific reference to “homeschooling” (i.e. New Jersey and Maryland). In those states, the requirements for homeschooling are set by the particular parameters of the compulsory attendance statute.

3. In other states (i.e. Maine, New Hampshire and Iowa) homeschool requirements are based on a statute or group of statutes that specifically applies to homeschooling, although statutes often refer to homeschooling using other terminology (in Virginia, for example, the statutory term is “home instruction”; in South Dakota, it is “alternative instruction”; in Iowa, it is “competent private instruction”). In these states, the requirements for homeschooling are set out in the relevant statutes.

While every state has some requirements, there is great diversity in the type, number, and level of burden imposed. No two states treat homeschooling in exactly the same way. Generally, the burden is less in states in category 1, above. Furthermore, many states offer more than one option for homeschooling, with different requirements applying to each option.
2.1. Classification of Homeschool Legislation

The legal situation of homeschooling is best understood with a presentation of a classification of the various pieces of states legislation. There are four broad categories of laws that affect the establishment and operation of homeschooling programs directly or indirectly:

- Homeschooling Laws
- Religious Freedom Acts
- Parental Rights Laws
- Child Abuse Prevention and Treatment Acts

2.2. Characteristics of Homeschooling Laws

Forty states have adopted homeschool statutes or regulations, beginning in 1982. The 1980s were particularly noteworthy for the establishment and expansion of homeschooling as a legally protected phenomenon, as twenty-seven states enacted home education legislative regimes.

As noted above, each jurisdiction took its own approach to legislating. For example, the rules governing homeschooling in Maryland, New York, and Ohio are state board of education regulations rather than statutes; the rules governing homeschools in Connecticut are Department of Education “Guidelines.”

253 We set out the following chronological list of states with the date of enactment: Idaho and North Dakota (2009); North Carolina and District of Columbia (2008); Nevada (2007); Utah (2006); Maine (2003); Delaware and Alaska (1997); Michigan (1996); Iowa (1991); New Hampshire and Connecticut (1991); South Dakota, Hawaii and Ohio (1989); Colorado, New York, South Carolina and Pennsylvania (1988); Maryland, Minnesota, Vermont and West Virginia (1987); Missouri (1986); Arkansas, Florida, New Mexico, Oregon, Tennessee, Washington and Wyoming (1985); Georgia, Louisiana, Rhode Island, and Virginia (1984); Wisconsin and Montana (1983); Arizona and Mississippi (1982).
In at least fifteen states individual home education programs may operate under private school or church school laws.\textsuperscript{254} And within that subgroup, in seven states homeschoolers have the option to operate under the private school law or a homeschool law.\textsuperscript{255} Additionally, in five states groups of homeschoolers, rather than individual homeschools, qualify as private or church schools.\textsuperscript{256}

To provide a specific example of statutory recognition of homeschooling, we set out the relevant section of Colorado’s \textit{Compulsory School Attendance Law}.\textsuperscript{257}

Section 104. Compulsory school attendance

(1)(a) Except as otherwise provided in subsection (2) of this section, every child who has attained the age of six years on or before August 1 of each year and is under the age of seventeen years, except as provided by this section, shall attend public school...

(2) The provisions of subsection (1) of this section shall not apply to a child:

(i) Who is being instructed at home:

(I) By a teacher licensed pursuant to article 60.5 or 61 of this title; or

(II) Under a nonpublic home-based educational program pursuant to section 22-33-104.5.

(5)(a) The general assembly hereby declares that two of the most important factors in ensuring a child’s educational development are parental involvement and parental responsibility. The general

\textsuperscript{254} Arkansas, Alaska, California, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, Ohio, Pennsylvania, Tennessee, Texas, and West Virginia.

\textsuperscript{255} Arkansas, Louisiana, Michigan, Ohio, Pennsylvania, Tennessee, and West Virginia.

\textsuperscript{256} Colorado, Florida, Maine, Virginia, and Utah. In these states, homeschoolers have the option to operate under either a homeschool law or the private school law.

\textsuperscript{257} Title 22, \textit{Colorado Revised Statutes}; Education Article 33; \textit{School Attendance Law of 1963} at s. 104. Emphasis added.
assembly further declares that it is the obligation of every parent to ensure that every child under such parent’s care and supervision receives adequate education and training. Therefore, every parent of a child who has attained the age of six years on or before August 1 of each year and is under the age of seventeen years shall ensure that such child attends the public school in which such child is enrolled in compliance with this section.

(b) Parents whose children are enrolled in an independent or parochial school or a non-public home-based educational program pursuant to the provisions of subsection (2) of this section shall be exempt from the requirements of this subsection (5).

As can be observed, the legislature first sets out the rule of compulsory attendance and then proceeds to exempt homeschoolers by a very precise and de-limited category. Moreover, the exemption allows for multiple home education options; in this case, a licensed teacher or a “non-public home-based educational program.” In addition, the Colorado legislature has chosen to underline the crucial importance of parental involvement and responsibility in their children’s education by dedicating two paragraphs to this matter. In stressing parental rights and duties, the state of Colorado has taken up the natural law principles enshrined by the various international declarations and covenants we have studied in Chapter 1. Although it is not stated explicitly, parental choice is considered by Colorado’s legislators as a protected value.

Another example of state monitoring requirements for homeschooled children are those codified in Florida. 258 This statute sets forth six stipulations for homeschooling parents: (1) the parents must send the district school superintendent a notice of intent to homeschool; (2) the parents must maintain a portfolio of the child’s work, attendance, etc.; (3) the portfolio must be available for inspection by the superintendent within 15 days’ notice; (4) an annual evaluation must be submitted to the

258 Florida Statutes Annotated § 1002.41 (West 2004).
superintendent outlining the child’s progress;\textsuperscript{259} (5) “The portfolio shall be preserved by the parent for 2 years;”\textsuperscript{260} and (6) if the homeschooling program is to be terminated, 30 days’ notice must be provided to the superintendent.

We will now assess particular characteristics of homeschooling statutes and regulations where state intervention has created specific parental obligations.

\textbf{2.2.1. Discretionary Approval}

Presently, two states require homeschools to be subject to the discretionary “approval” of the local school district, school board or state commissioner: Massachusetts and Rhode Island.

The Massachusetts \textit{Compulsory Attendance Statute}\textsuperscript{261} does not use the words “home education”, rather it includes homeschoolers in the “otherwise instructed” category. Section 1 states:

1. Every child between the minimum and maximum ages established for school attendance by the board of education... shall attend a public day school in said town, or some other day school approved by the school committee,... but such attendance shall not be required... of a child who is being \textit{otherwise instructed} in a manner approved in advance by the superintendent or the school committee.\textsuperscript{262}

What standard do school officials use for approving the “otherwise instructed” in a homeschool? The Supreme Judicial Court of Massachusetts

\textsuperscript{259} In lieu of a progress report, parents can arrange for their children to take a standardized test or a psychological evaluation. In addition, there are other evaluation methods available based on a mutual agreement between the parent and superintendent.

\textsuperscript{260} \textit{Florida Statutes Annotated} § 1002.41.

\textsuperscript{261} \textit{Massachusetts General Laws}, Chapter 76.

\textsuperscript{262} Emphasis added.
in 1987 in the Charles decision\textsuperscript{263} determined that school officials could use the same standard used to evaluate private schools, that is:

For the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching.\textsuperscript{264}

As to “thoroughness and efficiency”, the law of Massachusetts requires coursework in “instruction and training in orthography, reading, writing, the English language and grammar, geography, arithmetic, drawing, music, the history and constitution of the United States, the duties of citizenship, health education, physical education and good behaviour.”\textsuperscript{265} Such clarity under Massachusetts law with respect to the curriculum on the one hand ensures a minimum level of competence for homeschoolers, but on the other hand diminishes parental choice to engage in varied intellectually stimulating and creative forms of instruction.

According to the law, the approval and oversight of home education is a local, rather than a state function in Massachusetts. In parallel, the Department of Education (DOE) of the state of Massachusetts issues “Advisories on Home Education”. DOE is not involved in setting policy, overseeing school district practices, or otherwise enforcing the Commonwealth’s home education law. When asked, the Department provides school officials and parents with information and answers to questions about the legal requirements for home education. The intent is to avoid unnecessary judicial intervention by a superintendent in response to a family who begins homeschooling without “prior approval”.


\textsuperscript{264} Massachusetts General Laws, Chapter 76, s. 1. Emphasis added.

\textsuperscript{265} Massachusetts General Laws, Chapter 71, ss. 1, 2 and 3. Note that there is no requirement that all subjects must be taught all years or that any particular subject must be taught in any particular year.
The highly regulated approach taken by Massachusetts with respect to homeschooling places it among the most restrictive states, as we shall in the analysis of state regulation later in this chapter.

### 2.2.2. Unique Legislative Responses to Homeschooling

South Carolina is the only state in which the legislature has specifically exempted homeschool associations from compulsory attendance. Any homeschooler enrolled in the South Carolina Association of Independent Home Schools or an association of 50 or more homeschoolers does not have to meet the homeschool law requirements.

Oklahoma, Idaho, New Jersey, and South Dakota are the only states that do not fit into the general categories of a homeschool statute, private school law, or state approval. Oklahoma has the distinction of being the only state with a constitutional amendment that specifically guarantees the right to homeschool, referenced as “other means of education”. In Idaho, children simply must be “otherwise comparably instructed”; no approval is involved. In New Jersey, homeschooled children are considered to be under the category “elsewhere than at school.” In South Dakota, they are “alternative instruction programs” along with private schools; parents must annually notify and test their children.

These original responses to the homeschooling phenomenon indicate that states are disposed to find the most expedient means to ensure both parental choice and minimal regulatory interference.

### 2.2.3. Teacher Qualifications

The teacher certification requirement has its origins in powerful teachers’ unions that support certification laws to discourage homeschooling by eliminating a majority of parents who have not
undertaken post-secondary education. While the teacher certification statutes have been overturned in some states, mainly because they were viewed as unreasonable, the United States Supreme Court has never forbidden a state from requiring teacher certification. That said, homeschooling advocates strongly object to them and dispute the validity of such requirements pointing out a lack of correlation between proper teaching certification and the quality of a child’s education. Primarily for this reason, state legislation tends to favour minimal conditions for parents to teach at home.

Forty-one states do not require homeschool parents to receive some form of prior teacher qualification or certification. Of the remaining nine states which do require a recognized measure of intellectual preparation, seven and the District of Columbia are satisfied with a high school diploma or a General Education Diploma (GED). Interestingly, North Dakota requires neither a high school diploma or GED, provided that a certified teacher monitors the parent for two years. Finally, Tennessee only requires teacher qualification for those parents providing high school education.

Three states require homeschool teachers to be “competent,” “qualified,” or “capable of teaching.” In these jurisdictions, a parent can be recognized as competent or capable of teaching without having a high school diploma or GED.


267 Georgia, North Carolina, New Mexico, Ohio, Pennsylvania, South Carolina, West Virginia, and the District of Columbia.

268 California, Kansas, and New York. In New York, parents who comply with the home instruction regulation are deemed “competent.”
2.2.4. **Standardized Testing or Evaluation**

Standardized testing requirements are perhaps the most common method of state monitoring. Typically, homeschooled children are required to take a standardized achievement test annually as a means of measuring their progress. It is one of the least restrictive, and probably one of the most effective, means of ensuring that homeschooled children are receiving an education that is comparable to that administered by a public school.

As we shall see in the caselaw review in Chapter 5, the most numerous disputes involving state regulation are typically associated with requirements for standardized testing or evaluation. Homeschool parents generally consider these conditions a manifest state intrusion into their carefully tailored home education program that at times emphasizes less-traditional subject or learning methodologies. Additionally, Christian Fundamentalist homeschoolers oppose state evaluation on the grounds that parents are only accountable to God.269

Twenty-four states require standardized testing or evaluation if the family is operating under the homeschool law. Eleven of them require

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standardized testing only. And the other thirteen states provide an alternative to testing.

2.2.5. Religious Exemption

Two states — Virginia and Vermont — allow homeschoolers to obtain some type of religious exemption from compulsory attendance laws.

In the case of Virginia, the relevant statute stipulates:

“A school board shall excuse from attendance at school... any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school.”

As Virginia law does not specify how or when, or even whether, to notify the school board of religious objection to compulsory schooling, it is the practice of homeschoolers in Virginia to file the following documents in support of a claim for religious exemption:

270 Arkansas (standardized testing with the local public school or approved alternate testing procedure in grades K-9); Georgia (requires annual progress report by instructor and testing every three years beginning at grade 3); Hawaii (grades 3, 5, 8, and 10); Minnesota and North Carolina (annual testing); North Dakota (grades 4, 6, 8, and 10); Oregon (grades 3, 5, 8, and 10); Pennsylvania (grades 3, 5, and 8); South Dakota (grades 2, 4, 8, and 11); Tennessee (grades 5, 7, and 9); and New York (grades 9-12). Minnesota and Georgia do not require submission of results to the public school; Pennsylvania requires an annual portfolio review in addition to testing.


• A letter that describes the family’s religious beliefs, particularly including those relating to the education of the family’s children and the spiritual basis for opposing attendance at school;
• Letters from friends, relatives, or members of the faith, that confirm the family’s beliefs are sincere;
• Scriptural or other spiritual quotations, if available, that support or affirm the family’s beliefs; and
• A letter or affidavit from a religious expert or scholar or a religious leader, if the family has such an authority that confirm the beliefs as spiritual in nature and/or genuine.

The language used in the statute requires a school board to decide whether the religious belief or training is *bona fide*, that is, credible or sincerely-held. Local school board reaction varies; some scrutinize claims, while some do not. School boards with formal written policies on religious exemption claims in their policy manual have an easier time to determine whether a claim is *bona fide*, whereas those without interpretative guidance rely on evidence and testimony to prove conscientious objection to compulsory public schooling.

As regards Vermont: “After the filing of the enrollment notice or at a hearing, if the home study program is unable to comply with any specific requirements *due to deep religious conviction* shared by an organized group, the commissioner may waive such requirements if he or she determines that the educational purposes of this section are being or will be substantially met.”

The Vermont legislative provisions provide more discretion to the school commissioner, whereby evidence is required of “inability” to comply and the official can make an assessment whether the educational alternative meets the general statutory requirements.

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273 *Vermont Statutes Annotated* Title 16 § 166b(j). Emphasis added. This exemption is rarely granted.
2.2.6. Curriculum Requirements

As we have seen with respect to Massachusetts, state regulation of curriculum is aimed at ensuring a minimum level of competence for homeschoolers, in furtherance of long-accepted compulsory education objectives.

Five states require instruction or amount of time to be “equivalent” to that of the public school. 274 In Indiana, although the “equivalent curriculum” requirement is still in place, the legislature rendered it inapplicable to homeschools by enacting legislation which exempts private schools from all curriculum requirements.275

The vagueness of the term “equivalent” has spawned a number of court challenges which we will review in Chapter 5, where the term was struck down by courts as void in several states. Three states, meanwhile, have opted for instruction to be “regular and thorough.” 276 In Idaho, the legislature amended the Idaho Code in the 2009 session, removing the vague requirement that children be “comparably” instructed, to read, “instructed in subjects commonly and usually taught in the public schools.”277

State regulation of curriculum must lend itself to clear and unambiguous application of the law for both officials and homeschooling parents that must develop an educational program. That said, this type of state interference restricts parental choice to develop curriculum tailored to their children’s natural interests or proclivities.

274 Connecticut, Indiana, Kansas, Maine and New Jersey.

275 Indiana Code § 20-33-2-12.

276 Maryland, Delaware and Rhode Island.

277 Idaho Code § 33-207.
2.2.7. Graduation Requirements

Only three states impose high school graduation requirements on homeschoolers. For example, in New York, a high school graduate must demonstrate the completion of 4 credits of English, 4 credits of social studies, 2 credits of math, 2 credits of science, 1 credit of art or music, 5 credits of health education, 2 credits of physical education, and 3 credits of electives. Pennsylvania and North Dakota have similar requirements. Such regulation allows parents to structure their curriculum as they see fit, while ensuring a basic minimal level by the age of 18.

2.2.8. Access to Public School Activities

In the 1990s a bridge of sorts between the public school system and the homeschooling movement was erected, allowing homeschooled students to be enrolled part-time in public schools and thus take individual courses in subjects of their choice. Additionally, seven states permit homeschoolers to participate in sports, music and other extracurricular activities in state schools. These states place conditions which may require a greater degree of monitoring than homeschoolers would experience otherwise, for example,

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279 8 New York ADC 100.5.

280 Pennsylvania requires 4 credits of English, 3 credits of math, 3 credits of science, 3 credits of social studies, and 2 credits of arts and humanities. Pennsylvania Statutes Annotated Title 24 § 13-1327.1(c-d).

281 North Dakota requires 4 credits of English language arts, 4 credits of math, 4 credits of science, 4 credits of social studies (which includes one of world history and one of United States history), .5 credits of health, .5 credits of physical education during each school year, 2 credits of fine arts (at least one must be music), 2 credits of the same foreign language, and 2 credits of career and technical education. Also, every two years, .5 credits of North Dakota studies, with an emphasis on the geography, history, and agriculture of the state, must be completed. North Dakota Century Code § 15.1-21-02.

282 Bauman, Education Policy.
the submission of additional documentation to prove that the state homeschool regulations are being followed. Homeschoolers may also have to obtain a designated minimum score on a standardized test acceptable to that state as well as to satisfy all the eligibility and other performance requirements expected of students enrolled full-time in public schools.

Florida has enacted legislation that recognizes a “state interest” in homeschooler participation in public school programs and activities. This statute is unique as it unites the state interest in public education and the corresponding rights of homeschooled children to benefit from government funded education. In Maine, homeschoolers have access to the public school only by obtaining approval from the local school superintendent, whose decision is made on a case-by-case basis. That said, the Maine statute requires the superintendent not to make these decisions arbitrarily.\(^{283}\)

In other jurisdictions, however, the public-homeschool collaboration has given rise to disputes. For example, sports are the purview of interscholastic athletic associations, which in most cases restrict participation to those students enrolled on a full-time basis in a member school, thus finding that homeschoolers are ineligible for competitions.\(^{284}\) These outcomes result from the absence of any reference to homeschoolers in relevant regulations, rather than a principled objection to home education.

### 2.3. Analysis of State Regulation

Having reviewed the characteristics of homeschooling laws in the United States in broad terms, we can summarize the situation as follows, grouping states into those with and without a homeschooling statute, and


\(^{284}\) In Chapter 5, we will review a judicial decision on this matter where athletic eligibility was denied due to the strict application of state educational regulations.
categorizing their regulation as largely unrestrictive, moderately restrictive, and highly restrictive.285

2.3.1. Among States without a Homeschooling Statute

2.3.1.1. Requiring No Notice286

As is evident, the states not requiring notification of the intent to homeschool are very favourable to homeschooling.

Most states in this category do require that homeschooled students be taught specific subjects or be given an education that is comparable to that in the public schools, but these subject matter requirements are often undercut by state laws exempting religious homeschoolers from statutory requirements that burden their exercise of religion. Missouri, for example, provides as part of its compulsory education law:

Nothing in this section shall require a private, parochial, parish or home school to include in its curriculum any concept, topic, or practice in conflict with the school’s religious doctrines or to exclude from its curriculum any concept, topic, or practice consistent with the school’s religious doctrines.287

Connecticut allows a homeschool to operate if the parent is able to show that the child is elsewhere receiving “equivalent instruction” in the studies taught in the public schools.288

286 Connecticut, Indiana, Missouri, New Jersey, Oklahoma, and Texas.
287 Missouri Annotated Statutes 167.031.3.
288 “Revised Procedures Concerning Requests from Parents to Educate Their Child at Home” approved on November 7, 1990, by the Connecticut Board of Education.
Indiana law, meanwhile, exempts homeschools from any subject matter requirements, providing: “A school that is non public, non–accredited, and not otherwise approved by the Indiana State Board of Education is not bound by any requirements set forth in IC 20 or IC 21 with regard to curriculum or the content of educational programs offered by the school.”

Even in states in which substantive requirements remain in effect, however, the practical import of the requirements is dubious given that these states do not require parents to notify the state of their intent to homeschool.

### 2.3.1.2. Largely Unrestrictive Regulation

Largely unrestrictive states are supportive of homeschooling, with minimal requirements to ensure the attainment of basic educational standards.

Homeschooling in Alabama, for example, requires a competent private teacher who must send reports to the State Board of Education.

Although California has no homeschool statute as such, and requires compulsory attendance at a public school, nevertheless an individual homeschool can qualify as a private school by filing an annual private school affidavit. There are two models of home education: private school satellite program and independent study program (ISP).

A private school satellite program files a single private school affidavit for multiple homeschooling families whose children are enrolled in their school. This program can be run as a private campus-based school with a

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289 *West's Annotated Indiana Code* 20-8.1-3-17.3.

290 Alabama, California, Kentucky, Nebraska and Kansas (*Kansas Statutes Annotated* § 72-53, 101. See also section on *Parental Rights Act*.)

291 Homeschools are considered as “church schools” that is, operated as a ministry of a local church group of churches, denomination, and/or association of churches.
home study option, as a school operated as a business exclusively serving homeschoolers, or as a private school composed entirely of homeschool families. In each case, the enrolled family’s home is a “satellite location” of the private school with the parents or guardians operating as the teachers of the children in their homes, with varying degrees of assistance or supervision from the school.

The ISP, meanwhile, uses the public school curriculum and there is an assigned publically qualified teacher who directs the students’ education; the parents are classified as teachers’ aides.

While Kansas has not enacted homeschool legislation, a non-accredited private school is permitted.

2.3.1.3. Moderately Restrictive Regulation

This category requires that certain conditions be met prior to undertaking homeschooling and allow for state monitoring of parental teaching.

To cite an example, Florida law treats homeschools as private, parochial, religious or denominational schools. A business license is required to operate the school and students are subject to annual evaluation by the state superintendent. If educational progress is found wanting, the parent has one year to provide remedial instruction.

2.3.1.4. Highly Restrictive Regulation

Highly restrictive states are largely opposed to homeschooling for educational policy or political reasons (i.e. teacher’s unions) and have allowed for parental choice in education only when forced by the courts.

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292 Illinois, Oregon, South Dakota, and Florida (see Florida Statutes Annotated § 1003.02(1) (g)1).
Massachusetts is such a state. Following multiple instances of undesired state intervention, homeschooling parents in Massachusetts have resorted to the courts, which have produced a series of judicial decisions setting out a framework wherein homeschooling can exist under the vigilance of state officials.293

2.3.2. Among States with a Homeschool Statute

2.3.2.1. Requiring No Notice

States requiring no notice allow parents virtually complete control over the homeschooling decision and its implementation. Alaska, which is one of the most explicitly hands-off states with regard to homeschooling, requires no notification of the intent to homeschool.294

Alaska not only exempts homeschooled students from its compulsory education laws without notification, it also dispenses them from seeking curriculum approval, testing, filing forms, or demonstrating any teacher qualifications. The burden is on the state to prove that parents are not teaching their children. The approach is typical of the individualistic, frontier mentality that pervades in Alaska, where the state is seen as a necessary evil.

2.3.2.2. Largely Unrestrictive Regulation295

These states favour homeschooling and provide parents wide discretion on how to go about homeschooling, but have enacted a few requirements to assess the quality of education at home.

293 These decisions are reported and analyzed in Chapter 5.
295 Arizona, Arkansas, Idaho, and Louisiana.
Arizona law exempts a child between 6 and 16 from compulsory school attendance merely by filing an affidavit of intent to begin homeschool instruction.296

In Arkansas, parents or guardians may provide a homeschool for their children by notifying the local public school superintendent in writing and must also sign a waiver acknowledging that the State of Arkansas is not liable for the education of their child during the period of homeschooling.

The Idaho code allows for a child to be instructed by, or at the direction of, the parent or guardian, in subjects commonly and usually taught in Idaho public schools. 297 Parents can, however, refuse to answer questionnaires about the nature of home study program. Additionally, the state has the burden of proof to show that the homeschool program is not in compliance with law.298

Louisiana sits on the upper limit of this category. Its legislation defines a home study plan as “a program in which an approved curriculum can be implemented under the direction and control of a parent or a tutor”. 299 An initial application must be made within fifteen days of beginning a program of home instruction. A renewal application is accepted upon presentation of satisfactory evidence that the program offered a sustained curriculum of a quality at least equal to that of the public schools at the same grade level. The sustained curriculum can be substantiated in several ways, including presentation of test results on which the student scored at or above his/her grade level or description and substantiating documents detailing the contents of the instructional program. Alternatively, a homeschool may operate as a private school if it has an “adequate physical plant,” “instructional staff members,” and operates for a minimum of 180 days.

296 Arizona Revised Statutes § 15-80224.
298 Idaho Youth Rehabilitation Act.
2.3.2.3. Moderately Restrictive Regulation\(^{300}\)

Moderately restrictive states have enacted a series of conditions whereby parents are subject to regular and well-defined state monitoring.

The State of Colorado requires homeschool families to provide attendance records and evaluates results of home education, as the State does not consider this instruction fully equivalent to private school.\(^{301}\)

Delaware allows parents to choose from three homeschool options: 1) single-family, 2) multi-family with a liaison reporting to Department of Education on enrolment and attendance, and 3) single-family homeschool coordinated with the local school district, using a curriculum approved by the local superintendent. All three options require attendance reports and annual enrolment statements on forms prescribed by the Department of Education.\(^{302}\)

Iowa requires parents to submit a “Competent Private Instruction” (CPI) form annually to the school board secretary.\(^{303}\) Homeschool families are given the option to employ a teacher who supervises the educational progress of children; this teacher will review student materials and write a brief evaluation of their progress.

New York law provides that a child “may attend a public school or elsewhere.” Instruction given to a minor “elsewhere” must be “at least substantially equivalent to the instruction given to minors of like age or attainments at the public schools.”\(^{304}\) Parents must submit notice of intent to homeschool to the superintendent and must also complete an Individualized Home Instruction Plan (IHIP) containing the child’s name, age, and grade level; a list of syllabi, course materials, or plan of instruction;

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\(^{300}\) Colorado, Delaware, Iowa and New York.

\(^{301}\) Colorado Revised Statutes § 22-33-104.532.

\(^{302}\) Delaware Code Annotated, Title 14, § 2703A.

\(^{303}\) Iowa Administrative Code §§ 281-31.1 to -31.10.

\(^{304}\) New York Education Law § 3204(2).
the dates for submission of quarterly reports; and the name of the individuals providing the instruction. Finally, parents are required to maintain records of attendance; file quarterly reports containing hours of instruction, material covered in each subject, and an evaluation for each subject; and file an annual assessment with the last quarterly report. Regarding teacher qualifications, instruction must be provided by a competent teacher. A parent is deemed “competent” if the regulations are followed.305

2.3.2.4. Highly Restrictive Regulation306

These states have enacted homeschool statutes that place a number of restrictions upon homeschooling parents and thus diminish true educational choice in order to further the state’s compelling interest.

Through the Public Education Reform Act, 2007, the District of Columbia City Council created a State School Board of Education which approves standards for homeschooling. In 2008, the superintendent adopted regulations which require parents or guardians to keep a portfolio of homeschooling material that demonstrate the child’s current work in a range of subjects.307 Moreover, parents must have a high school diploma or its equivalent in order to ensure the best interests of the children. If the school superintendent determines that a student is not receiving a thorough education, the parents will receive a “Notification of Deficiencies” and must respond within 30 days with a “Corrective Action Plan”. If the superintendent determines that the homeschool program “does not conform” to the requirements of the regulations, it can issue a letter of non-compliance which can be appealed in writing within 15 days to the

305 New York Education Law § 3204 and homeschool regulations enacted in 1988, New York Comprehensive Codes Rules & Regulations Title 8, § 100.10.

J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection
superintendent, and following a final decision, the parent or guardian may appeal to the D.C. Superior Court.

Georgia law requires parents to submit a declaration of intent to home study to the local superintendent within 30 days after the establishment of the program and every year thereafter. The homeschool must offer a “basic academic educational program” in keeping with state educational standards. In addition, parents are to prepare an annual written report and students must take a national standardized achievement test every three years beginning at the end of the third grade. 308

Hawaii allows families to set up a homeschool or an alternative educational program approved by the school superintendent. Parents must give notice of the establishment of the homeschool by submitting a form to the education department. 309 The law compels parents to make and keep a record of the planned curriculum and summit an annual report to the local authority; failure to do so can result in charges of “educational neglect”. 310

Possibly the most regulated of all the states, the Pennsylvania code and regulations provide parents four options based on the language of the state constitution: “Parents have a substantial constitutional right to direct and control the upbringing and development of their minor children.” 311 Despite affirming parental education rights, the homeschooling requirements are quite onerous.

First, parents may file a notarized affidavit with the superintendent prior to the commencement of the home instruction and annually thereafter. The affidavit includes all basic information, plus assurance that subjects are taught in English; an outline of educational objectives for each subject; evidence of immunization; receipt of health and medical services required

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308 Georgia Code Annotated § 20-2-690(c).
309 Hawaii Revised Statutes § 302A-1132(a)(5).
310 Statute and Hawaii Administrative Rules, § 8-12-13.
by law; and a certification that the parent, all adults living in the home, and any other persons having legal custody of the children have not been convicted of a certain criminal offenses within the last five years.

A parent must annually maintain and provide the superintendent with a portfolio including a log which designates reading materials used, samples of any writing, worksheets, workbooks or creative materials used by the student.\textsuperscript{312} The parent must also maintain and provide an annual written evaluation of the student’s educational progress by a licensed psychologist, teacher certified by the state, or a non-public school teacher or administrator. If the superintendent deems that a homeschooled student is not learning, he can call a hearing to try to return the child to school.\textsuperscript{313}

Second, parents may homeschool their children if they are a “properly qualified private tutor.” To qualify, the parents must be certified by the state to teach in the public schools; teach one or more children who are members of a single family; provide the majority of the instruction to such child or children; and receive a fee or other consideration for these instructional services.\textsuperscript{314}

As a third option, parents may homeschool their children if the home is a satellite of a religious day school. Children must be enrolled in a day school which is operated by a \textit{bona fide} church or other religious body and which provides a minimum of 180 days of instruction. Groups of homeschoolers could organize a school under the auspices of their church, selecting an administrator to keep records, with parents as the teachers, and the school campus being the sum total of all private homes.\textsuperscript{315}

The fourth possibility allows parents to set up an accredited day school or boarding school. Parents may teach their children at home if their child is enrolled in an extension or satellite of a day or boarding school accredited

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\textsuperscript{312} \textit{Pennsylvania Statutes Annotated} Title 24, § 13-1327.1(e)(1). \\
\textsuperscript{313} \textit{Pennsylvania Statutes Annotated} Title 24, § 13-1327.1(e)(2). \\
\textsuperscript{314} \textit{Pennsylvania Statutes Annotated} Title 24, § 13-1327(a). \\
\textsuperscript{315} \textit{Pennsylvania Statutes Annotated} Title 24, § 13-1327(b).
\end{flushright}
by an accrediting association that is approved by the State Board of Education.\textsuperscript{316} The parent or supervisor must have a high school diploma or its equivalent if students are not enrolled in a day school.

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This summary and analysis of state regulation indicates that the legal situation of homeschooling in the United States, although marked by wide variations across jurisdictions, overall is favourable to homeschooling parents. Their rights to choose educational options other than the public school system may require lesser or greater collaboration with school and state officials, but generally homeschoolers will be unmolested to develop and implement curricula and programs that further the academic, social, and moral development of their children.

The map below prepared by HSLDA describes in pictorial terms the legal analysis we have made of homeschooling in the continental United States.\textsuperscript{317}

\textsuperscript{316} Pennsylvania Statutes Annotated Title 24, § 13-1327(c).

\textsuperscript{317} From A. Martin, “Homeschooling in Germany and the United States” (2010) 27:1 Arizona J. Int. & Comp. L. 225 [hereinafter “Martin, Homeschooling”].
LEGEND

☐ **States requiring no notice**: No state requirement for parents to initiate any contact with state officials.

☐ **States with low regulation**: State requires parental notification to state only.

☐ **States with moderate regulation**: State requires parents to send notification, test scores, and/or professional evaluation of student progress.

☐ **States with high regulation**: State requires parents to send notification or achievement test scores and/or professional evaluation, plus other requirements (e.g. curriculum approval by the state, teacher qualification of parents, or home visits by state officials).

Fig. 1: Current Laws Regarding Homeschooling
*Courtesy of the Homeschool Legal Defense Association.*
*Available at http://www.hslda.org/laws/default.asp.*

J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection
2.4. Other Forms of Legislative Support for Homeschooling

As noted above, besides homeschooling statutes and state legislation that allows a homeschool to be established as a church or private school, individual states have enacted laws that aid parents to set up and operate homeschools with minimal government interference.

2.4.1. Religious Freedom Restoration Acts

Following the 1997 United States Supreme Court decision in City of Boerne v. Flores, \(^{318}\) sixteen states passed religious freedom statutes, entitled Religious Freedom Restoration Acts (RFRA), to restore the protection of individuals’ right to freely exercise their religious beliefs. \(^{319}\) In addition to these sixteen states, eight additional states provide a safeguard equivalent to the RFRA through their own state supreme court case law. \(^{320}\)

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\(^{318}\) 521 U.S. 507 (1997). Flores struck down the Federal Religious Freedom Restoration Act which had been passed in order to compel states to grant religious exemptions as they had done prior to Employment Division, Department of Human Resources of Oregon v. Smith. The Act was found unconstitutional as applied to the states for exceeding Congress’s power under the Fourteenth Amendment to pass remedial legislation.


\(^{320}\) Kansas, Massachusetts, Minnesota, Ohio, Vermont, Washington, Wisconsin, and Michigan.
These acts generally prohibit states from burdening the free exercise of religion unless the state proves that the burden is, first “in furtherance of a compelling governmental interest,” and second is “the least restrictive means of furthering that compelling governmental interest.” In essence, the RFRA legislation restores the principles contained in the 1963 Supreme Court decision Sherbert v. Verner, subsequently modified in Employment Division, Department of Human Resources of Oregon v. Smith.

If parents in one of these states are homeschooling for religious reasons and sincerely believes that they cannot comply with the state law, these parents could possibly invoke the state’s Religious Freedom Restoration Act as a defense to a truancy prosecution. Typically, in order to override the parents’ religious beliefs, these states require the government to prove with “clear and convincing evidence” that its regulation is “essential” for children to be educated and that it is the least restrictive means of fulfilling that interest. In Chapter 5 we will review judicial decisions where religiously-motivated homeschoolers argued that the RFRA protections override compliance with the homeschool law.

The RFRA thus protects the parental right to educate children according to one’s moral or religious convictions, in furtherance of the international human rights enunciated in the covenants analyzed in Chapter 1.

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321 374 U.S. 398 (1963). Sherbert requires a court to apply strict scrutiny to a law which threatens a fundamental constitutional right and requires a government to demonstrate that the law is the least restrictive means to achieve its compelling interest. If the state’s “compelling interest” imposes the least restriction upon citizens, then the claim for Free Exercise will fail. Sherbert’s implications on homeschooling will be discussed in Chapter 5.

322 494 U.S. 872, 880 (1990). In a nutshell, the Smith decision modified the Sherbert test, allowing state legislation to impose incidental burdens on one’s religious beliefs without infringing an individual’s First Amendment rights under the Federal Constitution.

323 ICCPR, Article 18 and ICESCR, Articles 13(3) & (4).
2.4.2. Parental Rights Acts

Another form of positive intervention by the state on behalf of parents are the Parental Rights Acts, which have been passed by three states – Michigan, Kansas and Texas – in order to enshrine the rights of parents to educate their children. In effect, Parental Rights Acts translate the natural law principles in support of parental education rights into positive law. These can be relied upon by parents to exercise particular schooling options, whether religious based or not. Their language echoes statements of the United States Supreme Court concerning the fundamental rights of parents that we will review in Chapter 5.

2.4.3. Child Abuse Prevention and Treatment Acts

Twenty-two states have enacted laws giving greater protection to homeschool parents during investigations by Child Protective Services.

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324 “It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children.” M.C.L.A. § 380.10.

325 “It shall be the public policy of this state that parents shall retain the fundamental right to exercise primary control over the care and upbringing of their children in their charge...Any parent may maintain a cause of action in a state court or in any court of competent jurisdiction for claims arising under the principles established in subsection (b)...” Kansas Statutes Annotated § 38-141.

326 “The department [of Family and Protective Services] shall... provide family support and family preservation services that respect the fundamental right of parents to control the education and upbringing of their children.” V.T.C.A., Human Resources Code § 40.002 (b)(2); and “A state agency may not adopt rules or policies or take any other action that violates the fundamental right and duty of a parent to direct the upbringing of the parent’s child.” V.T.C.A., Family Code § 151.003.

327 Abbreviated as “CAPTA”.

328 Alaska: House Bill 408 2006 (amending Alaska Statutes 47.17.033); Arizona: House Bill 2024 2003 (amending Arizona Code Section 8-802); Arkansas: Senate Bill 392 2005 (amending Arkansas Code § 12-12-503); California: Assembly Bill 2749 2004 (amending California Penal Code Section 11167); Idaho: Senate Bill
These laws are all modeled after language passed by Congress in the *Keeping Children and Families Safe Act of 2003.* The CAPTA legislation provides clearly defined procedures for state investigations that have been used in the past to interfere with homeschooling situations by uninformed state officials and police officers.

### 3. Academic Debate over the Correct Amount of State Regulation

The legislative advantage for homeschoolers is not without its critics. In the last two decades, a series of law review articles were framed around the issue of homeschooling regulation. Initially, these articles focused on the narrow question of whether public schools ought to permit homeschoolers

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to participate in part-time courses or extracurricular activities. Some provided a critical evaluation or assessment of current homeschooling laws more generally, defending the validity of parental rights or advocating child welfare interests. Opponents of unregulated homeschooling pointed


out that most states mandate approval or accreditation in the private school context to ensure compliance with minimum educational standards, questioning why home education receives separate treatment.

In his 2000 article on the precedential value of the United States Supreme Court cases Meyer and Pierce, William Ross stated the importance of providing parental educational options – in particular, vouchers and homeschooling. Moreover, Ross argued that the economic desire of parents to provide a quality education for their children has a moral component as well. That is, the goal of parents to provide a quality education for their children is morally equivalent to the desire of parents to educate their children in a school that will properly transmit their religious and cultural heritage. Ross supports parental arguments that the generalized violence and lewdness in some public schools grossly offends the cultural and spiritual traditions of many of the parents whose children attend these schools.


334 W.G. Ross, “The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education” (2000) 34 Akron L. Rev. 177. These cases will be reviewed in Chapter 5.
Another author, William Campbell, made noteworthy observations on the disparate treatment that homeschooling statutes inflict on different types of families, using the example of Alabama’s statutory scheme.³³⁵ There are two possibilities for Alabama families who want to homeschool their children. If they are religiously-oriented, the parents can request support or affiliation from their church and be designated a “church school.” Church schools are exempt from reporting and teacher certification requirements. As a result, the state has no mechanism for monitoring its educational interests. The other option, intended for those parents who are seeking a quality education without any religious content, is found in the “private tutor” exception to the state compulsory attendance laws. This possibility allows a person to be classified as a private tutor if he has been issued a certificate by the State Superintendent of Education and offers instruction for at least 140 days per year in the courses required to be taught in the public schools. Thus, parents with a high school diploma or non-education related college degree who wish to educate their child at home may find the certification requirement an obstacle. These parents will also have to keep a register of the students’ work and an attendance register, which the state can review at any time.

Campbell’s conclusion is self-evident: if the homeschooling program is a “church school” it will receive a more lenient degree of state regulation than if the program is not backed by a church. The result is that application of Alabama law results in significantly different treatment for religious and non-religious parents who choose to homeschool their children.³³⁶


³³⁶ Postcript: In September 2009 the Superintendent of Education for the State of Alabama stated, “the only legal means of ‘homeschooling’ is by a private tutor who is certified to teach in the public schools,” Alabama Code § 16-28-5 (2009). Apparently he circulated this formal reminder because of widespread abuses of the option for “enrollment and attendance” at a church school operated under the oversight of a local church, group of churches or denomination under Alabama Code § 16-28-1. Alabama’s Superintendent clarified that the state would require
Due to well-established legislative protection for homeschooling across the United States, the debate in the law reviews has become more adversarial, between those who contend that the state has a constitutional right to intervene and regulate homeschooling and those who consider that regulation is not in the state’s best interest. We will now consider these arguments and how they might change the legal landscape for homeschooling in the United States.

Louis Greenfield’s 2007 study of religious homeschooling favours more government regulation, recommending that parents who homeschool their children for religious purposes be subject to teacher certification requirements, progress reports, and standardized testing, in order to properly assess their children’s progress.

Greenfield categorizes homeschooling statutes based on three features. First, those which concern “the competence of the teacher”, i.e. teacher certification. The second feature deals with “regulations concerning the content of the program;” these regulations may be diverse, requiring that certain subjects be taught, requiring formal schooling take place at an actual school run by a church before a child would be deemed to be receiving the education the law requires, Alabama Code §§ 16-28-5, -1, -3.


minimum number of days per year and a minimum number of hours per day, and requiring periodic outside inspections and annual reporting. The third category involves “regulations to measure and assure the student’s academic progress”, i.e. a standardized achievement test.

In addition to classifying statutes based on their features, Greenfield classifies them as either ends-focused or process-focused.\(^\text{340}\) The ends-focused would be a standardized test, a more of hands-off approach which focuses on the end result of a child’s education. Ends-focused regulations typically mandate that a homeschooler be proficient in “certain skills at certain times.” By contrast, the process-focused approach involves on-site inspections by state officials or requirements that programs be “substantially equivalent”\(^\text{341}\) or mandating minimum time requirements for home education. This second approach calls for more government involvement in a homeschooling program, and as a result elicits serious objections from homeschooling parents.

In her 2008 law review article,\(^\text{342}\) Kimberly Yuracko argues that the state’s compelling interest in regulating homeschooling is to ensure that “liberal” values are communicated and prohibit parents from creating an “illiberal” educational environment in their homes. Relying principally on the Federal-State action doctrine and state constitution education clauses, she advances the theory that states must, not merely may or should, regulate homeschooling to ensure that parents provide their children with a basic minimum education and check what she views as “rampant forms of sexism” present in homeschooling. Yuracko claims that while there is a court-mandated upper limit on how much states can constitutionally regulate and control children’s education, there is a lower limit as well. That is, there is a minimum level of regulation and oversight over children’s

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\(^{340}\) Greenfield borrows the analysis of homeschooling regulations contained in Page, Changing Our Perspective.


\(^{342}\) Yuracko, Education Off the Grid.
education that states may not avoid. Yuracko’s contention is that “to the extent that homeschooling parents control the public function of providing a basic minimum level of education, they are bound,” either as executors of a monopolized public function or as delegates vested with state authority, “by the state’s own constitutional obligations.”

Yuracko’s novel argument focuses on constitutional guarantees for a basic education contained in state legislation that require every state to provide a system of free public education. She divides these into four categories of increasing strength and expanding state obligation. Courts have interpreted clauses of each type as obligating states to establish and operate public schools that provide children with a basic minimum or adequate education.

Yuracko’s central argument that homeschooling is failing to prepare “democratized” citizens, mainly because states have abdicated their

343 Yuracko, Education Off the Grid, pp. 144-45.
345 Education clauses in the first category contain “only general educational language.” Education clauses in the second category speak not only of a general requirement to provide public education but “emphasize the quality of public education.” Education clauses in the third category “contain a much stronger and more specific education mandate” than those in the first two groups. Education clauses in the fourth category “mandate the strongest commitment to education.” Yuracko, Education Off the Grid, pp. 137-38.
346 In Leandro v. North Carolina, 346 N.C. 336 (N.C. S.Ct. 1997), the state supreme court interpreted North Carolina’s education clause requiring the provision of a “uniform system of free public schools” as establishing “a right to a sound basic education.”
constitutionally appropriate role as protectors of the “right to education”,\textsuperscript{347} has drawn a number of adherents. One of these, Catherine Ross, considers that homeschooling denies children exposure to the constitutional norm of tolerance.\textsuperscript{348} Ross urges states to engage in far more stringent oversight and regulation of homeschooling than currently exists, agreeing with Yuracko that there is no constitutional bar to doing so. The compelling state interest may require use of what she calls “additional oversight tools”, for example civic education that teaches democratic values about tolerance and diversity.\textsuperscript{349}

In her view, parental preferences concerning the education of one’s children are limited in a pluralist democracy where “shared experiences and common values” provide societal cohesion.\textsuperscript{350} As schools play a central role in democracy, there must be a minimum consensus around shared educational goals. Her principal goal is to inculcate the core value of tolerance, whereby “absolutist views” are rejected and respect for differences are not confused with approval for approaches that would “splinter us into countless warring groups.”\textsuperscript{351} For Ross, “state(s) can and should limit the ability of intolerant homeschoolers to inculcate hostility to difference in their children—at least during the portion of the day they claim to devote to satisfying the compulsory schooling requirement.”\textsuperscript{352}


\textsuperscript{348} C.J. Ross, “Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling” (2010) 18 \textit{Wm. & Mary Bill Rts. J.} 991 [hereinafter “Ross, Fundamentalist”].

\textsuperscript{349} Ross, Fundamentalist, p. 992.

\textsuperscript{350} Ross, Fundamentalist, p. 1004.

\textsuperscript{351} Ross, Fundamentalist, p. 1005.

\textsuperscript{352} Ross, Fundamentalist, p. 1005.
This highly negative view of homeschooling is premised on her opinion that public schools provide a forum for exposure to different ideas, and that parents of public school students have ample time to counteract and undermine lessons the children have learned in school that conflict with family values.

As states are legally bound to impose minimum curricular requirements and test students to be sure that they receive the mandated education, Ross argues that states should be able to require homeschoolers to meet broader curricular goals. She proposes the add lessons on mutual respect for diverse populations to civics education as mandatory curricular requirements. Ross would impose these requirements in order to “undermine the most authoritarian conservative homeschoolers—those who believe in an absolute truth which forms the basis of the education they provide their children.” 353 The Federal Constitution’s inherent parental rights neither protect the right of parents to homeschool without oversight nor outweigh the state’s interest in the appropriate education of youth for citizenship. In summary, Ross supports two major reforms: stronger curricular requirements aimed at teaching constitutional values and statutes or common law favoring organized schooling in cases where parents are unable to agree on homeschooling, i.e. in custody disputes.

Timothy Waddell builds upon both Yuracko and Ross, proposing that the Supreme Court clarify what rights homeschooling actually possesses under the Constitution to give clear direction and guidance to state courts. 354 His concern is with the laxity of homeschooling regulations which dispense with notification, thus opening the door to educational neglect or abuse or which render children as dangerous or unproductive citizens. Waddell considers homeschooling a viable, popular educational alternative and would provide some degree of constitutional protection, but he insists that state legislatures take notice of the potential harm to children educated without

353 Ross, Fundamentalist, p. 1008.
standards or oversight and reexamine the appropriate level of regulation. Waddell believes that the uncertainty about when and to what degree the Constitution protects homeschooling decisions presents a major obstacle to a reasonable dialogue on what level of regulation is appropriate; in his view this uncertainty “magnifies perceived threats to homeschoolers, provides political cover for weak-willed legislatures, and fails to adequately protect important interests of parents, children, and society as a whole.”

For Waddell, the scope of fundamental parental rights includes the choice to homeschool and the choice to teach certain subjects in homeschools, but does not prevent states from imposing additional obligations that do not effectively foreclose those choices. As a result, he considers that the current level of regulation in many states leaves important public interests and children’s rights largely or entirely unprotected.

Waddell’s review of pending and recently passed legislation suggests that the trend may be in the direction of stricter regulation. For example, in New Jersey, which currently does not require parental notification of their intent to homeschool, the General Assembly considered legislation that would have required homeschooling parents to notify local superintendents and to submit portfolios of written materials, standardized test results, and an independent evaluation of each child on an annual basis.

355 Waddell, Back Home, p. 546.

He argues, in tandem with Yuracko, that “when states abandon oversight and regulation of homeschooling, they may violate positive constitutional obligations to ensure equal access to an adequate education.” 357 Waddell underlines the political significance of this position, stating:

Recognition of, or even a plausible argument for, state constitutional obligations to regulate homeschooling may pack sufficient political firepower to cause a reversal of the trend toward wholesale deregulation and reinvigorate the debate over the appropriate level of regulation.358

Beyond the issue of a basic education, Waddell considers that homeschooling serves to shelter children from interaction with state officials or concerned citizens, thus weakening both the state’s interest in and systems for protecting the mental and physical welfare of children.359 He would apply laws designed to protect children and the state’s interest in the health and safety of its citizens that affect students in any other educational setting.

In his view, states that do not regulate homeschooling or fail to exercise oversight abdicate the protection of the public interest in a well-educated and socially cohesive population. Legislation that supports parents’ choices to homeschool or creates a fundamental interest in homeschooling requires that all homeschooling regulations survive strict scrutiny. According to Waddell, this severely restricts the means at states’ disposal to protect child welfare and promote an educated, productive citizenry. While a state may be able to show that protecting the safety of children is a compelling

357 Waddell, Back Home, p. 555.
358 Waddell, Back Home, p. 556.
359 Schools function as central reporting agencies for potential cases of abuse and neglect; moreover, teachers and school employees are required by law to report suspected instances of mistreatment under reporting statutes in every state. U.S. Department of Health and Human Services statistics show that teachers are the source of nearly 25% of reports of physical abuse. U.S. Dep’t of Health & Human Services, Child Maltreatment 2006, p. 6, available at: www.acf.hhs.gov/programs/cb/pubs/cm06/index.htm (last visited June 21, 2011).

J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection
interest, it may be difficult to show that home visits, for example, are necessary to protect that interest. In summary, Waddell encourages states to initiate debate about the correct level of homeschooling regulation and enact reliable enforcement mechanisms.

In response to the liberal, statist position, homeschooling advocates Tanya Dumas, Sean Gates and Deborah Schwarzer offer arguments in support of the current legislative framework. These authors acknowledge that homeschooling presents a conflict between the constitutional right of parents to direct the education of their children and the state’s right to impose regulations in the interest of ensuring an educated citizenry. They insist that the Supreme Court has made it clear that any regulation impacting this constitutional right must be reasonable. For Dumas et al, the question courts ought to address is whether particular state regulations affecting parental rights to direct their children’s education in fact advances the state interest. A regulation that fails this criterion is therefore an unreasonable burden on parental rights.

Low levels of state regulation, including minimal teacher qualification requirements, do not imply that children receive a substandard education. Dumas et al. argue that homeschoolers perform well academically regardless of the degree of regulation imposed by the state. Statistical analyses of standardized achievement test scores from homeschooled students across the nation show no correlation between the degree of regulation imposed by the state and academic achievement.

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361 Dumas, Evidence, p. 65.

Moreover, requiring parents to hold a credential in order to properly teach their children is not “essential” to meeting the state’s interest. In support of their position, Dumas et al. cite People v. DeJonge (further discussed in Chapter 5) where the court found that:

the DeJonge children [were] receiving more than an adequate education: they [were] fulfilling the academic and socialization goals of compulsory education without certified teachers or the state’s interference. 364

Accordingly, the court rejected the state’s reliance on its compelling interest in ensuring the adequate education of all children, finding that this was “the incorrect governmental interest.” The DeJonge court based its decision on empirical studies that “disprove a positive correlation between teacher certification and quality education” in the homeschooling context, and therefore a teacher certification requirement could not be “compelling”. Dumas et al. conclude that the social science evidence demonstrates that homeschooling serves the state’s interest in education and this interest is best aided by minimal regulation on parental rights to homeschooling.

Another strong defence of homeschooling rights is provided by Aaron Martin, comparing the United States regulatory regime with that of Germany. He accepts Yuracko’s position that educational cases in the United States are often decided in relation to the language in a state constitution. Martin also accepts her classification of state constitutional language which provide for a child’s right to education, and additionally, a

363 Dumas, Evidence, p. 85, citing Lines, Homeschooling Comes of Age, p. 81: “[S]tudent achievement for homeschoolers has no relation to the educational attainment of the homeschooling parent. This is consistent with tutoring studies that indicate that the education level of a tutor has little to do with the achievement of a tutored child. One explanation might be that the advantages of one-to-one learning outweigh the advantages of professional training.”

364 501 N.W.2d 127, 140 (Mich. 1993) [hereinafter “DeJonge”].

365 DeJonge, pp. 141-142.

366 Martin, Homeschooling.
right to a basic (and presumably state-mandated) level of education. But he disagrees with Yuracko and other liberal scholars, arguing that instead of a right to education per se, they are actually advancing, through a dubious application of substantive due process, a right to a narrowly circumscribed type of public education.367

Yuracko would argue that the right to a basic level of education is only found in a state-run educational system. Martin asks whether, given a state’s mandate to provide an education to its children, a particular regulation on homeschooling actually furthers that goal and protects the basic right to education. For their part, homeschoolers cite a fairly consistent line of federal cases interpreting the Federal Constitution in favor of parental control and limited government regulation. These cases (analyzed in Chapter 5) present a balance of parental educational rights and state interest, whereby the means the state employs must fit the end of regulating parental choice.

Martin expresses concern as regards the future of homeschooling, for although there is a developed body of law in the United States, courts and legislators hesitate to draw clear and distinct lines setting out where parental rights end and state interests begin. Scholars in favor of re-regulating homeschooling (most prominently, Yuracko and Greenfield) are now proposing bright-line rules 368 that would increase government regulation of homeschooling.

367 Martin, Homeschooling, p. 258. He responds to Yuracko’s argument as follows: “The basic premise of such arguments is that children have a right to a minimal level of education while the state has the corresponding duty to provide such an education. The conclusion of these arguments, however, is that the state is the best entity to provide that education and that homeschoolers are somehow attempting to provide an inferior education out of sight of the state. The reality is that homeschoolers seek to provide a superior education and feel that state regulation — such as imposing curriculum requirements — is actually a hindrance to their ability to provide that superior education.”

368 Martin, Homeschooling, p. 272.
Conclusions

This review and analysis of United States legislation indicates that homeschooling parents across the country benefit from supportive legal protections. Reflecting socio-cultural values, the patchwork of legislation varies widely from the extremes of Alaska’s hands-off approach to Pennsylvania’s highly regulated environment. Some states treat homeschools as a type of private school, others base their educational requirements on the precise wording of the state’s compulsory attendance statute, while still other states have enacted a statute that specifically applies to homeschooling.

In summary, all states have incorporated homeschooling as a legal alternative to compulsory schooling and created a set of administrative rules enforced by school officials that ensure a minimum quality standard of education for homeschooled children. These rules allow for regular monitoring, which may take the form of teacher certification, standardized testing, or curriculum requirements.

The current system, while favourable to homeschooling’s growth, may change due to academic efforts that put forward constitutional justifications for stricter regulation. The law review debate between scholars opposed to unregulated homeschooling and those who see state benefits in the current regimes may result in an altered legislative landscape for homeschooling. Changes in the current application or interpretation of compulsory education laws may have negative impact on homeschooling and could violate parents’ constitutional rights. Preventing parents from homeschooling unless they obtain a teaching credential, for example, would amount to a de facto prohibition due to the logistical and financial demands of attaining certification, but achieve no educational benefit for the homeschooled children. It would also limit potentially appropriate educational choices for children who do not fit well into institutional schooling environments.
There is general agreement that the state has a compelling interest in the education of children and may adopt regulations to advance this interest so long as it does not violate the fundamental constitutional rights of parents. Based on the review of legislation in this chapter, the test of whether a regulation is permissible appears to be: it must both be narrowly drawn to avoid undue restriction of fundamental rights and serve the state's compelling interest. Moreover, regulations should not inflict disparate treatment upon religious and non-religious based homeschoolers.

In accordance with prior parental rights, the state's compelling interest in the education of its citizens ought to take place using the least restrictive means available. This least restrictive requirement effectively functions as the limitation on homeschool regulation. It is evident that standardized testing, curricular requirements, and performance reporting infringe on the autonomy of parents' educational decisions. That said, regulations can be measured to achieve state monitoring of homeschooling and at the same time minimally burden parents. Sensible regulation that measures educational achievement should be sufficient for those who have concerns that homeschooling parents are abusing the leniency of the legislative regimes.

A legislative program that balances both parental rights and state interests, applied equally to religious and non-religious based homeschooling programs, could incorporate the following requirements:

1. Every homeschooling parent be required to maintain (but not required to submit to school officials) the following records: a plan, book, diary, or other record indicating subjects taught and activities engaged in (i.e. a daily log) and a portfolio of samples of child’s academic work. These records would constitute written credible evidence to evaluate the child’s academic progress.

OR

369 We will review the constitutional rights of parents specific to education in Chapter 5.
2. Every homeschooled child be required to take a standardized achievement test (chosen by the parents from a pre-approved list) with the same frequency as public school children. If the child does not meet the minimum scores for their age level, school officials can meet with the parents to discuss curriculum issues to ensure the child’s advancement in basic educational areas (i.e. literacy, mathematics and physical sciences).

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The right of parents to control the education and upbringing of their children encompasses the right to teach them at home. The discussions in Chapter 1 on parental rights and the evidence given in Chapter 2 on academic achievement by homeschoolers leads to the conclusion that restricting homeschooling does not necessarily serve a state’s interest in education. This interest is served, rather, by parental choice for homeschooling supported by a clear legislative framework through properly enacted statutes and a minimum of enforced monitoring. To paraphrase Emily Brown, the state’s interest is better described as enabling parents to provide for their children’s education — by either providing public schools or permitting parents to use alternative education such as homeschooling.370

For the present, state regulatory regimes in the United States (and their interpretation by judicial decisions that we shall see in Chapter 5) ensure a substantial measure of parental choice in education. Offering more choices to parents and diminishing homeschooling regulation appears to increase educational success without negatively impacting social interaction.

Chapter IV. The Legal Status of Homeschooling in Canada

Introduction

This chapter will review the legislative regime that governs homeschooling in Canada. As in Chapter 3, we will summarize and analyze the laws of each province according to a scale of lesser or greater restrictivity.371

1. The Federal Constitution and Education

Former British colonies in Canada were established as a federal state in 1867, with legislative jurisdiction divided into federal and provincial structures that comprise the Federal Government, ten provinces and three territories. Due to a historical compromise between the English and French traditions, the country is both bilingual and bi-juridical, as codified law (Québec) coexists alongside the common law (the rest of the country).

371 For legal citation of Canadian legislation, we follow The Canadian Guide to Uniform Legal Citation, 7th ed. (Toronto: Carswell, 2010).
Canada’s Constitution has two parts, the *British North America Act*, passed by the Parliament of Westminster in 1867 to establish the Dominion of Canada (now known as the *Constitution Act, 1867*) and the *Constitution Act, 1982*, also a British statute which repatriated the Constitution by implementing an amending formula and setting up a Charter of Rights and Freedoms.

The *British North America Act*, fruit of compromise between English-speaking Protestants and French-speaking Catholics and which functioned as Canada’s exclusive constitutional statute from 1867 until 1982, assigns exclusive power over education to the individual provinces via section 93.\(^{372}\)

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions... (referencing Denominational and Separate Schools in Ontario and Québec).

Section 93 of the 1867 Constitution safeguards the parental freedom found in article 13 of the *International Covenant on Economic, Social and Cultural Rights* “to ensure the religious and moral education of their children in conformity with their own convictions.” This right gives Canadian parents the ability to control the content of the religious moral and cultural education their children receive.

As noted above, the *Canadian Charter of Rights and Freedoms*\(^ {373}\) is contained in the *Constitution Act, 1982*, and provides for a wide range of human rights and freedoms in the spirit of an entrenched “Bill of Rights”,

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\(^{372}\) Education was the crucial issue in the debates that led to the creation of Canada. Interpreting s. 93 in *Brophy v. Attorney General of Manitoba*, (1895) A.C. 202, the Privy Council, final court of appeal for all Canadian decisions until 1949, wrote of the country’s foundation: “In 1867, the union of the Provinces of Canada, Nova Scotia, and New Brunswick took place. Among the obstacles which had to be overcome in order to bring about that union, none, perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education.”, pp. 213-214. Emphasis added.

\(^{373}\) Part 1 of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11 [hereafter referred to as “the Charter”].
subject only to “reasonable limits” prescribed by law. The Charter applies to both the federal and provincial legislatures and governments.

Although the Charter does not contain any general right to education, the provision guaranteeing freedom of religion under section 2 and the right to liberty in section 7 may be relied upon to defend parental interests in education. These sections of the Charter state as follows:

Section 2: Everyone has the right to fundamental freedoms:
   a) freedom of conscience and religion;
   b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication;
   c) freedom of peaceful assembly; and
   d) freedom of association.

Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

While these two sections contain no explicit provision recognizing a right of parents to set up, run, or choose to send their offspring to schools outside the publicly funded system, the judiciary has indicated that they are the

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374 Section 1 of the Charter states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

375 The Charter only refers directly to education at s. 23, which protects minority language educational rights, and at s. 29, which upholds the s. 93 provisions concerning denominational and separate schools.

basis of constitutional rights of parents to have their children instructed at home.377

2. Provincial Regulation of Homeschooling Education

Beyond the rights guaranteed by Canada’s constitutional texts, the provinces have legislative competence to recognize other rights or widen those already existing. For this reason, the international covenants signed by Canada, studied in Chapter 1, are legally enforceable through provincial legislation.

Every Canadian province recognizes parental education rights to choose homeschooling for their children. In comparison with the United States, this has taken place relatively recently, mainly during the 1990s.378 Every jurisdiction in Canada offers homeschooling, or “home-based learning” as referred to often in regulations, as an alternative to compulsory attendance at a public school. Each province has its own Education Act and Regulations with sections relevant to home education, governed by a ministry of Education.379

377 We will review the relevant caselaw in Chapter 6.

378 We set out the following chronological list of provinces with the date of enactment: Manitoba (1987); Alberta (1988); British Columbia (1989); Ontario (1990); Saskatchewan (1993); P.E.I., NW Territories and Yukon Territory (1995); Nova Scotia (1996); Québec and Newfoundland (1997); New Brunswick and Nunavut Territory (1999).

Alberta, British Columbia, Saskatchewan and the Yukon Territory facilitate support for homeschooling from school boards, or in some cases, from private schools, that is, courses or extracurricular activities that the homeschooled child can attend while remaining “outside” the public system. The remaining jurisdictions provide for the right to unsupported home instruction.

As each province has its own specific rules governing homeschooling, compliance with the regulatory regime in the respective province can mean different things. For example, the British Columbia School Act of 1989 gave parents the statutory right to educate their children at home on the condition that they “provide each school-age child with an educational program.” In Ontario, the Education Act states that a child is exempt from attending school if he or she is receiving “satisfactory instruction at home or elsewhere.” Following years of inconsistent practices by school boards throughout the province, the Ontario government adopted a policy in 2002 whereby all school boards should accept the written notification of the parents each year as evidence that the parents are providing satisfactory instruction at home.  

As we will review below, in most provinces parents must register their homeschooled children with their local school or school board.

In several Canadian jurisdictions, homeschooling is a positive right, rather than an exemption from compulsory education. To cite a specific example of such statutory recognition of homeschooling, here follows the relevant section from Alberta’s School Act.

380 Ontario Ministry of Education, Memorandum No. 131, June 17, 2002 [hereinafter “Memorandum 131”]. discussed in section 2.2.2, below.

Section 29. Home Education

(1) A parent of a student may provide, at home or elsewhere, a home education program for the student if the program:

(a) meets the requirements of the regulations, and

(b) is under the supervision of a board or a private school accredited under section 28(2).

(2) If a parent resides in unorganized territory, the Minister shall act as a board under this section.

(3) The Minister may make regulations respecting home education.

Meeting the requirements of these laws may be as simple as informing the school district or department of education of intent to homeschool or as complex as having children tested and fulfilling detailed requirements of provincial regulations.

2.1. Characteristics of Homeschool Legislation

We will now assess the regulation of Canadian homeschooling in various areas where provincial intervention dictates specific obligations.\textsuperscript{382}

2.1.1. Discretionary Approval

Four provinces (Alberta, Saskatchewan, Newfoundland, and Prince Edward Island) require that parents submit to an application process intended to prove that they are capable of homeschooling their children before they start. The three territories (Northwest Territories, Nunavut, and the Yukon) all oblige parents to register with the local school district which will supervise their home education program.

\textsuperscript{382} See generally, Basham et al, Extreme to Mainstream.
The remaining six provinces (Nova Scotia, New Brunswick, Québec, Ontario, Manitoba, and British Columbia) place the decision to homeschool directly in the hands of parents. These six provinces do not require parents to seek government permission before starting a homeschool program. Instead, the government intervenes only if the parents prove themselves to be irresponsible or incapable.

2.1.2. Unique Legislative Responses to Homeschooling

Alberta provides direct financial assistance to parents who homeschool their children, paying homeschooling expenses up to 16% of the per pupil public school expenditure. The money may be used for any costs associated with the homeschool.

As noted in Chapter 2, British Columbia’s “E-Bus” is a government-subsidized program that helps with homeschool computer hardware and software costs, providing each school board with approximately CAN$4,000 per interested homeschooling family.383

Saskatchewan, Alberta, and British Columbia also allocate money to school boards or independent schools that register homeschool students.

These financial responses by provinces are positive signs that governments are disposed to encourage parental choice to all families, not only those who can afford alternatives to public schooling.

2.1.3. Teacher Qualifications

While we noted that the teacher certification requirement is highly contentious in the United States, this is a non-issue in Canada. No province requires that homeschool parents possess teaching qualifications.

2.1.4. Standardized Testing or Evaluation

Two other regulatory instruments in the United States that have proven conflictive, standardized achievement tests and state evaluation requirements, are a minimal factor in provincial legislation regimes in Canada.

Alberta is the only province to require standardized testing for a family operating under the homeschool law.

Five provinces demand that parents who homeschool report their children’s progress on a regular basis – Nova Scotia, Prince Edward Island, Manitoba, Saskatchewan, and British Columbia. Meanwhile, Newfoundland, New Brunswick, Québec, Ontario, and British Columbia do not require parents to submit any reports.

All provinces however maintain the right to terminate a homeschool program if they determine that a child’s right to education is being denied.

2.1.5. Religious Exemption

Only one province mentions religious or conscientious beliefs in its homeschool legislation. Saskatchewan provides the following religious freedom clause under section 12(7) of the Education Act, 1995.

12(7) Subject to the requirements of this section, a home-based educator shall not be required in his or her written educational plan:

(a) to include any concept, topic, or practice that is in conflict with his or her conscientious beliefs; or

(b) to exclude any concept, topic, or practice that is consistent with his or her conscientious beliefs.\(^{384}\)

No interpretative aids or examples of such objection have been located. That said, the section codifies religious freedom of parents to choose the particular method or subject matters that reflect their convictions, in line

with the international declarations and the Church’s Magisterium discussed in Chapter 1. Saskatchewan legislation in this manner accepts that parents may disagree with state-sponsored educational objectives and content, and thereby recognizes the prior right of parents.

2.1.6. Curriculum Requirements

As seen in United States legislation, state regulation of curriculum is aimed at ensuring a minimum level of competence for homeschoolers, in furtherance of long-accepted compulsory education objectives.

Only Alberta, Manitoba, and the Northwest Territories require the approval of curricula. This practice in essence imposes conditions on how parents structure, develop and deliver the home educational program, and interferes unduly with their freedom as first educators. On the other hand, eight provinces issue curriculum guidelines to homeschooling parents but these same provinces do not require that the curriculum be government approved.

Alberta, Manitoba, Nova Scotia, and Saskatchewan demand an annual report of student progress. Such requirement is consistent with state’s interest in ensuring a minimal level of education at each level of schooling.

2.1.7. Graduation Requirements

In contrast to the United States jurisdictions, no Canadian provinces impose high school graduation requirements on homeschoolers. As such, parents are given freedom to structure the home education curriculum as they wish.

2.2. Analysis of Provincial Legislation

Having reviewed the legislative reality of homeschooling in Canada, we can summarize the situation as follows, categorizing each province’s
regulation as largely unrestrictive, moderately restrictive, and highly restrictive.

In general, the western provinces tend to favour homeschooling and provide varying degrees of funding, but impose a series of regulatory requirements. The central and Atlantic provinces allow for the practice, but place few administrative hurdles. Finally, Québec which has a unique socio-cultural and statist identity, approaches homeschooling as with a high degree of caution.

**2.2.1. Largely Unrestrictive Regulation**

In British Columbia the government provides substantial support to homeschooling to respond to the needs of isolated communities and families. As we have seen, through E-Bus the province has developed innovative programs to help parents financially to deliver an education in the home technologically on par with the public schools.

Homeschooling in British Columbia is covered by the *School Act* at Division 4 “Home Education”. Section 13 provides parents three options for registration: a local school, a distance education school or an independent school. Failure to register is classified as an offence.

Section 14 establishes a procedure for “citizen reporting” to the superintendent of schools of children that are unregistered. Both the person making the report and the superintendent investigating the report are immune from subsequent legal action by parents for a false report. However, parents have cause to seek legal redress if the report was made maliciously. It is understandable that the state creates a system to discourage general truancy, but this provision, as it is placed in “Home Education” division of the *School Act* appears to be aimed directly at

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387 *School Act*, s. 14(3).
homeschooling families. If not applied correctly, section 14 can result in unwarranted harassment from troublesome neighbours.

British Columbia allows homeschoolers the option to write provincial examinations at the school where they are registered.

The province has enacted a variety of regulations to provide specific guidelines. A school that registers a child under section 13 must offer evaluation and assessment services to parents in order to determine whether the child’s educational progress meets that of students of similar age and ability. Such services include the loan of authorized educational resource materials.

With the permission of a board, a registered child may audit public educational programs subject to terms and conditions, including the payment of a fee.

2.2.2. Moderately Restrictive Regulation

In Ontario, the most populous province, the Education Act provides for home education if the child is receiving “satisfactory instruction at home or elsewhere”. As the Act does not define what is meant by “satisfactory instruction”, the task of measuring what is satisfactory has been assigned to school boards. In 2002, the Ministry of Education issued a policy to interpret the law entitled Memorandum No. 131, which sets out “Procedures for School Boards” whereby boards should accept the written

388 BC School Regulation, B.C. Regulation 265/89, s. 3; BC Investigation by Superintendent Order, Ministerial Order 151/89, s. 2; Independent School Act, S.B.C. 1989, c. 51, s. 9; Independent School Regulation, B.C. Regulation 262/89, s. 6, amended by 252/2006.
389 Horsburgh, Public School, pp. 29-30.
391 Education Act, R.S.O., 1990, c. E.2, s. 21(2)(a). Caselaw on the meaning of “satisfactory instruction” will be discussed in Chapter 6.
notification of the parents each year as evidence that the parents are providing satisfactory instruction at home.

The *Education Act* features an inquiry procedure if the school officials consider that the instruction is unsatisfactory. Moreover, section 30 threatens a parent with conviction and a monetary fine if they “neglect or refuse to cause the child to attend school.” *Memorandum No. 131* indicates that boards generally should not initiate investigations, “unless there are reasonable grounds to suspect that the child is not receiving satisfactory instruction at home.” The document provides “Guidelines for Conducting an Investigation” in the event the board makes the decision to investigate. The Guidelines advise officials to focus on three items in order to ensure parents are providing “satisfactory instruction”:

- a plan for educating the child;
- plans for assessing the child’s achievement; and
- plans to ensure literacy and numeracy at developmentally appropriate levels.

In order to assist school boards in applying their statutory discretion, the Guidelines state:

> [B]oard officials should recognize that the methodology, materials, schedules, and assessment techniques used by parents who provide home schooling may differ from those used by educators in the school system. For example, the parent may not be following the Ontario

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392 *Education Act*, s. 24(2).

393 Memorandum No. 131, p. 2.

394 Memorandum No. 131, p. 3. The Guidelines state: “If the board is unable to determine from this investigation whether the child is receiving satisfactory instruction at home, it may take further action, in accordance with subsection 24(2) and/or section 30 of the Education Act.”
curriculum, using standard classroom practices in the home, or teaching within the standard school day or school year.\textsuperscript{395}

While Ontario’s legislative framework could act as a serious restraint on parents’ freedom to determine the educational curriculum and to select school texts, due to policy directives, the province has not created many difficulties for homeschoolers.

It is noteworthy that the \textit{Ontario Human Rights Code},\textsuperscript{396} focused on tolerance and gender equality issues, remains silent concerning parental guarantees in the education of the children.

In Manitoba, the \textit{Public Schools Act} provides exemption to compulsory public education, “if the field representative certifies that in his opinion the child is currently receiving a standard of education at home or elsewhere \textit{equivalent} to that provided in a public school.”\textsuperscript{397}

Parents are required to provide an outline of the education program for each pupil and periodic progress reports on each pupil in the homeschool. The minister determines the frequency and content of the reports.\textsuperscript{398}

Interestingly, the province allows parents to choose among three different Curriculum Options: Child-Centered Instruction; Christian-Based Curricula; and an Independent Study Option.\textsuperscript{399}

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395 Memorandum No. 131, p. 3. The Ontario Federation of Teaching Parents, the province’s largest homeschooling organization, responded positively to the Guidelines: “Clearly, this statement is a recognition of homeschooling as not only a viable alternative to public education, but also a recognition that the educational experiences found within each home are unique to each family.” Available at: www.ontariohomeschool.org/ppm131.htm (last visited June 21, 2001).


398 \textit{Public Schools Act}, ss. 260(3) & (4).

399 The provincial Education Ministry describes the three options as follows:
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New Brunswick legislation offers homeschooling where “the Minister is satisfied that the child is under effective instruction elsewhere.” Under this arrangement, parents request approval from the Minister of Education and sign a form accepting full responsibility for their children’s education and that this choice makes the children ineligible for a New Brunswick High School Diploma.

The provincial Department of Education has indicated that to qualify as “effective instruction”, a homeschool curriculum must include specific subjects covered in the public school curriculum: Language Arts, Mathematics, Science, Technology, Social Studies, Health, Career Development, French, Music, Art, and Physical Education. More importantly, the Department places responsibility on the parents to document the “effective instruction” taking place in the home.

In addition, as each school district has the discretion to interpret “effective instruction”, School District n. 2 issued Policy Statement 342 on

1. Parents who choose a child-centered approach elect to use materials from a variety of sources and often supplement their teaching with a variety of experiences and activities that enhance their child(ren)’s learning.

2. There are a number of Christian-based curricula being used by homeschooling parents (e.g., A Beka, Alpha-Omega, School of Tomorrow).

3. Courses for students in grades 1-8 may be ordered from Alberta Learning. For grades 9-12, Manitoba Education, Independent Study Option offers course materials and marking services.


402 “Home Schooling in New Brunswick” goes on to state: “A critical part of effective instruction is the evaluation of a child’s development and the recording of that progress over time. A portfolio containing samples of a child’s work (e.g. projects, reports, tests, and dated writing samples) can be used to show growth in the child’s development. The child’s progress should be reviewed at regular intervals and the child’s program should be adjusted to accommodate his or her changing needs, interests and abilities.”
September 1, 2004, whereby a parent needs to request an exemption and submit to an evaluation of the homeschooling curriculum which “would normally involve a visit to the home and an observation of the place of study”.403

Nova Scotia also provides home education as an alternative to public school attendance under its Education Act 404 and accompanying regulations.405 The Act defines a “home education program” as a course of study provided to the student under the direction of the student’s parent and centered in the student’s home.406 Home education section 113 exempts a child if “the child is being provided with a home education program in accordance with the regulations.”

The Home Education Legal Requirements are set out under section 128 of the Education Act and set out further requirements in Regulations 39 and 40. These require notification of the ministry and identification of the proposed home education program and an annual report “which accurately reflects the child’s progress”.

Additionally, Nova Scotia law allows, with the approval of the school board, that a child in a home education program may attend courses offered by a public school.407 The Act empowers the Minister to require the parent of a child in home education to provide evidence of the child’s educational progress by providing the results of a standardized test, an assessment from a qualified assessor, or a portfolio of the child’s work.408 Moreover, the Minister is authorized to appoint an independent assessor if further

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403 A similar policy issued by School District 10, Administrative Procedure No. 366, on December 1, 2005 (revised 2007) makes no mention of home visits or curriculum acceptance.

404 S.N.S. 1995-96, c. 1.

405 Nova Scotia General Regulations, s. 63(f).

406 Education Act, s. 3.1.

407 Education Act, s. 128(3).

408 Education Act, s. 128(4).
evidence of a child’s progress is required to determine if the home education program is “adequately addressing the child’s needs” and if the “available public school program will do more to further the child’s educational progress than the home education program”.\textsuperscript{409} The parents themselves may request an assessment under the Act.\textsuperscript{410} The province retains the power to terminate a home education program if its ministry determines that the child “is not making reasonable educational progress as determined by the child’s performance.”\textsuperscript{411} Before making this determination, an education official must notify the parent in writing and give the parent an opportunity to make representations as to why the home education program should be provided or continued.\textsuperscript{412}

Prince Edward Island law contains homeschooling provisions\textsuperscript{413} requiring notice and a proposed home education program. Regulations allow a homeschooler to attend courses offered by a school board.\textsuperscript{414}

Newfoundland, whose population is clustered in isolated communities and has struggled to offer reliable schooling, also makes provision for homeschooling in its education legislation.\textsuperscript{415}

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\textsuperscript{409} \textit{Education Act}, s. 128(5).
\textsuperscript{410} \textit{Education Act}, s. 128(6).
\textsuperscript{411} \textit{Education Act}, s. 129(1). The provincial education department will exercise its delegated ministerial powers to investigate and make such determination.
\textsuperscript{412} \textit{Education Act}, s. 129(2).
\textsuperscript{413} \textit{School Act}, P.E.I. 1993, c. 35, ss. 69(4)(c) & 139.
\textsuperscript{414} “The Private Schools and Home Education Regulations”, EC 534/95, ss. 19-23.
\textsuperscript{415} \textit{Schools Act}, R.S.N. 1997, c. S-12.2, ss. 5(c), 6(1), 6(2), 7, 15(1); \textit{School Attendance Act}, R.S.N. 1990, c. S-9, s. 8(d).
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2.2.3. Highly Restrictive Regulation

Alberta’s School Act provisions establish homeschooling at section 29. The Act recognizes and affirms parental rights and responsibilities as a home educator. As the provincial government considers home education to be a school, before proceeding with a home education program, parents must notify an associate school board or associate private school of their choice and enter into a formal agreement for each school year of the home education program. Many home educating parents choose to work with a willing non-resident board or private school (i.e., a board or private school from another area of the province).

The school authority, which accepts the parents’ notification, has the responsibility to provide the parents with support, if asked. Together with the parents, the associate school authority must ensure that the child meets the parents’ educational goals.

The province has created a detailed licensing scheme under the Home Education Regulation. Section 2 requires the filing of a notice of intention to provide home education. A parent who intends to provide a home education program must develop the program with appropriate outcomes that may or may not follow the provincial “Programs of Study”. If the parent chooses not to follow the provincial program, the associate board or associate private school that will supervise the program must accept the program, including a list of the activities, the instructional methods and resources to be used, the means of conducting evaluations of the student’s progress.

A teacher employed by the associate board or associate private school must, at the request of a parent, advise and provide assistance to the parent.

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416 Alberta, Saskatchewan, and the Territories.
417 S.A. 1988, c. S-3.1, s. 29.
419 School Act, s. 3.
in the preparation of the written description of a home education program.\textsuperscript{420}

The Home Education Regulation requires parents to keep samples of evaluation activities (tests and work samples) completed by their children. Associate boards or associate private schools are required to maintain detailed assessment-of-learning records for the children, including records from at least two evaluations of student progress completed by the associate board or private school during the year.

The Regulations allow for either the parents or the associate board or private school may end the agreement. If the associate board or private school assesses lack of student progress or parent is non-compliant with the Home Education Regulation, they may end the agreement, but only after consulting the parents, specifying the reasons and offering an alternative. Notice of termination must be in writing and inform the parents of their right to ask the Minister of Education to review the termination decision. The parents may accept the alternate program or arrange a program for the children with another school board or private school.\textsuperscript{421}

When the parents decides to end the home education agreement, they must provide written notice to the associate board or private school and, if the children are between 6 and 16 years old, must enroll them in a school operated by a school board or in a private school.\textsuperscript{422}

A homeschooler is required to complete the provincial achievement tests or an alternative form of assessment approved by the superintendent, in accordance with the Home Education Regulation. That said, parents have flexibility in choosing the methods used for evaluating their child’s performance. For example, parents can decide whether or not they wish to have their child write provincial achievement tests in Grades 3, 6 and 9.

\textsuperscript{420} School Act, s. 8.

\textsuperscript{421} Alta Regulation 145/2006, “Home Education Regulation”, s. 8(1).

\textsuperscript{422} Alta Regulation 145/2006, “Home Education Regulation”, s. 8(4).
Home educated students are visited at least twice each year by a teacher from the associate school board or associate private school. These teachers measure progress by reviewing samples of the students’ work and by observing students while they perform learning tasks.

The province of Saskatchewan has developed a well articulated home learning program pursuant to the *Education Act*[^423] and accompanying regulations. Compulsory attendance at public school allows for an exemption at section 157 of the Act.

> 157(1) A pupil may be exempted from attendance at a school, and no parent, guardian or other person is liable to conviction for an offence pursuant to section 156 where:
>
> (c) the pupil is receiving instruction in a registered home-based education program.

The Home-based Education Program Regulations define the parent as a “home-based educator” and the child as a “home-based learner”. Within 30 days of notification by the parents, the state will respond affirmatively or negatively, and in the latter case, give the parents the opportunity to supply additional information to rectify noncompliance or arrange a conference to resolve the matter. If the provincial Ministry still refuses to register the home-based education program, the parents have access to a dispute resolution process set up by the Board of Education made up two representatives, one of which is nominated by the parents.[^424]

The parent is required to provide a written educational plan to demonstrate that there is a positive and constructive approach to the child’s education. The legislation gives parents “freedom to structure [the] plan in


[^424]: “Home-Based Education Program Regulations”, ss. 9 and 17. The representative of each party must be acceptable to the other party and the Board of Education will cover all reasonable costs associated with the dispute resolution process. Parents unsatisfied with the outcome may appeal to the Board of Education.
accordance with the philosophical approach” of the parents, that is, in conformity with the parents’ moral convictions and pedagogical views.\(^{425}\) The Saskatchewan government only requires that the plan submitted to the Ministry contain the following:

(a) the reason for and the philosophical approach of the proposed home-based education program;

(b) the areas of study and the learning objectives for the student in the home-based education program for the school year;

(c) the educational activities, instructional methods and learning resource materials that the home-based educator expects to use to achieve the learning objectives for the student in the program during the school year; and

(d) the means of assessing and recording the educational progress of the student in the program.\(^{426}\)

A portfolio of work and summative record is also required and must contain a period log that records educational activities, samples of writings, worksheets, workbooks and creative materials used or produced by the home-based learner.\(^{427}\) For each home-based learner, the portfolio must be preserved for at least two years and the summative record until the home-based learner attains the age of 18 years.

Parents are required to submit an annual progress report which includes the material set out in section 13 so as to assess the home-based learner’s “ability to handle, deal with, and apply material” in which the child has received instruction in accordance with a written educational plan; this report may include standardized tests provided in accordance with the Act.\(^{428}\)

\(^{425}\) *Education Act*, s. 12(3).

\(^{426}\) *Education Act*, s. 12(3).

\(^{427}\) *Education Act*, s. 13.

\(^{428}\) *Education Act*, s. 14.
The regulations also provide for “Monitoring” following the submission of the annual progress report by the parents.\textsuperscript{429} For this purpose, the Ministry may require a conference with the home-based educator to review the educational progress of the home-based learner.\textsuperscript{430}

As with other provinces, either party can end the agreement for home-based education; the parents may terminate the program and place their children in the public school or the Ministry may cancel the registration for non-compliance, including a refusal to schedule or to attend a monitoring conference.\textsuperscript{431}

While the Home-Based Education Program acknowledges parental responsibility and right to direct their children’s education,\textsuperscript{432} its many requirements reflect more on the province’s compelling interest in the education of all children.

Northwest Territories, Yukon, and Nunavut have small, almost exclusively First Nations populations spread out over immense distances, making delivery of state sponsored education an arduous task. Due to the prevalence of aboriginal customs, these jurisdictions view education as a community activity, whereby children receive the accumulated wisdom of their people. This is reflected in the Preamble to the \textit{Education Act} of Northwest Territories and Nunavut, which states:

\textsuperscript{429} The “Home Based Education” pamphlet issued by the Saskatchewan Provincial Ministry of Education clarifies that “the emphasis in monitoring home-based programs is on educational outcomes... rather than concentrating on the methods by which the education program is delivered.”

\textsuperscript{430} \textit{Education Act}, s. 19.

\textsuperscript{431} \textit{Education Act}, s. 23(1)(a). Cancellation of the parents’ registration cannot take place without giving the home-based educator an opportunity to be heard and providing access to the dispute resolution process.

\textsuperscript{432} The “Home Based Education” pamphlet states: “Recognizing the flexible and spontaneous nature of home-based education, the regulations were written to provide freedom without burdensome requirements upon parents... Choices related to the duration and frequency of instruction belong to the parent.”
Recognizing that communities should be significantly involved in the education of their children to reflect local needs and values, that parents have special responsibilities and that Elders can make important contributions.

All three territories make provision for homeschooling. Under the Northwest Territories legislation, a parent conducting a program must fulfill the curriculum standards set by the Minister and twice during the academic year provide a sampling of assessments and discuss the student’s progress. There is an added duty of “make all reasonable efforts to implement any [suggested] changes, to the homeschooling program.” Yukon Territory and Nunavut have similar legislation. In the case of Nunavut, the importance of the Inuit culture is incorporated directly into the legislative mandate of a homeschooling program:

21. (2) A district education authority shall supervise a home schooling program in accordance with Inuit societal values and the principles and concepts of Inuit Qaujimajatuqangit (defined at section 1).

2.2.4. Québec: a Unique Approach

The province of Québec, with a majority francophone Catholic population, recognizes parental rights to organize private schools, including homeschools, and publicly subsidizes them. That said, these favourable circumstances have produced few homeschoolers as parents generally do not wish to assume educational responsibilities in opposition to the dominant public sector, possibly due to extensive government controls.

Québec has its own Charter of Human Rights and Freedoms, enacted in 1976, that imports into Québec law those commitments contained in the

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433 Education Act, R.S.N.W.T. 1995, c. 28, ss. 11 “choice of access by parent” & 20 “homeschooling program”; and “Home Schooling Regulations”, R-090-96.
434 Education Act, S.Y. 1989-90, c. 25, ss. 19, 22(e), & 31.
435 Consolidation of Education Act, S.Nu. 2008, c.15, s. 21.
436 Consolidation of Education Act, S.Nu. 2008, c.15, s. 21.
International Covenant on Economic, Social and Cultural Rights and complements the rights guaranteed in the posterior Canadian Charter.

The right to education is found in the Québec Charter at section 40, but is conditional upon the scope and the standards provided for by law.

Unique in Canadian law, Section 41 of the Québec Charter formerly recognized parental rights to moral education and religious instruction of their children:

41. Parents or the persons acting in their stead have a right to demand, in public institutions, a religious and moral education for their children in keeping with their convictions, under programs established by law.439

Section 41 constituted a moral commitment by the state that could be invoked politically and judicially, as it formed part of the Québec Charter. That changed, however, following the tabling of a government-sponsored report in 1999.440 Following minimal societal debate and parliamentary irregularities, in 2005 the state remedied what were cited as “legislative deficiencies” and constructed a purely secular school system in order to “respect” human rights norms. A major change was the modification of the

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437 Charte des droits et libertés de la personne, (Québec) L.R.Q. c. C-12, [hereinafter referred to as “the Québec Charter”].


439 The original in French reads: “Les parents ou les personnes qui en tiennent lieu ont le droit d'exiger que, dans les établissements publics, leurs enfants reçoivent un enseignement religieux ou moral conforme à leurs convictions, dans le cadre de programmes prévus par la loi.” Emphasis added.

Québec Charter to remove the explicit guarantee of parental rights. The new article 41 now reads:

41. Parents or the persons acting in their stead have a right to give to their children a religious and moral education with proper regard for their children’s rights and interests.

Thus, the previous parental right to demand from the state religious instruction and moral education for their children within the public school system disappeared. The Quebec government eviscerated any religious and moral dimension and created a parental obligation to provide religious and moral education, subject to “their children’s rights and interests”. This final phrase may allow the state to interfere if it deems that parents have violated their children’s rights, for example, by educating them in intolerance or “undemocratic” values. In this manner, the Quebec state can impose its values, completely ignoring the international obligations it assumed upon ratifying and integrating parental rights into its law.

441 Loi modifiant diverses dispositions législatives de nature confessionnelle dans le domaine de l’éducation, L.Q. 2005, c. 20 (Projet de loi 95), enacted June 17, 2005. Moreover, the new law abolished articles 5, 20 and 21 of the Loi de l’instruction publique, which recognized parental rights to choose religious (Catholic or Protestant) and moral instruction for their children in public schools, and allowed public school teachers and professors the right to conscientious objection.

442 The original in French reads: “Les parents ou les personnes qui en tiennent lieu ont le droit d’assurer l’éducation religieuse et morale de leurs enfants dans le respect des droits de leurs enfants et de l’intérêt de ceux-ci.” Emphasis added.

443 For further discussion of this reform, see E. Caparros, “Aspectos de una libertad religiosa parcialmente acorralada: las derivas canadienses” in Ius et Jura: Escritos de derecho eclesiástico y de derecho canónico en honor del profesor Juan Fornés María Blanco, ed. (Granada: Ediciones Comares, 2010), p. 211.

444 Caparros argues that the Quebec government is in fact promoting a “state religion” through laicization of the schools and the introduction of relativism. See D. Farrow, “Babel ou le nouveau programme d’enseignement religieux au Québec” Égards no 19, printemps 2008, pp. 7-14; B. Kay, “Québec’s creepy new curriculum”, National Post, December 17, 2008.
Notwithstanding the above, section 42 of the Québec Charter still confers on parents the right to choose private education:

42. Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.445

Within ordinary legislation, the Québec government has entrenched the principle of parental choice in education in the preamble to the Act respecting the Conseil supérieur de l’éducation:

Whereas parents have the right to choose the institutions which, according to their convictions, ensure the greatest respect for the rights of their children.

... 

Whereas persons and groups are entitled to establish autonomous educational institutions and, subject to the requirements of the common welfare, to avail themselves of the administrative and financial means necessary for the pursuit of their ends.446

Although these provisions appear to grant effective rights, this is not in fact the case, because they are situated in the preamble to the Act. However, the provisions do serve to interpret the Act.

In Québec, the legislative right to school choice is provided for in the Education Act.447 According to the Act, a student of full age or the parent has a right to choose the school which best reflects their preferences.

Section 15 requires compulsory attendance at public school but provides an exemption for approved homeschooling. The section states:

445 This right to private schooling in Québec law is derived from article 18(1) of the International Covenant on Civil and Political Rights.

446 Act respecting the Conseil supérieur de l’éducation, R.S.Q., c. C-60.

447 Education Act (Loi de l'instruction publique), R.S.Q., c. I-13.3.
15. The following students are exempt from compulsory school attendance:

(4) a student who receives home schooling and benefits from an educational experience which, according to an evaluation made by or for the school board, are equivalent to what is provided at school.448

As a result, the right to homeschooling is subject to verification by the local school board that the child is receiving an “equivalent” educational experience. No provision is made in the Education Act for support of homeschooling by either the Ministry or school boards, although the latter do often supply support on an ad hoc basis.

To summarize the situation in Québec: the law formally adheres to article 13(4) of the International Covenant on Economic, Social and Cultural Rights through the Québec Charter guarantee of the parental right to choose for their children private institutions or homeschooling. In practice, however, the provincial government exercises a statist policy of control and supervision regarding private schools and homeschooling. Perhaps for this reason, homeschooling in Québec is miniscule – as we have seen in Chapter 2 – and faces bureaucratic and socio-cultural obstacles. Generally, parental rights fare poorly in a province that is ideologically statist.449

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448 Education Act, s. 15. Emphasis added.

449 See for example, S.L. c. Commission scolaire des Chênes et La procureure générale du Québec, 2009 QCCS 3875; appeal rejected 2010 QCCA 346; the Supreme Court of Canada has accepted to hear the appeal, dossier # 33678. In this case, parents requested a legally recognized exemption from the state imposed “Ethics and Religious Culture” program, and were successively denied by school officials, government officials and finally the courts.
The Fraser Institute’s *Home School Indicator* reproduced below shows in graphic terms the legal situation of homeschooling in Canada. 450

<table>
<thead>
<tr>
<th>Province</th>
<th>Funding</th>
<th>Permission</th>
<th>Reporting</th>
<th>Regulations</th>
</tr>
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<td>No</td>
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A review of the Indicator leads to the initial conclusion that public funding for homeschooling opens the door to increased regulation. 451 While Alberta, and to a lesser extent Saskatchewan, 452 offer public funding for the benefit of homeschooled children, these provinces also place more


452 The *Home School Indicator* only reflects direct financial assistance to parents. As noted in section 2.1.2 of this Chapter, British Columbia and Saskatchewan allocate money to school boards or independent schools that register homeschool students in order to provide these children with indirect public benefits.
regulatory demands. Ontario, New Brunswick and P.E.I., on the other hand, offer homeschoolers no public funding but impose minimal requirements. Based on our review above, on a combination of financial assistance and low regulation, British Columbia appears to be the most attractive jurisdiction for homeschooling; that is, most favourable to parental educational choice.

Home educators in financially supportive provinces are required to report progress to the ministry, to a school board, or to an independent school. In provinces that do not require reporting, the state explicitly acknowledges that parents, not governments, hold the primary responsibility for educating their children. In these provinces, if the educational value of the homeschool program is suspect or if the parent is accused of being incapable, the state carries the burden to prove negligence or incompetence.

One may ask if homeschoolers better off with more funding and more regulation, or with no public funding and less state intervention? At times, public school educators express concern that if homeschooling parents are not accountable to local school boards or to a provincial educational authority, their children may experience difficulties should they re-enter the school system. Moreover, without some type of monitoring for basic literacy and mathematic achievement, they question whether parents can properly gauge the quality of the child’s academic standing. Consequently, as a number of homeschooled children eventually return to their local school for secondary education, some form of regulatory legislation or policy to provide direction to school boards and homeschooling parents may be useful.

As our review of homeschooling outcomes in Chapter 2 indicates, most children schooled at home are receiving an equal or superior education to that offered in public and private schools. If that is the case across Canada,

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453 Hepburn & Robson, Learning from Success, p. 20.
then one may question how necessary are regulations to ensure a minimal level of education. And if provinces initiate or increase current funding for homeschooling, it may be unreasonable to impose regulatory oversight on parents to monitor the educational progress of their children.

Conclusions

Homeschooling in Canada, although less significant than in the United States, enjoys general legislative support and in certain provinces, financial support. With the exception of Québec, where a statist approach infringes upon parental rights, homeschooling across Canada is protected in provincial acts and regulations. Due to the existence of many isolated communities, the western provinces and northern territories are natural environments for home education.

In contrast to the dynamic situation in the United States we have seen in the academic debates, the situation in Canada appears relatively stable. This position is supported for two reasons. First, the low penetration of homeschooling (1.2% in Canada vs. close to 4% in the United States) demonstrates that Canadian families are less disposed to take on the challenges implicit in providing a homeschool education. Secondly, Canada has not experienced a “culture war” like that in the United States,455 and therefore has not been exposed to the same conflict of values, which in the United States resulted in a widespread social movement for families seeking cultural or educational alternatives. Perhaps for this second reason, there has been no debate on the correct level of state regulation of homeschooling.

Canadian provincial legislation recognizes the right of parents to educate their children at home. By creating a place for homeschooling within their regulatory regimes and developing specific policies in support, provincial

governments have acknowledged that parents can exercise their educational duties and responsibilities in their children’s best interests.

Additionally, the current situation is positive as provincial ministries and local school boards have clear guidelines in order to avoid unnecessary conflict with homeschooling parents. This will allow the homeschooling movement in Canada to continue growing should more parents seek alternatives to public or private institutional schooling.
Chapter V. **ANALYSIS OF UNITED STATES JURISPRUDENCE RELEVANT TO HOMESCHOOLING**

**Introduction**

In previous chapters we have discussed parental education rights and their specific manifestation in the homeschooling movement in the United States and Canada. Although in chapters 3 and 4 we saw that the right to home school is legally protected throughout all jurisdictions, the development of the movement has made progress largely through judicial decisions. Early caselaw in the United States Supreme Court established the constitutional right of parents to direct the education of their children. Later, however, conflicts arose between this basic right and the state’s right to impose regulations in the interest of ensuring an educated citizenry. The Supreme Court has since made it clear that any regulation impacting this constitutional right must be “reasonable.” The courts have therefore generally resolved homeschooling cases by examining whether state regulation of homeschooling places an unreasonable burden on the rights of parents.
We will set out and analyze the jurisprudence in both the State and Federal jurisdictions that has impacted upon the homeschooling movement and draw conclusions as to the current status of the law.456

1. The State’s Overriding Interest to Educate

Parental rights vs. state’s rights are the two values in tension in homeschooling. To assess the strength of these competing positions, the courts have considered the implications of two basic ideas: on the one hand the primary authority of parents to direct the education of their children and on the other, the state’s aim to develop technical competence, ability to choose a path in life, and participate meaningfully in society.457

States enact compulsory education laws as they have an important stake in children being educated, for both individual and general welfare. Parents will argue that the state’s interest can be satisfied in a number of ways and that instruction need not be provided directly by the government; it may

456 In the United States, there are two large groups of jurisprudence, federal and state. The former is integrated hierarchically by the Supreme Court, the Federal Appellate Courts and the Federal District Courts. For legal citation of United States caselaw we follow The Bluebook: A Uniform System of Legal Citation, 19th ed. (Cambridge, MA: Harvard Law Review Association, 2010).

457 K. Greenawalt, Religion and the Constitution. Volume 1: Free Exercise and Fairness (Princeton, NJ: Princeton University Press, 2006), chapter 6, “Free exercise objections to educational requirements,” offers an insightful discussion on the intersection of free exercise of religion and parental rights. Greenawalt largely reflects the state view when he writes: “children are not the property of parents. Although parents have wide freedom to determine the children’s religious upbringing, they cannot rely on religious grounds to deprive the children of what the state deems vital benefits, such as literacy.” See also A. Gutmann, Democratic Education (Princeton, NJ: Princeton University Press, 1987), p. 32: “the value of parental freedom at least to the extent that such freedom does not interfere with the interests of children in becoming mutually respectful citizens of a society that sustains family life.”
take place in a private school or at home, in such way that children make progress according to ordinary educational criteria.

We will first consider cases that support the overriding interest of the state in fostering public education to help develop ideals of equality, mutual respect, and critical thinking. A further reason courts have espoused to keep children in public schools is to enable them to participate actively in the political institutions of liberal democracy.\textsuperscript{458}

The basic principle of the state’s interest to educate was enunciated in \textit{People ex rel. Vallimar v. Stanley} (1927).\textsuperscript{459} There, a Colorado court found that “the state, for its own protection, may require children to be educated.” In a frontier state, with sparse population and minimal communications, one can understand why publicly organized and funded education would be considered necessary for the advancement of the societal good.

Another early case that sets out the state interest is \textit{People v. Turner},\textsuperscript{460} where a Los Angeles court reviewed a state law that created an exemption for tutors from the general state legislation. The court considered that the legislature had fashioned the tutorial exemption for parents who taught at home as a way to distinguish private schools and home instruction by a tutor. As such, it ruled that the tutorial exemption was required to be used to home school legally. A decade after \textit{Turner}, the legislature remedied the problem of the proliferation of private schools by developing a tool for the state to track private schools without interfering with them – the private school affidavit. The creation of the private school affidavit made possible the rapid development of homeschooling in California.

In 1961, the California State Court of Appeal decided \textit{In re Shinn}\textsuperscript{461} that reviewed the Education Code and applied the private school laws to a homeschooling situation. The court assumed that private homeschooling

\textsuperscript{458} Greenawalt, p. 96.
\textsuperscript{459} 81 Colo. 276 (1927). See also \textit{In Interest of Y.D.M.} 197 Colo. 403 (1979).
\textsuperscript{460} 121 Cal.App.2d Supp. 861 (1953).
was legal and proceeded to determine whether the Shinn family was meeting private school requirements spelled out in the law. They decided the Shinn family’s chosen correspondence curriculum did not meet the required course of study.

**Wisconsin v. Yoder**, a 1972 Supreme Court case, recognized two basic state interests in support of compulsory education:

Some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. 462

### 2. The Basis of Parental Education Rights in American Law

The homeschooling movement bases its right to educate at home on a line of cases decided by the Supreme Court that involved parental rights. We will review these decisions and analyze their strength or weakness in support of parental education rights to education at home.

#### 2.1. The Seminal Cases: *Meyer* and *Pierce*

In the first of these cases, *Meyer v. Nebraska*,463 the Court overturned the conviction of a teacher in a Lutheran school who had been prosecuted for teaching the German language, in defiance of a state law, passed during the First World War, which forbade teaching modern foreign languages to

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463 262 U.S. 390 (1923) [hereinafter “*Meyer*”].
children in elementary school. While the Court recognized that the state had the power to compel public school attendance and impose reasonable regulations, it found that the language restriction was both unreasonable and not injurious to the health, morals or understanding of the ordinary child. The Court made a sweeping statement on the importance of education and referenced the natural duty of parents to provide the same.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged...Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life, and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.464

Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.465

That said, the Court did make statements upholding the constitutionality of compulsory education and the reasonable regulation of same.

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State’s power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy.466

With Meyer, the Supreme Court began to place general limitations on the government’s power over education.

465 Meyer, p. 401.
466 Meyer, p. 402.
Homeschooling advocates point to *Meyer* as evidence of a fundamental parental right in education, upon which states may only impose “reasonable” regulations.467

The Supreme Court spoke on parental educations again in 1925, in *Pierce v. Society of Sisters*.468 Two private schools sought an injunction against the enforcement of the *Oregon Compulsory Education Act*, which required all children to attend public schools. The schools claimed that the Act violated the right of parents to choose where their children should be educated, the right of schools and teachers therein to engage in a useful business, and the right against the deprivation of their property without due process of law – all rights that are secured by the Fourteenth Amendment.

The Supreme Court ruled that the Act “unreasonably interferes with the liberty of parents... to direct the upbringing and education of children under their control” and therefore violated the Fourteenth Amendment.469 Justice McReynolds made forceful arguments in favour of parental rights:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.470

*Pierce* thus furthered the movement away from a monopoly by the public schooling system.

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468 268 U.S. at 510 (1925) 534-35 [hereinafter “Pierce”].

469 *Pierce*, pp. 534-535.

470 *Pierce*, p. 535. Emphasis added. The “additional obligations” referred to by the Court were later defined to include “the inculcation of moral standards, religious beliefs, and elements of good citizenship.” *Wisconsin v. Yoder*, 406 U.S. 205, p. 233 (1972).
Meyer, Pierce, and a third case from that time, Farrington v. Tokushige,\textsuperscript{471} establish that both the state and the parents both have a strong interest in the upbringing and education of children, but the state cannot unreasonably regulate their education.\textsuperscript{472} When parents remove their children from the public school system and decide to educate them in a setting which reflects the parents' philosophical, moral, or religious convictions, prior approval of such plans may clash with parental choice. These decisions of the United States Supreme Court have recognized a certain degree of autonomy afforded to parents with respect to the education of their children.\textsuperscript{473} From these cases comes the general principle that although the state has an important interest in ensuring that children are educated, the means by which the state may achieve that interest are bounded by the constitutional rights of parents.\textsuperscript{474}

\textsuperscript{471} 273 U.S. 284 (1927). In a Hawaii case, the Supreme Court struck down statutes that unreasonably restricted the curriculum of private schools, recognizing that a parent has a constitutional right “to direct the education of his own child without unreasonable restrictions”, p. 298.

\textsuperscript{472} Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005), p. 1207 says this clearly: “[W]hat Meyer-Pierce establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one’s child will receive [hereinafter “Fields”].

\textsuperscript{473} The court in Fields explained that “once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished.” (p. 1206)

\textsuperscript{474} Point raised in Dumas, Evidence.
2.2. Parental Rights Viewed as Religious Freedom

Hitchcock meanwhile sees these two early education cases as part of a continuum in the Court’s treatment of religious freedom. He states that:

*Meyer* and *Pierce*, upholding the rights of private education, marked the transition in the Court’s approach to religion, although their exact significance is somewhat murky, because the basis on which they were rendered was not made entirely clear at the time. The two decisions can be seen as based on substantive due process but may also have marked an implicit and tentative move by the Court toward the incorporation theory of the Fourteenth Amendment.

*Meyer* was argued as analogous to various kinds of state regulation of business that the Court had struck down over the years. The majority opinion supported this argument but also made passing reference to religious freedom and in general produced a broad judgment. The private schools that sought protection in *Pierce* argued that they would suffer loss of property if required to close. As precedents for parental rights, however, the two cases were Court applications of substantive due process (under the Fourteenth Amendment) to personal, as distinct from economic, liberties.

*Meyer* and *Pierce* continued their lives in Supreme Court jurisprudence, as they were both later cited *Carolene Products*, treating as fact the “incorporation theory” whereby that the Fourteenth Amendment

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478 Hitchcock notes that in a 1953 case involving racial segregation, Justice Black dissuaded Chief Justice Warren from citing *Meyer* and *Pierce* as precedents, on the grounds that the decisions were invalidly based on “natural law”, p.191.

479 United States v. Carolene Products Co., 304 U.S. 144 (1938).
incorporated the Free Exercise clause of the First Amendment.\(^{480}\) By the time of \textit{Wisconsin v. Yoder} (1972) which we will review next, substantive due process had receded into insignificance and scholars assumed that under modern doctrine the constitutional right of parents over their children’s education should be viewed as a matter of Free Exercise, not as a general parent right to control their children’s education.\(^{481}\)

Eisgruber and Sager consider that \textit{Pierce} is an excellent example of how a broad understanding of constitutional liberty contributes to religious freedom. By protecting the right of parents in general to guide the upbringing of their children, \textit{Pierce} enables religious parents in particular to send their children to religious schools.\(^{482}\) They note that \textit{Pierce} is criticized\(^{483}\) for giving wealthy parents the right to exit from the public schools, and thus the decision undermined taxpayer support for the public schools. Critics also contend that the state should be able to mandate attendance at public schools in order to integrate the population and teach tolerance.\(^{484}\) That said, it is generally agreed that the integrity of the parent-child relationship is an important human good deserving constitutional

\(^{480}\) For the first one hundred and fifty years of the jurisprudence of the Supreme Court, the prevailing view held that the Bill of Rights and further Amendments to the Federal Constitution did not apply to the individual states. At the time of \textit{Meyer} and \textit{Pierce}, the Supreme Court had not yet decided that the religion clauses of the First Amendment were applicable against the states and the Court simply maintained that requirements of substantive due process (i.e. substantive justice) set significant limits on state regulation. This doctrine continued until the 1940 case of \textit{Connecticut v. Cantwell}, 310 U.S. 296 where the justices formally accepted the “incorporation theory” whereby the Amendments were applicable to individual states through the Fourteenth Amendment’s guarantees.

\(^{481}\) Greenawalt, p. 105.


protection. The state may intervene to protect children from parental abuse, mistreatment, neglect, and sufficiently extreme foolishness, of course. The state can also encourage forms of parenting that, in its view, are more likely to promote public values and the common good. But the state can pursue these goals by regulating education and subsidizing favored alternatives; these objectives do not empower the state to compel all children to enter public schools.

2.3. Parental Rights, Religion and the First Amendment

As we saw in Chapter 2, the majority of homeschoolers are practicing Christians and therefore view their educational choice as an exercise of religious liberty.

Likely the first true homeschooling case, People v. Levisen,485 concerned a Seventh Day Adventist family who were convicted in 1950 of not complying with compulsory attendance under the Illinois State School Code.486 The Illinois Supreme Court found as fact that the Levisens believed:

[T]hat the child should not be educated in competition with other children because it would produce a pugnacious character, that the necessary atmosphere of faith in the Bible cannot be obtained in the public school, and that for the first eight or ten years of life, in the field or garden is the best schoolroom, the mother the best teacher, and nature the best lesson book.487

485 404 Ill. 574 (1950) [hereinafter “Levisen”].
486 Illinois State School Code, ch. 122 “Schools”, s. 26-1 mandated attendance at public schools for children 6 to 16 years of age.
487 Levisen, p. 574.
Based on an expansive reading of the statute, the court held that the Levisen’s home school classified as a “private school”. As a result, the parents could benefit from the statutory exemption from compulsory school attendance\textsuperscript{488} and the conviction reversed. In its ruling, the court balanced the state’s interest with parental rights, stating:

Compulsory education laws are enacted to enforce the natural obligation of parents to provide an education for their young, an obligation which corresponds to the parents’ right of control over the child... The object [of the Illinois statute] is that all children shall be educated, not that they shall be educated in any particular manner or place.

... We think the term “private school”, when read in the light of the manifest object to be attained, includes the place and nature of the instruction given to this child. The law is not made to punish those who provide their children with instruction equal or superior to that obtainable in the public schools. It is made for the parent who fails or refuses to properly educate his child.”\textsuperscript{489}

This finding by the Illinois Supreme Court indicates that the parents’ right to control their children includes the right to provide an education for them at home. The Levisen court ruled that the fact that the child’s school was in the home and there was only one student had no bearing on the legality of the home school situation.

The United States Supreme Court decision in \textit{Wisconsin v. Yoder}\textsuperscript{490} is considered the first homeschooling precedent decided under the Free Exercise clause of the First Amendment.

\textit{Yoder} came before the Supreme Court in 1972 when three Amish parents violated Wisconsin law by refusing to send their children to public school

\textsuperscript{488} The statutory exemption existed under s. 10-19.1.
\textsuperscript{489} \textit{Levisen}, p. 577.
\textsuperscript{490} 406 U.S. 205 (1972) [hereinafter “\textit{Yoder}”].
for religious reasons.\textsuperscript{491} The Amish parents claimed that compulsory high school attendance would not only expose themselves to the danger of the censure of the church community, but also endanger their own salvation and that of their children. In short, they feared an adverse impact on the very survival of the Amish Community.\textsuperscript{492} The Court sided with the parents and ruled that the Wisconsin law violated their Free Exercise under the First Amendment, that is, that public schools did not adequately suit the particular needs of Amish children.\textsuperscript{493} \textit{Yoder} in effect made homeschooling a valid option for religious parents.

It is worthwhile reproducing a lengthy extract from the Court’s holding in \textit{Yoder}:\textsuperscript{494}

\begin{quote}
The State’s interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children.

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e. g.,
\end{quote}

\textsuperscript{491} \textit{Yoder}, pp. 208-10. The Wisconsin statute required all children between the ages of seven and sixteen attend a public or private school.

\textsuperscript{492} \textit{Yoder}, pp. 209-12. The Amish community was formed during the sixteenth century as a rejection of institutionalized churches and as a return to the simple life of the early Christians. Community life typically involves hard labor via farming or farming-related occupations with an emphasis on learning through doing. Amish formal education ceases at the eighth grade level because such education tends to emphasize values that are in conflict with their beliefs (such as conformity with the outside world) and takes the children away from the Amish community.

\textsuperscript{493} \textit{Yoder}, pp. 210, 217. The court noted that “the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion.” Regardless, the court ruled that the Wisconsin statute was constitutional because it was the least restrictive means to enforce a compelling state interest. \textit{Yoder} at 214.

\textsuperscript{494} \textit{Yoder}, pp. 213-215.
Pierce v. Society of Sisters. Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system... As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society... Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, “prepare [them] for additional obligations.”

Even more markedly than in Prince 495 [concerning illegal child labour], therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters.

Yoder makes abundantly clear how the Court moved from general parental autonomy to parental education rights circumscribed as part of religious freedom.

2.4. Free Exercise Claims Focused on Education

In order to properly analyze claims under the Free Exercise clause, the Court developed a “compelling interest” test in Sherbert v. Verner.\(^{496}\) The Sherbert test is also sometimes called the “strict scrutiny-least restrictive means test” because the court must see if a fundamental constitutional right is threatened, i.e. apply strict scrutiny to a law, and, if the law threatens this right, the government show it has used the least restrictive means to achieve its compelling interests. If the state’s “compelling interest” imposes the least restriction upon citizens, then the claim for Free Exercise will fail.

The Sherbert test is used frequently in homeschooling cases to substantiate a First Amendment violation and is best illustrated in Blount v. Department of Education and Cultural Services.\(^{497}\) There, the Court laid out the test requiring a claimant to show that (1) there is a sincere religious belief and (2) the homeschooling regulation restrains the belief. If the petitioner proves (1) and (2), the state can still prevail if it shows that the regulation is (3) the least restrictive means of (4) enforcing a compelling state interest.\(^{498}\)

In Blount, the family refused to allow the state to monitor their homeschooling program, claiming such monitoring was in conflict with their religious beliefs.\(^{499}\) The Court ruled that the statute\(^{500}\) in question

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\(^{496}\) 374 U.S. 398 (1963). Sherbert, a Seventh-day Adventist, was discharged from her job because she refused to work on Saturdays, the day of the Sabbath. She could not find employment due to her inability to work on Saturdays and was also disqualified for unemployment benefits. The Court found that the disqualification for benefits imposed a significant burden on her free exercise of religion.

\(^{497}\) 551 A. 2d 1377 (Me. 1988) [hereinafter “Blount”].

\(^{498}\) Blount, pp. 1379-80.

\(^{499}\) Blount, p. 1380. “The Blounts...believe that parents’ sovereignty over the spiritual development of their children is divinely ordained and that parents in this sphere are responsible immediately to God.”

J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection
which mandated monitoring homeschooling programs did not violate the Free Exercise Clause because it was the least restrictive means to enforce the state’s compelling right to monitor the homeschooling program.\footnote{Blount, pp. 1381-82.}

The use of the four-part test as explained in \textit{Blount} was modified in 1990 by \textit{Employment Division, Department of Human Resources of Oregon v. Smith}.\footnote{494 U.S. 872, 880 (1990). [hereinafter “\textit{Smith}”]. Smith, former employee of a drug rehabilitation center, was fired as a result of using peyote for religious reasons, then denied unemployment benefits because Oregon Law made it a crime to consume peyote. The Supreme Court held that the prohibition of peyote use in this case was not prevented by the First Amendment.} In \textit{Smith}, the United States Supreme Court held that the Oregon statute prohibiting the use of peyote did not violate the Free Establishment Clause because the Oregon statute only incidentally infringed upon the free exercise of religion.\footnote{\textit{Smith}, p. 878. Specifically, the Court held that “[i]t is a permissible reading of the text,... to say that if prohibiting the exercise of religion (or burdening the activity) is not the object... but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” See also J. Macmullan, “Comment: The Constitutionality of State Home-schooling Statutes” (1994) 39 \textit{Vill. L. Rev.} 1309, p. 1326 [hereinafter “Macmullan, Constitutionality”].} Therefore, if a statute only incidentally places an undue burden on one’s religious beliefs, it is not a violation of one’s First Amendment rights under \textit{Smith}.\footnote{Macmullan, Constitutionality, citing \textit{Smith}, pp. 876-82: “Therefore, any generally applicable neutral state law will survive a free exercise claim, unless the claim is offered 'in conjunction with other constitutional protections, such as... right of parents...to direct the education of their children.'”}
This test established in *Blount* and modified in *Smith* provides a basis on how to judge the validity of a home school monitoring statute. As homeschooling became accepted by the courts as a legitimate means of education, homeschooling parents shifted their attention to challenging regulations that monitor these homeschooling programs.

### 2.5. *Troxel* and Fundamental Parental Rights

Homeschooling advocates find much support in the Supreme Court’s 2000 decision of *Troxel v. Granville*. The Court returned to parental rights in a round about way in *Troxel* as the case concerned the visitation rights of grandparent, and focused on whether a state law could subordinate parent’s wishes. The majority of the Supreme Court used the opportunity to clarify the law on parental rights. The Court, speaking through Justice O’Connor, discussed the evolution of the law to the point that parents now possess a fundamental constitutional right to direct the education of their children:

> The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, we again held that the “liberty of parents and guardians” includes the right “to

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505 530 U.S. 57, 65 (2000) [hereinafter “Troxel”].

506 *Troxel* (plurality opinion). Prior to *Troxel*, state courts already made similar rulings, see *Ohio v. Whisner*, 47 Ohio St.2d 181 (1976), where the Ohio Supreme Court stated, “[i]t has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment” (p. 214).
direct the upbringing and education of children under their control.” We explained in Pierce that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” We returned to the subject in Prince v. Massachusetts, and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., Stanley v. Illinois,507 “It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements’”; Wisconsin v. Yoder, “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”; Quilloin v. Walcott,508 “We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”; Parham v. J.R.,509 “Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course”; Santosky v. Kramer,510 discussing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child”; Glucksberg, “In a long line of cases, we have held that, in addition to the specific freedoms

protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right...to direct the education and upbringing of one’s children” (citing Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

In a concurring opinion, Justice Thomas reiterated that Pierce held “that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them,”511 and that an infringement of this right should be evaluated under strict scrutiny.

Authoring a highly original dissent, Justice Scalia bluntly asserted that a theory of parental rights does not exist: “the constitution does not mention them” and added that Meyer & Pierce were from a bygone era.512

Justice Kennedy, also dissented, but supported parental rights:

As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, e.g., Meyer v. Nebraska; Pierce v. Society of Sisters; Prince v. Massachusetts; Stanley v. Illinois; Wisconsin v. Yoder; Santosky v. Kramer.513

The homeschooling lobby claims that Troxel has effectively placed parental rights in a specially constitutionally protected sphere by labeling it

511 Troxel, p. 80.

512 Troxel. Scalia instead finds the parental right to direct the upbringing of their children among the “unalienable Rights” with which the Declaration of Independence proclaims “all Men...are endowed by their Creator.” Additionally, he views this right among the “othe[r] [rights] retained by the people” which the Ninth Amendment says the Constitution’s enumeration of rights “shall not be construed to deny or disparage.”

513 Troxel.
“fundamental” and therefore the strict scrutiny test will always apply to state interference with parental education rights.514

This is illustrated in Goulart & Travers v. Calvert County Community Center, 515 a 2003 Maryland case where homeschoolers were denied a request to use public space for classes. While the homeschoolers argued that Troxel gave them a “fundamental” right to use the public space,516 both the District Court and Appellate Courts found against a violation of parents’ First Amendment rights to public speech.

Home school advocates rely insistently on the Troxel decision so as to claim complete “custody, care, and control” of their children, to the exclusion of the state’s interest in ensuring that a child receives a basic

514 In Michael H. v. Gerald D., 491 U.S. 110 (1989), p. 123, Justice Scalia outlined the criteria for finding a fundamental right, stating that the critical question in determining whether an interest is a fundamental right is whether the interest is “rooted in history and tradition” of the society. Scalia explained that tradition should be determined by “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” Some scholars have observed that the Court recognizes a relatively small number of fundamental rights that are not directly stated in the U.S. Constitution’s Bill of Rights: freedom of association, voting, interstate travel, fairness in the criminal process, procedural fairness for governmental deprivations of life, liberty, or property (i.e., procedural due process), and privacy. Prior to Troxel, scholars and the Court placed the right of parents to oversee the upbringing of their children under the fundamental right to privacy. See J.E. Nowak & R.D. Rotunda, Treatise on Constitutional Law: Substance & Procedure 6th ed. (St. Paul, MN: West Publishing Group, 2000), §11.7, pp. 393-94. These authors consider that, although there remains uncertainty, “significant impairment” of fundamental rights generally invokes strict scrutiny by the courts.

515 345 F.3d 239 (2003).

516 The Appellate Brief in support of Goulart & Travers argued at page 22: “The right of parents to direct the education of their children by home schooling them is a fundamental right that may not be infringed without a compelling justification. This right of parents to direct the education of their children is not only “basic”, instead it is fundamental. A long line of Supreme Court cases hold that parents’ rights are fundamental and subject to strict judicial scrutiny, most recently expressed in Troxel.” Emphasis in original.
education in preparation for adult life and full participation in the community. In this respect, the Second Circuit Court in *Leebaert v. Harrington*\(^{537}\) noted a post-*Troxel* shift in juridical terminology concerning the upbringing and education of children:

*Troxel* appears to be the first to use the phrase “care, custody, and control,” rather than the very similar “care, custody, and management,”\(^{518}\) in the context of a parent’s right concerning his or her children. Prior to *Troxel*, the phrase was typically used with respect to physical property, for example, in criminal statutes, see, e.g., *Fischer v. United States*,\(^{519}\) and in the context of insurance policies, see, e.g., *First Investors Corp. v. Liberty Mutual Insurance Company*.\(^{520}\) After *Troxel*, federal courts of appeals have begun to employ the phrase to refer to parental rights.\(^{521}\)

As such, we can see that the legal arguments used by homeschooling advocates have sought the highest constitutional standard as a means of properly defending parental education rights in the United States. The development of the caselaw in support has been impressive, although

\(^{537}\) 332 F.3d 134 (2d Cir. 2003), para. 63. In *Leebaert*, a parent alleged a violation of the First and Fourteenth Amendments because a school refused to excuse his son from a mandatory health and education course. While not questioning the sincerity of the parent’s beliefs, the Second Circuit found the claims were not governed by *Yoder*.


\(^{520}\) 152 F.3d 162, 167 n. 6 (2d Cir.1998).

\(^{521}\) The court cited *Batten v. Gomez*, 324 F.3d 288, p. 295 (4th Cir. 2003) (seizure of child violated mother’s due process interest “in the companionship, care, custody, and control of her child”); *Hatch v. Dep’t for Children, Youth and Their Families*, 274 F.3d 12, p. 20 (1st Cir.2001) (“The interest of parents in the care, custody, and control of their children is among the most venerable of the liberty interests embedded in the Constitution.”); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, p. 288 (5th Cir.2001) (“One of ‘the fundamental liberty interests’ recognized by the Court is the ‘interest of parents in the care, custody, and control of their children.’”).
courts do not always agree with the expansiveness and wide breath ascribed to the cases by parental rights claimants.

3. A Review of Outcomes in Homeschooling Caselaw

Judicially protected parental rights and the state’s interest in education have come into collision frequently in the area of homeschooling. While courts upheld the propriety of a number of state regulations affecting homeschooling, there have also been victories for homeschoolers.

3.1. Constitutionality of Compulsory Attendance Statutes

A series of early homeschooling cases tested state compulsory attendance laws and successfully argued that they did not specify basic requirements and were therefore unconstitutional and of no force or effect.

In Roemhild v. State, the Georgia Supreme Court declared the former law as unconstitutionally vague and unjust, which resulted in the legislature

522 Cf. Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988) and Null v. Board of Education, 815 F. Supp. 937 (S.D. W.Va. 1993) both upheld testing requirements, while Combs v. Homer-Center School District, 540 F.3d 231 (3d Cir. 2008), cert. denied, 129 S. Ct. (2009) upheld minimum attendance days and hours of instruction in certain courses, review of logs and materials by school district. We will review the Murphy and Combs cases below.


524 308 S.E.2d 154 (Ga. 1982).
passing a favorable home school law. *State v. Popanz* (Wisconsin),\(^\text{525}\) *State v. Newstrom* (Minnesota),\(^\text{526}\) *Jeffery v. O’Donnell*,\(^\text{527}\) and *Ellis v. O’Hara* (Missouri)\(^\text{528}\) all produced similar outcomes.

The Iowa case of *Fellowship Baptist Church v. Benton*,\(^\text{529}\) upheld certification requirements against private schools and remanded to a district court the issue of the vagueness of the “equivalent instruction” requirements. The district court ruled that new administrative regulations cured the vagueness of the statute.\(^\text{530}\)

*Perchemlides v. Frizzle*,\(^\text{531}\) a 1978 Massachusetts case that challenged compulsory attendance laws, upheld the right of a non-religious family to home school their child. The court concluded that “the Massachusetts compulsory attendance statute might well be constitutionally infirm if it did not exempt students whose parents prefer alternative forms of education.”

### 3.2. Homeschooling as Analogous to Private School

As we have seen in Chapter 3, statutory language in a state’s compulsory education law provides a mechanism for homeschoolers to choose an alternative to an organized, licensed school. In this respect, courts have allowed parents to claim that they run a private school in the sense contemplated by the statute, even though the enrollment of the school is

\(^{525}\) 332 N.W.2d 750 (Wis. 1983).
\(^{526}\) 371 N.W.2d 525 (Minn. 1985).
\(^{528}\) 612 F. Supp. 379 (E.D. Mo. 1985). Following the passage of a new homeschool law, *Ellis* was reversed as moot: 802 F.2d 462 (8th Cir. 1986).
\(^{529}\) 815 F.2d 485 (8th Cir. 1987).
\(^{530}\) 678 F. Supp. 213 (S.D. Iowa 1988).
\(^{531}\) No. 16641 (Massachusetts Supreme Court, November 13, 1978), p. 9.
limited to one or more family members and the school is located in their home.

One of the earliest homeschooling cases, *State v. Peterman*[^532^] (1904) held that the state compulsory attendance law[^533^] allows the operation of home schools as a private school. The Indiana Appellate Court explained its reasoning thusly:

> [u]nder a law very similar to ours, the Supreme Court of Massachusetts has held that the object and purpose of a compulsory educational law are that all the children shall be educated, not that they shall be educated in any particular way.^[534^]

> ...

> The [compulsory attendance] law was made for the parent who does not educate his child, and not for the parent who...so places within the reach of the child the opportunity and means of acquiring an education equal to that obtainable in the public schools.^[535^]

In a more recent Indiana case, *Mazanec v. North Judson-San Pierre School Corporation*,[^536^] a federal district court recognized that parents have the constitutional right to educate their children in a home environment.

A Florida case, *State v. Buckner*,[^537^] decided that one home school does not qualify as a private school by itself, but that a group of home schools can register as private schools, as the statute provides an exemption from compulsory attendance for a child who attends a private school.

[^532^]: 32 Ind. App. 665 (1904) [hereinafter “Peterman”].


[^535^]: *Peterman*, p. 552.

[^536^]: 614 F. Supp. 1152, p. 1160 (N.D. Ind. 1985), aff’d. 798 F.2d 230. The parents were Jehovah’s Witnesses who decided to educate their children at home in order to shield them from the secular and immoral atmosphere of the public schools.

[^537^]: 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985), interpreting *Florida Statutes Annotated* 1002.01 (2).
In 2008, the California Court of Appeal ruled that California statutes permit homeschooling as a species of private school education. In re Rachel L. reversed an earlier Appeal Court decision in the same case which held that parents must hold a teaching credential to home school their children. (See further discussion below, section 3.4)

3.3. The Validity of Testing Requirements

In Murphy v. Arkansas, the Eighth Circuit Court of Appeals considered statutory testing requirements challenged by homeschooling parents. Murphy alleged that the Arkansas Home-schooling Act deprived him of the right to free exercise of religion by requiring home schooled children to take an achievement test in order to monitor the progress of the home schooled children. The Court found that the state had a compelling interest in educating the children, and therefore “must have a

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539 852 F. 2d 1039 (8th Cir. 1988) [hereinafter “Murphy”].
540 Arkansas Home-schooling Act, Arkansas Code Annotated § 6-15-504 (2003). This law required all Arkansas home schooled students to take an achievement test selected by the state board of education as a means of monitoring the progress of home schooled children. If the home schooled student fails to achieve a minimum score within eight months of their grade level in designated subjects, the student must be placed in a public, private, or parochial school. Murphy, pp. 1040-41. Note, however, that public, private, and parochial students are not required to take such annual tests and, if they do, those not achieving minimum scores are not placed into remedial programs.
541 Murphy, p. 1041. Murphy also alleged that the statute deprived them of equal protection, due process, and the right of privacy and parental liberty in violation of the Constitution.
542 Murphy, p. 1042. The Court stated that the State has “beyond dispute...a compelling interest in ensuring that all its citizens are being adequately educated.”
mechanism by which it can confidently and objectively be assured that its citizens are being adequately educated.”

Respecting Murphy’s claim that parental control over a child’s education involves a fundamental right and therefore the statute violates the Equal Protection Clause of the Fourteenth Amendment, the Court stated:

[W]e find no persuasive arguments advanced that there is a fundamental right of parents to supervise their children’s education to the extent that the Murphys contend. The recognition of such a right would fly directly in the face of those cases in which the Supreme Court has recognized the broad power of the state to compel school attendance and regulate curriculum and teacher certification. See Board of Education v. Allen, Pierce v. Society of Sisters.

Moreover, the Court rejected the argument that the right of privacy should be extended to protect parental decisions concerning the direction of a child’s education from state interference:

In Runyon v. McCrary the Supreme Court specifically rejected this contention, stating:

The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation...Indeed, the Court in Pierce expressly acknowledged “the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils.”

The Court held that the state’s homeschooling statute was the least restrictive means of enforcing that interest. As a result, it upheld the Arkansas statute.

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543 Murphy, p. 1042.
544 392 U.S. 236 (1968), pp. 245-46.
545 Murphy, p. 1042.
Another example of a homeschooling regulation challenge to standardized testing is *Stobaugh v. Wallace*. In *Stobaugh*, the parents set up a home education program but refused to participate in standardized testing and, thus, no results were sent to the school superintendent as part of their portfolio. The parents argued that the home education statute did not grant the superintendent authority to require standardized testing beyond that required by the statute and that such a request created an “undue stress”. The court, however, found that while the superintendent did not have authority to request testing above and beyond that required in the statute, no undue stress was created because there was no deprivation of rights. *Stobaugh* helped define a baseline standard for a home education statute as the court found that there was no deprivation of parents’ rights because the homeschooling program was not interrupted and a procedure set in motion wherein the homeschooling program may be revoked.

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547 *Murphy*, pp. 1041-43. The *Murphy* court followed the test for the Free Exercise Clause set forth in *Yoder* and *Blount*, later modified in *Smith*. The testing procedure imposed by the homeschooling statute allowed the parent to choose the test “from a list of nationally recognized standard achievement tests and allowed the parent to be present while the test [was] administered.” The Court held that this procedure “allow[ed] parents vast responsibility and accountability in terms of their children’s education – control far in excess of limitations on religious rights that have been previously upheld”, and held that, unlike *Yoder*, Appellants made no showing that the state’s interest would be satisfied if their religious beliefs were accommodated.

548 *Murphy*, pp. 1041-43. The Court rejected Murphy’s equal protection claim, ruling that his children were part of the category of home schooled children, the category at which the statute was aimed, and thereby failed to qualify for the strict scrutiny analysis under the Equal Protection Clause. See P.T. O’Neill, “High Stakes Testing Law and Litigation” *B.Y.U Educ. & L.J.* (2003) 623, p. 644.

549 757 F. Supp. 653 (W.D. Pa. 1990). The challenged statute, the *Pennsylvania Home Education Statute*, 24 *Pennsylvania Statutes* § 13-1327.1(e)(1), requires a portfolio of the homeschooled child’s work to be submitted annually and include the results of a standardized achievement test to be taken every year.
3.4. Teacher Certification Requirements

In a 1993 case challenging the validity of state monitoring of homeschooling programs, People v. DeJonge, two homeschooling parents appealed their conviction for violating Michigan’s compulsory education law because they taught their children without the aid of a state certified teacher. The DeJonges claimed that the certification requirement violated their First Amendment right to free exercise of religion and such requirement was not the least restrictive means to satisfying the state’s compelling interest. The Michigan Supreme Court agreed, ruling that parents who home school their children for religious reasons are not required to obtain any specific credential. As a result, the DeJonges’ convictions were reversed and teacher certification was struck down as unconstitutional violation of Free Exercise clause. Interestingly, the Court found that the state’s compelling interest in ensuring the adequate education of all children was “the incorrect governmental interest”, stating:

[T]he state has focused upon the incorrect governmental interest. The state’s interest is not ensuring that the goals of compulsory education are met, because the state does not contest that the DeJonges are

551 DeJonge, pp. 129-130, n.2 “[t]his act requires parents of children from the age of six to sixteen to send their children to public schools or to state-approved nonpublic schools...students must be instructed by certified teachers; in order to receive state approval, the instructors must be certified to teach in a public school of a comparable grade level.” See also Mich. Comp. Laws § 380.1561 (2004).
552 DeJonge, p. 131.
553 DeJonge, p. 141. The Court stated that even though the state may have possessed a compelling interest, it failed to prove that the certification requirement is essential to that interest. Additionally, the Court observed that “the DeJonge children [were] receiving more than an adequate education: they [were] fulfilling the academic and socialization goals of compulsory education without certified teachers or the state’s interference.”
succeeding at fulfilling such aims. Rather, the state’s interest is simply the certification requirement of the [statute], not the general objectives of compulsory education. The interest the state pursues is the manner of education, not its goals.\textsuperscript{554}

The Court noted that the State still has an effective means at its disposal to monitor home schooled children: standard individualized achievement testing.\textsuperscript{555}

The Michigan Supreme Court handed down its decision in \textit{People v. Bennett},\textsuperscript{556} on the same day as \textit{DeJonge}; both involved a challenge to the same teacher certification requirement and had nearly identical factual circumstances involving homeschooling their children\textsuperscript{557} but with one exception: the Bennetts did not raise any challenge based on their religious convictions.\textsuperscript{558} Without the religious argument, the Court ruled that the right to direct a child’s education is not a fundamental right.\textsuperscript{559} Since the Bennetts could not prove that the state’s certification requirement was an

\begin{enumerate}
\item \textit{DeJonge}, pp. 138-39.
\item \textit{DeJonge}, p. 131, n.6; 141, n.52. The Court found that individualized standardized achievement testing was an adequate alternative to the instructor certification requirement as a means of state monitoring, for the testing would comply with DeJonge’s religious beliefs, and that such testing is the core requirement utilized in most other states.
\item 501 N.W. 2d 106 (Mich. Sup. Ct. 1993) [hereinafter “\textit{Bennett}”].
\item \textit{Bennett}, pp. 108–9. The Bennetts withdrew their children from public school and home schooled the children because they believed that they could do a better job than the public system.
\item \textit{Bennett}, pp. 107, 112. The Bennetts argued they had a fundamental right, [derived from the Fourteenth Amendment.] to direct the education of their children by educating them at home. The Bennetts further argued that since the state requires that children can only be educated by state-certified teachers, the same type of teacher will be educating their children, regardless of where the child is educated (public school, private school, or home school, for example).
\item \textit{Bennett}, p. 115. The Court ruled that the right to direct a child’s religious education is a fundamental right. Homeschooling, absent a claim of impinging on one’s religious beliefs, may be subject to reasonable government regulation.
\end{enumerate}

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unreasonable burden, the Court upheld the application of the statute.\textsuperscript{560} The court stated:

Teacher certification can measure, and to some extent ensure, the minimum qualifications of each teacher. Certification is, therefore, at least not an unreasonable way to further the state’s interest.

These contrasting cases help to show that the reasons for homeschooling are significant in determining what state regulation and monitoring will be allowed. As we saw in \textit{DeJonge}, when the court reviews homeschooling as a manifestation of religious freedom, it will uphold a greater degree of parental rights. Thus, it appears that religious reasons provoke higher standards of scrutiny.\textsuperscript{561} While this trend tends to make the restrictions for religious home schools more lax than non-secular home schools, religious home schools will still be exposed to some regulation and monitoring due to the state’s compelling interest in the education of its citizens. These methods of monitoring include standardized testing, teacher certification requirements, and the submission of portfolios used to monitor the progress of the home schooled children.

In \textit{Bevins, et al. v. Calhoun County School Board},\textsuperscript{562} the court held that the inclusion of the words “certified teacher” in the West Virginia statute indicates that the legislature intended a certified teacher to be automatically qualified to provide a written evaluation of the homeschooled child’s

\textsuperscript{560} \textit{Bennett}, p. 120. The Court held “that the Fourteenth Amendment does not provide parents a fundamental right to direct their children’s secular education, and...that the defendants have not met the burden of establishing that teacher certification is not reasonably related to the state’s legitimate interest.” The Michigan Supreme Court applied the statute in \textit{Bennett} using the rational basis test, but not in \textit{DeJonge} as it applied a more rigorous strict scrutiny standard due to the Free Exercise Clause challenge.

\textsuperscript{561} The DeJonges chose to home school their children because they wanted to provide “a Christ-centered education” for their children and cited a belief that “the major purpose of education is to show a student how to face God, not just show him how to face the world.” \textit{DeJonge}, p. 130.

\textsuperscript{562} West Virginia, Civil Action No. 00-08 (2002).
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progress, instead of vesting discretion with the superintendent as to the qualifications of the teacher. As a result, the court held that the state certification of a teacher is sufficient to comply with the statute, without additional approval by the school superintendent.

_In re Rachel L_,563 decided by the California Court of Appeal, initially ruled that requiring home school parents to obtain a teaching credential would be a reasonable regulation of parents’ constitutional rights because the regulation might be related to a state interest in supervising homeschooling.

The court wrote, “[p]arents do not have a right to home-school their children under the California Constitution, and must comply with the state’s compulsory education law even if they profess religious objections”.

Upon the handing down of the decision, however, a media firestorm erupted claiming that homeschooling was now illegal in California. This exaggerated view of the case resulted in the Governor’s public support for homeschooling,564 the state legislature to pass a resolution noting California’s homeschooling tradition,565 as well as a publically released press release from the Superintendent of state schools reaffirming the

563 _In re Rachel L_, 73 Cal. Rptr. 3d 77 (Ct. App. 2008).
564 Press Release, Governor of California, “Gov. Schwarzenegger Issues Statement Regarding Court of Appeals Home Schooling Ruling” (Mar. 7, 2008), available at http://gov.ca.gov/press-release/8951 (last visited June 21, 2001). The Governor stated, “[e]very California child deserves a quality education and parents should have the right to decide what’s best for their children... This outrageous ruling must be overturned by the courts and if the courts don’t protect parents’ rights then, as elected officials, we will.”
565 Assem. Con. Res. 115, 2007–08 Leg., Reg. Sess. (Cal. 2008). The resolution stated that “[s]ome [thirty] years of experience with the modern home schooling movement in California demonstrates that home school graduates take up responsible positions as parents, as students in and graduates of colleges and universities, in the workplace, and as citizens in society at large[.]” The resolution then stated that the Rachel L. decision was a “misguided interpretation den[y]ing California parents their primary responsibility and right to determine the best place and manner of their own children’s education” and called for its reversal.
legality of homeschooling. Several months later, the decision was vacated, that is, ceased to have any force or effect and the California Court of Appeals ruled that homeschooling is indeed a legal option in California due to “the Legislature’s apparent acceptance of the proposition that home schools are permissible in California when conducted as private schools.” Notwithstanding, the court found that “parents possess a constitutional liberty interest in directing the education of their children, but the right must yield to state interests in certain circumstances.”

3.5. Court Decisions in States Restrictive of Homeschooling

As discussed in Chapter 3, the most regulated homeschooling jurisdictions in the United States are New York, Massachusetts, and Pennsylvania. In these states, due to staunch opposition by public school officials, the courts created a framework for legal homeschooling through caselaw.

New York

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566 Press Release, California School Superintendent, “Schools Chief Jack O’Connell Issues Statement Regarding Home Schooling in California,” (March 11, 2008). O’Connell stated: “I have reviewed this case, and I want to assure parents that choose to home school that California Department of Education policy will not change in any way as a result of this ruling. Parents still have the right to home school in our state.”

567 73 Cal. Rptr. 3d 77, vacated, Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Ct. App. 2008) [hereinafter “Jonathan L.”].

568 Jonathan L., p. 578.

569 Jonathan L., p. 592.
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Blackwelder v. Safnauer\(^{570}\) upheld the state’s *Education Law* which mandated that the educational services provided to a minor outside of a public school should be “at least substantially equivalent” to the instruction given to minors of like age and attainments at the public schools. The parents failed in their First Amendment claim for religious freedom because the statute was narrowly tailored to accommodate the parents’ religious conduct without sacrificing important state interests. Moreover, the court upheld the requirement of home visits in New York.\(^{571}\)

Massachusetts

In *Care and Protection of Charles*,\(^{572}\) the Supreme Judicial Court ruled that parents have a right to educate their children at home, but this right must be reconciled with the state interest in the education of its citizenry. The court held that home education is protected by the Fourteenth Amendment and the Massachusetts statute has as its object “that all children shall be educated, not that they shall be educated in any particular way.”\(^{573}\)

The Court in *Charles* held that if a home school is rejected after seeking approval, the burden of proof shifts to the school authorities to show that the proposed instruction fails to equal in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town.\(^{574}\)

Moreover, the Supreme Judicial Court outlined four areas a superintendent or school committee may examine when determining

\(^{570}\) 866 F.2d 548 (2d Cir. 1989) [hereinafter “*Blackwelder*”].

\(^{571}\) *Blackwelder*, pp. 551-552. Following the case, the New York State Board of Regents eliminated home visits, instead authorizing visits only after a family’s homeschooling program has been placed on probation and the local superintendent has “reasonable grounds” to believe that the program is not in compliance with state requirements.

\(^{572}\) *Care and Protection of Charles*, 504 N.E.2d 592, 598-99 (1987) [hereinafter “*Charles*”].

\(^{573}\) *Charles*, p. 600.

\(^{574}\) *Charles*, p. 601.

J. A. LAGOS, Parental Education Rights in the United States and Canada: Homeschooling and its Legal Protection
whether to approve a home education plan. These four areas are:575

- The proposed curriculum and number of hours of instruction of each of the proposed subjects;
- The competency of the parents to teach their children (superintendents or school committees may not require certification, advanced degrees, or college degrees);
- Textbooks, workbooks, and other instructional aids, as well as lesson plans and teaching manuals. The superintendent or school committee may “not... dictate the manner in which the subjects will be taught”;
- Periodic assessments to ensure educational progress and attainment of minimum standards. The superintendent or school committee may properly require standardized testing or may substitute, subject to the approval of the parents, another form of assessment.

As the case predated Troxel, the court recognized only a “basic” right of parents to direct the education of their children. Moreover, the right is not absolute and must be reconciled with the substantial state interest in the education of its citizens, as set out in Brown v. Board of Education:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 576

The parents’ argument contended that the extent of the state’s interest is not in educating the children, but only in knowing that the children are being educated. The court agreed with this argument, stating that the state interest is “not that the educational process be dictated in its minutest

575 Charles, pp. 601-602.
detail.” Nevertheless, the Court upheld the statutory approval process as necessary to effectively promote the state’s “substantial interest.”

In response to a homeschooler challenge of a school district’s policy mandating home visits, the Supreme Judicial Court ruled in *Brunelle v. Lynn Public Schools* that home visits are unconstitutional if imposed against the parent’s objection or as a condition to the approval of home education plans. The court stated that “the approval of the home school proposal must not be conditioned on requirements that are not essential to the state interest in assuring that all children be educated.” Moreover, the court recognized that:

> while a schedule may be an important consideration in a public school where preexisting schedules need to be maintained and coordinated, the perception and use of time in a home school are different. In a homeschool, parents can observe and accommodate variations (from child to child, subject to subject, day to day) in the learning process and teach through a process that paces each student. The results of their teaching programs can be adequately verified through testing without the need to visit the home to see if a formal schedule is being followed. Additionally, the school committee, if desired, can ask the plaintiffs to submit periodic reports on the progress of each child’s education in order to indicate what subjects, areas, and materials have been learned and what is planned for the next reporting period.”

The precedent that home visits are not essential for children to be educated has been relied upon by homeschoolers throughout the United States.

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577 Charles. See also, *Appeal of Peirce*, 122 N.H. 762, 768, 451 A.2d 363 (1982): “While the State may adopt a policy requiring that children be educated, it does not have the unlimited power to require that they be educated in a certain way at a certain place.”


579 *Brunelle*. 
In its discussion of limit to state interference, the *Brunelle* court wrote,

[both the United States Supreme Court and this court have emphasized, in connection with the protected right of parents to raise their children, that ‘government may not intrude unnecessarily on familial privacy.’]

*Pennsylvania*

In *Combs v. Home-Center School District*, 581 a group of families challenged the state’s monitoring requirements for their homeschooling program claiming that they are answerable only to God for their children’s education. The parents relied on multiple passages from the Bible to argue against government oversight. In their supporting materials, the families stated that:

The Lord has established jurisdictional boundaries between the family and the State...subjecting their home education program to the authority, oversight and discretionary review of the State violates Biblically-ordained jurisdictional lines between the family and the State.

In response, the Third Circuit Court of Appeals found that state’s home education regulations concerning reporting and review requirements 583 did not infringe upon the religious expression of homeschooling families as protected by Pennsylvania’s *Religious Freedom Protection Act (RFPA)*. 584 The home education statute requires parents to provide instruction for a minimum number of days and hours in certain subjects and submit a portfolio of teaching logs and the children’s work product for review. The

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582 Brief in Support of Summary Judgment at 6–7, cited by *Combs*.


584 71 Pennsylvania Consolidated Statutes Annotated § 2404 (2002).
parents considered the review as an onerous burden, but the court noted that “[i]n practice, the school districts engage in a limited level of oversight.”

The case turned on the fact that the local school district only determines whether each student demonstrates progress in the overall program, but does not review the educational content, textbooks, curriculum, instructional materials, or methodology of the program. Rather than acting as a substantive check on parents, the Pennsylvania regulations were found to be administrative procedures. As a result of this finding, the Circuit Court held that the home education statute is a neutral law of general applicability, rather than “a licensing scheme for homeschooling” as claimed by the families. The court in effect interpreted the regulations as applying to all Pennsylvania children equally and allowing homeschooling as one valid method to satisfy the compulsory school attendance requirement.

More importantly, the court determined that the parents do not have a constitutional right to avoid reasonable state regulation of their children’s education. Although the parents relied on *Pierce*, *Meyer* and *Yoder*, the court found that the right to be free from all reporting requirements and “discretionary” state oversight of a child’s home school education has never been recognized.

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585 *Combs*, p. 239.

586 *Combs*, p. 250: “Even though Parents are required to keep records and submit them for review, they are in complete control of the religious upbringing of their children. In fact, Parents are unable to point to even one occasion in which the school districts have questioned their religious beliefs, texts, or teachings.”

587 *Combs*, p. 242.

588 The court held that there is no recognized right for parents to educate their children “unfettered by reasonable government regulation,” citing *Runyon v. McCrory*.
3.6. Education and Employment

In Peterson v. Minidoka County School District, a public school principal informed one of the District’s assistant superintendents that he was considering home schooling for his children in accordance with his religious beliefs. When the public found out, the School Board demoted him to a teaching position.

The Ninth Circuit Court found that the school district’s adverse employment action violated the principal’s constitutional rights. The Court applied strict scrutiny to both the Free Exercise claim as it relates to a parent’s choice to home school their children and the right to due process in employment.

The Ninth Circuit recognized that Peterson’s right to home school his children was fundamental and could only be interfered with if the government could prove that there was a compelling state interest at stake. Here, the government’s interest was merely a concern that Peterson might not be able to fulfill his job as a public school principal and that he might send the wrong message to the community that he was not fully committed to the public school. The Court held that neither of these interests rose to a compelling level, and it ruled that the school district had violated Peterson’s fundamental right to home school his children.

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589 118 F.3d 1351, 1358 (9th Cir. 1997) [hereinafter “Peterson”].

3.7. Educational Benefits for Homeschoolers in the Public School System

In re Meggan Stone591 dealt with a dual-enrolled home school student who was denied funds for community college courses that are available to public and accredited nonpublic school students. The state law, the Post Secondary Enrollment Options Act (“PSEO”), provides dual-enrolled students with access to all educational benefits available, but the Department of Education followed an internal policy against homeschoolers on the basis of reducing expenses. On appeal, an administrative judge ruled in favour of the homeschooler, stating that the rationale underpinning PSEO “is to expand the academic opportunities available to high school pupils” and that a plain reading of the Act requires inclusion of dual-enrolled students in the PSEO's benefits.

Homeschooled students also benefit from participation in sports, music and other extracurricular activities in regular schools. Disputes in these matters have mostly been resolved among officials and administrative bodies. However, in the case of Jones v. West Virginia State Board of Education,592 a judge ordered an interscholastic athletic association to find a homeschooler eligible for participation on a public school wrestling team. The association had strictly interpreted a provision of the state code that restricted participation in interscholastic athletic activities to students who are enrolled on a full-time basis at a member school; the regulations did not reference homeschooled children.

While the judge in Jones rejected an argument that homeschoolers have a fundamental constitutional right to participate in interscholastic sports as part of a “thorough and efficient education”,593 he did accept that the school

592 Civil Action No. 02-MISC-477 (Circuit Ct.) [hereinafter “Jones”].
593 Jones, para. 12ff.
authority had erred on three separate grounds. First, it had failed to make an available educational resource available to the homeschooler; secondly, the school commission had violated his right to equal protection, as guaranteed by the West Virginia Constitution; and thirdly, it had breached the duty to promulgate reasonable rules and regulations by implementing a total ban rather than crafting fair rules tailored to any legitimate concerns that may flow from allowing home schooled students to participate on sports teams fielded by the public school they would be attending if they were not home schooled.\footnote{Jones, para. 58.}

4. The Irreconcilable Views of Conservative and Liberal Positions

The review of cases has illustrated that courts struggle at times to effect the necessary balance between the state’s compelling interest in the education of its citizens and parental rights to choose the method of instruction which best suits their children.

Reading between the lines of judicial opinions dealing with homeschooling, it appears that at times courts reach decisions which indicate a degree of suspicion as to the efficacy of family control of education to produce democratic or socialized individuals. Some judges believe that parents’ motives for homeschooling are not aligned with the state interest in education. Others doubt whether home school parents have the resources and means to teach effectively. Like any bias, these perceptions can subtly and subconsciously shape analysis of questions arising in homeschooling cases.\footnote{For example, Donna G.R. v. James B.R., 877 So. 2d 1164, pp. 1168–69 (La. Ct. App. 2004) (finding that homeschooling was not in the best interests of the children); Anderson v. Anderson, 56 S.W.3d 5, p. 9 (Tenn. Ct. App. 1999) (same);}
For example, in the case *In re Dukes, Sarah* 596 a Kentucky court judge forced a homeschooled teenager to attend public school two years beyond the state’s compulsory education law. Additionally, the judge issued a pick-up order for the adolescent and an arrest warrant for her mother for contempt of court.

This decision was overruled by a circuit court judge who disagreed entirely with the views of the first judge. The appeal judge found that the parents had a fundamental right to home school, which “includes the right of parents to choose an alternate education in lieu of public schools... generally speaking, parents are in a better position to make decisions concerning their children than the courts.” The Court further explained that unless there is evidence of misconduct or of the failure of a parent to provide for the child’s education, the state does not have the right to “confiscate” the parents’ fundamental right to direct the education of their child. The appeal judge, however, acknowledged that “some parents withdraw their children from school under the pretext of homeschooling with no intention of doing so and that some other well-intentioned parents may be incapable of providing an adequate education for the children.” 597

Such a decision shows how varying philosophies or world outlooks can lead to radically different outcomes in homeschooling cases, at least within school systems and lower courts.

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596 Case No. 01-XX-00002 (Kentucky Circuit Court, 2001); see also, J. Foster, “Kentucky home-schooler wins victory: Court reverses order placing teen in public education” WorldNetDaily.com, posted June 6, 2001. [hereinafter “Dukes”].

597 Dukes.
Homeschooling advocates point to the results of homeschooling as proof that unregulated homeschooling by uncredentialed parents should be left alone; that courts ought to accept the current level of legislative scrutiny as a manifestation of the democratic will, i.e. that homeschooling is an acceptable practice and requires minimal state interference. Their argument is that the state’s interest is ultimately served by well-educated, well-adjusted children who are becoming productive citizens, rather than imposing a set of regulations on the practice of home education in order to appease teacher’s unions and other “concerned” pressure groups.

The homeschooling side believes that the courts, however, have altogether failed to address another, more fundamental question: whether the state regulation in fact advances the state interest. A regulation that fails this criterion cannot be “reasonable.” The issue of whether the regulation in fact furthers the state interest can be posed as a threshold question, answerable with empirical research that illustrates how homeschoolers fare academically and socially as a result of their individualized education.

The defence of homeschooler interests in the United States has been exclusively led by Home School Legal Defense Association (HSLDA), discussed in Chapter 2. Over the past three decades, HSLDA has built up a large volume of representations before police, state and school officials who obstructed homeschooling procedures in large part due to ignorance of the law or prejudicial attitudes towards homeschooling. In the majority of cases, these incidents did not lead to litigation or if hearings were scheduled these were resolved in unreported legal decisions. Collected on the HSLDA website, this body of caselaw indicates the rapid response, organization and well-developed legal arguments that the home school phenomenon has constructed in the United States to defend parental rights.598

598 For a review of HSLDA legal representations across the United States over the past two decades, see www.hslda.org/legalcases. To illustrate the issues involved, we reproduce a typical case summary:

(Illinois v. Walters Family) In December 2005, the Will County Regional Superintendent’s Office sent a truant officer to contact the Walters family. HSLDA immediately wrote a letter to the school district explaining that the family was
The HSLDA sets forth a series of parental rights cases decided at the Supreme Court, in addition to Meyer, Pierce and Yoder, which support the homeschooling argument.

“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder... It is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.”


“The values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.

Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.”


“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”


homeschooling in full compliance of the law. The truant officer was not satisfied and charged the family with truancy. HSLDA Counsel discovered that the truant officer never provided written notice to the family, thus violating a statute requiring notice before filing charges. Counsel advised Mrs. Walters to contact the school superintendent and prepared her for how to explain to the superintendent that this was just a misunderstanding. Mrs. Walters met with the superintendent and showed that she had a teaching certificate, lesson plans and plenty of books. She then explained Counsel’s discovery that the truant officer had improperly filed written notice. Upon seeing evidence of home education and learning of the truant officer’s mistake, the superintendent contacted the state attorney to withdraw the petition. The case was dismissed.
“The liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in this Nation’s history and tradition.”


“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition...

Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.”


“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.

Until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”


“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the rights... to direct the education and upbringing of one’s children.

The Fourteenth Amendment forbids the government to infringe... ‘fundamental’ liberty interests of all, no matter what process is
provided, unless the infringement is narrowly tailored to serve a compelling state interest.”


Liberals who oppose unregulated homeschooling for political or cultural reasons respond that the “autonomy of parental rights” is exaggerated by homeschooling advocates. In their view, the succession of homeschooling victories in Congress and the courts is illustrative of the legislative and judicial failure to properly regulate homeschooling. In a pending New Hampshire case, the liberal argument that there is no “broad” constitutional right to home school was put as follows:

The State’s interest in assuring that [high educational] standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes.

Generally speaking, the liberal view responds to the homeschooling argument that there should be a complete absence of state interference. For their part, the liberal authors would hold home schools accountable to any regulation, law, guideline or enforcement that applies to other private schools.

The liberal argument is in large part focused on restricting the instances where regulation is limited for religious motivated parents who rely on *Yoder*. A number of courts, including at least four federal circuits, have indicated that *Yoder* does not extend to homeschooling generally, that the case is narrowly fact-based, and that it applies only to the traditional Amish lifestyle. These decisions cite Justice White’s concurring opinion in support:

This would be a very different case for me if respondents’ claims were that their religion forbade their children from attending any school at

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599 See Yuracko, Education Off the Grid and other authors discussed in Chapter 3.
600 *In the Matter of Martin F. Kurowski and Brenda A. Voydatch*, New Hampshire Supreme Court, No. 2009-0751 (2010); as of June 21, 2011, no decision has been rendered.
any time and from complying in any way with the educational standards set by the State.\footnote{601}

The decisions which have distinguished \textit{Yoder} in homeschooling actions are as follows:

- \textit{Combs \textit{v.} Homer-Center School District}: “\textit{Yoder}'s reach is restricted by the Court's limiting language and the facts suggesting an exceptional burden imposed on [those] plaintiffs... which placed the continued survival of Amish communities in ‘danger.’”;\footnote{602}
- \textit{Duro \textit{v.} District Attorney}: distinguishing Pentecostal parents’ claim against compulsory school attendance laws from “fact that for almost 300 years the Amish society had not altered their lifestyle, which was centered around a separate agrarian community”;\footnote{603}
- \textit{Fellowship Baptist Church \textit{v.} Benton}: holding that the “Amish exception” to Iowa’s compulsory attendance law does not apply to fundamentalist Christians;\footnote{604}
- \textit{Swanson \textit{v.} Guthrie Independent School District}: emphasizing “the nature revealed by [the \textit{Yoder}] record”;\footnote{605}
- \textit{Hanson \textit{v.} Cushman}: “\textit{Yoder} might conceivably apply to someone who is not Amish, but to make a constitutional claim the homeschooler would have to show the child was part of a centuries-long successful tradition in danger of extinction by enforcement of compulsory attendance laws.”\footnote{606}

Liberals argue strenuously that states clearly have the authority to regulate homeschooling in innumerable ways to ensure that the child is in fact being educated: \textit{Board of Education \textit{v.} Allen}.\footnote{607} They consider that this

\footnote{601 Yoder, p. 238.}
\footnote{602 540 F.3d 231, 250 (3d Cir. 2008), cert. denied, 129 S. Ct. (2009).}
\footnote{603 712 F.2d 96, 98 (4th Cir. 1983), cert. denied, 465 U.S. 1006 (1984).}
\footnote{604 815 F.2d 485 (8th Cir. 1987).}
\footnote{605 135 F.3d 694, 700 (10th Cir. 1998).}
\footnote{606 490 F. Supp. 109 (1980).}
\footnote{607 392 U.S. 236, 246 n.7 (1968).}
judicial authority to regulate distinguishes the right to education in a parochial school from the lack of such a right at home. States routinely demand teachers in private schools to have the same qualifications as those in public institutions, and mandate the same standards for educational facilities. But it is generally not practical to impose such requirements on homeschooling parents.608

5. The American Approach to Homeschooling Abroad

Recently, an immigration asylum case involving homeschooling received substantial press coverage.609 A German family, the Romeikes, sought unsuccessfully to home school their five children in their native country. Among European countries, Germany is nearly alone in requiring, and enforcing, attendance of children at an officially recognized school.610 Exceptions can be made for health reasons but not for principled objections.


610 For a comprehensive review of homeschooling in Germany and the report of the U.N. Special Rapporteur on the Right to Education in that country, see A. Martin, “Homeschooling in Germany and the United States” (2010) 27:1 Arizona J. Int. & Comp. L. 225. See also Frankfurter Allgemeine Zeitung, “Homeschooling ist keine Parallelgesellschaft”, June 20, 2011, p. 9, for a description of the practice of homeschooling in Germany.
Following several years of persecution by state officials for illegally homeschooling their children, the Romeikes fled to the United States and sought political asylum on the grounds of religious freedom. A federal immigration judge in Memphis granted their claim, ruling that they had a reasonable fear of persecution for their beliefs if they returned.

The judge denounced German policy in harsh terms, calling it “utterly repellent to everything we believe as Americans,” and expressed shock at the heavy fines and other penalties the government has levied on homeschooling parents, including taking custody of their children. 611 Describing homeschoolers as a distinct group of people who have a “principled opposition to government policy,” he ruled that the Romeikes would face persecution both because of their religious beliefs and because they were “members of a particular social group,” two standards for granting asylum. The federal government has appealed the decision.612

611 Robertson, N.Y. Times. In 2009, a German court of first instance imprisoned a father for failing to pay a fine imposed by an earlier court because the parents refused to send their children to the local public school due to their opposition on religious grounds to sexual education classes. The case is reported at Beschluss vom 21. Juli 2009 – 1 BvR 1358/09.

612 The United States Government Agency for Immigration and Customs Enforcement (ICE) lodged an appeal claiming that homeschoolers are too “amorphous” to be a “particular social group” and that “United States law has recognized the broad power of the state to compel school attendance and regulate curriculum and teacher certification” as well as the “authority to prohibit or regulate homeschooling.” The ICE points to the denial of an application by the European Court of Human Rights in the Konrad case as evidence that “the public education laws of Germany do not violate basic human rights.”
6. The Present State of Homeschooling Regulation in the United States

We have reviewed the Supreme Court jurisprudence that established parental rights, as well as state and federal cases where homeschooling regulation has been litigated.

The Supreme Court's decisions have articulated what one scholar terms "a general view of education that has redirected its emphasis from a rights-based to a values-based ideology over time."613 As a result, the Court now increasingly pays deference to the authority of school administrators to make curricular and administrative determinations that reflect community and societal values. While some of the authors reviewed in Chapter 4 argue that homeschooling advocates rely on a line of cases that reflect decisions from another time and socio-cultural environment, there is enough language in recent decisions, principally *Troxel*, to trace a consistent line of decisions in favor of parental rights.614 The Supreme Court in *Troxel* labels parental interest in “the care, custody, and control of children” as a fundamental liberty interest, implying that parental rights to control their children’s upbringing trigger some level of heightened scrutiny. Thus, parents’ right to direct their children’s education and moral training ought to receive substantial judicial protection.615

In recent cases, parents of home schooled children have challenged the monitoring of their programs by the government, claiming that their religious values are being compromised.616 Judges, however, have shown


614 Salomone, Visions of Schooling.

615 Ideas for this section taken from Greenfield, Religious Homeschools.

skepticism regarding the religious argument and are striking a balance between full parental autonomy and the “undue” interference of state regulation.

As the caselaw reviewed in this chapter shows, parents that challenge statutory requirements regarding the monitoring of their homeschooling programs generally rely on three legal arguments:

1. the First Amendment, through the Free Exercise Clause;
2. the Fourteenth Amendment’s Due Process Clause; and
3. the Fourth Amendment’s implied constitutional right to privacy.

According to the Court’s interpretation of the Free Exercise Clause, neither the federal nor the state government can interfere with religious belief, religious expression, or with religious practice that causes no harm apart from its religious significance. For the majority of homeschoolers, their education is equivalent to religious expression and they expect constitutional protection.

Macmullan offers a theory of judicial interpretation regarding challenges to homeschooling monitoring based on the Free Exercise Clause. He considers that a court’s ruling on a state’s monitoring of a homeschooling program will depend upon how the court characterizes the state’s interest.617 If a “court characterizes the purpose of the state’s interest [via monitoring] as ensuring that the children are receiving an adequate education,” the monitoring is far more likely to be allowed. On the contrary, when a regulation attempts to control the manner in which the children are educated, the court will characterize the state’s interest as one that is not compelling enough to ensure that a child receives an adequate education.618

617 Macmullan, Constitutionality, pp. 1328-29.
618 Macmullan, Constitutionality, illustrating non-compelling need in DeJonge, where the court held that the purpose of the state’s regulation was to ensure that teachers were properly certified, not to ensure that children were receiving an adequate education. Macmullan also points out that the more significant the government interference is, the more likely a challenge based on the Free Exercise Clause will be successful. This appears to be an extension of the least restrictive
Conclusions

This Chapter has addressed the evolution of homeschooling caselaw and the principles enunciated by the courts, both federal and state. Additionally, we have considered how the courts balance the state’s compelling interest in education with the Free Exercise Clause under the First Amendment.

While the legal doctrine of parental rights to education has been clarified by the Supreme Court ruling in Troxel, the federal and state courts have not responded consistently to the question of how much regulation or monitoring is constitutionally permissible. As such, it is correct to say that the law on homeschooling, while voluminous, is unsettled.619

Having reviewed the various species of homeschooling state regulation and the outcomes of numerous court challenges, we can fashion a series of propositions supported by United States jurisprudence.

1. There is an upper limit on how much states can regulate and control children’s education.620 The courts have consistently upheld that state approval of all private schools, certification of private school teachers, instruction in core subjects, and reporting of attendance information falls below this limit.621

mean of a compelling government need test set forth in Yoder and modified in Smith.


620 Pierce found that requiring attendance at public schools is beyond this constitutionally permitted upper bound on state regulation of children’s education; Meyer held that the prohibition on teaching subjects fails to respect parental decisions.

621 State v. McDonough, 468 A. 2d 977, 980-981 (Me. 1983), where the Court took a strong policy stance, stating that “[f]or the state to allow home education without
2. Parents have constitutionally protected liberty interests in their relationship with their children.\textsuperscript{622}

3. There exists a discretionary zone for state regulation, acknowledged by the Supreme Court.\textsuperscript{623} State permission of homeschooling itself appears to fall within this discretionary zone.\textsuperscript{624}

4. Courts have consistently held that parents’ First and Fourteenth Amendment rights to direct the upbringing of their children do not prevent reasonable state intrusions mandating basic educational requirements for children.\textsuperscript{625}

5. Most court decisions indicate that states are constitutionally able to limit parental autonomy. Parents have First and Fourteenth Amendment rights to make decisions about their children’s upbringing, but these rights imposing some standards as to quality and duration would be, in many cases, to allow parents to deprive their children of any education whatsoever.”

\textsuperscript{622} Pierce found that the Constitution guarantees the freedom of parents to direct the upbringing and education of children; Troxel stands for the “fundamental” parental right to direct the education of their children; Santosky v. Kramer requires a high burden of proof to terminate parental rights.

\textsuperscript{623} Pierce stated that the state has the power to reasonably regulate all schools, inspect, supervise, and examine them, their teachers and pupils; Yoder found that the state’s high responsibility for the education of its citizens gives it the power to impose reasonable regulations for the control and duration of basic education; Runyon v. McCrory held that parents do not have a constitutional right to provide their children education unfettered by reasonable government regulation.


\textsuperscript{625} Fellowship Baptist Church v. Benton, 815 F.2d 485, 496-98 (8th Cir. 1987) (holding that state could apply its compulsory attendance law to fundamentalist Christians); Duro v. District Attorney, 712 F.2d 96, 97-99 (4th Cir. 1983) (upholding compulsory school law against parents’ free exercise of religion objection).
are not absolute. With the exception of the Amish and similar groups, courts have denied religious protection to homeschooling.

6. Where an absence of regulation could result in abuse of children’s rights, the courts will favour the state’s compelling interest over parental rights.

In summary, while many homeschooling parents want the government completely out of the education of their children, the state has a duty to enforce a compelling interest in ensuring their citizens are adequately educated. A compromise solution may not be possible, but the present patchwork of judicial precedents in the United States guarantees a large measure of parental choice for families dissatisfied with the public school system or private school options.

626 Prince v. Massachusetts, 321 U.S. 158 (1944), pp. 166-67. “Acting to guard the general interest in youth’s well being, the state as parens patriae may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.” See also Santosky v. Kramer, 455 U.S. 745 (1982), pp. 747–48, 759 which required a state to provide “clear and convincing evidence,” but did not question its authority to absolutely sever the parent–child relationship in a neglect proceeding.

627 Yoder stated that “the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens”.

628 In re William A.A., 24 A.D.3d 1125 (N.Y. A.D. 2005), an educational neglect action against a mother who withdrew her child from a special education placement in order to homeschool and then left the child home alone for eight hours a day saying that she would teach him in the evenings; Yarbrough v. Arkansas Dept. of Human Services, 2006 WL 2848588, affirmed parental termination of rights of a woman with an IQ of 85 and diagnosed personality disorder and mood disorder who insisted on home schooling her children.
Chapter VI. **Analysis of Canadian Jurisprudence Relevant to Homeschooling**

**Introduction**

As we saw in Chapter 5, there were a number of court victories for the homeschooling movement in the United States beginning in the 1980s. Canadian homeschooling benefitted directly from the experiences and lessons learned in the United States. Although provincial legislation across Canada provides parents with a variety of schooling options, the homeschooling phenomenon is much smaller in the northern country. Perhaps for this reason, and the fact that Canadians are generally less litigious than their southern neighbours, there have been relatively fewer court challenges to provincial homeschooling regulation.

In this chapter, jurisprudence at both provincial and federal levels will be reviewed and conclusions on the current status of the law will be presented.\(^6\) We will review Supreme Court cases that speak of parental

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6 In Canada, courts are divided into federal and provincial jurisdictions. Section 96 of the Constitution Act, 1867, provides for a Supreme Court and the superior courts in the 10 provinces. The judges appointed to these courts are all federally appointed. Under s. 92(14) of the Act, provinces have authority for “the Administration of Justice in the Province”, both civil and criminal, and appoint
education rights as well as provincial Canadian caselaw touching directly upon homeschooling. Recent judicial decisions are less concerned with the limits to parental rights as regards the state; for the most part, these cases are related to custody disputes, that is, where former spouses have conflicting views on how to educate their children, or child protection actions, where the state claims parental neglect.\(^{630}\)

1. The State’s Overriding Interest to Educate

In a case we will review further, *R. v. Jones*, the Supreme Court considered the compulsory attendance provision of the Alberta *School Act*. In support of the state’s interest, Justice La Forest stated:

If the appellant has an interest in, and a religious conviction that he must himself provide for the education of his children, it should not be forgotten that the state, too, has an interest in the education of its citizens. Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society. From an early period, the provinces have responded to this interest by developing schemes for compulsory education. Education is today a matter of prime concern to government everywhere. Activities in this area account for a very significant part of every provincial budget. Indeed, in modern society, education has far-reaching implications beyond the province, not only at the national, but at the international level. Much of what was said by the Supreme

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\(^{630}\) Research on legal decisions conducted in 2010-2011 using the search term “homeschool” turned up only 8 hits including one Supreme Court decision (*Chamberlain*, reviewed below). “Home schooling” meanwhile turned up over 400, most referring to statutory requirements or custody proceedings, none where any judicial determination was required on state interference with homeschooling.
Court of the United States in the following passage in *Brown v. Board of Education of Topeka*\(^631\) has application here:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society... \(^632\)

As we have seen in Chapter 4, the education legislation of all Canadian jurisdictions provides for compulsory attendance at public schools unless a specified exception applies. In every province, these exceptions include the possibility of private schooling and homeschooling. However, the state reserves the right to verify the quality of this alternative to public schooling. Because of the provision of the private educational alternatives, the compulsory attendance requirements have never been, nor indeed could they be, the subject of a challenge based on a freedom of religion argument.

2. **Parental Education Rights in Canadian Law**

2.1. **Pre-Charter Jurisprudence**

Prior to the enactment of the *Charter of Rights and Freedoms*,\(^633\) the question of parental education rights largely focused on German Christian


\(^633\) Part 1 of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11) [hereinafter referred to as “the *Charter*”].
minorities that sought to protect their faith and way of life in the face of English-speaking assimilation within the public school system.

In *R. v. Hildebrand*, the Supreme Court considered guarantees provided by the federal government to Mennonite settlers in Manitoba that they would have the right to educate their own children, outside the school system. As noted in Chapter 4, section 93 of Canada’s constitution (the *British North America Act*) explicitly recognized education as falling under provincial jurisdiction. The Supreme Court therefore ruled that the federal guarantees were *ultra vires* the federal government.

Another early case, *R. ex rel Brooks v. Ulmer*, concerned the conviction of a Lutheran family in Alberta for failing to cause their children to attend the local public school. The Supreme Court of Alberta ruled that in the absence of a certificate exempting a child there was no defence to the charge of non-attendance at school.

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634 [1919] *3 W.W.R. 286, 31 C.C.C. 419 (S.C.C.). This case was a direct result of the province of Manitoba’s legislation of mandatory school attendance at accredited public schools in 1916. In neighbouring Saskatchewan, there were over 5,000 prosecutions of Mennonites over school attendance between 1920 and 1925.

635 The federal government provided these guarantees on the basis of religious and educational freedom in 1873, that is, three years after Manitoba formally entered the Dominion of Canada as a province.

636 The court decided the case by focusing on a difference in wording between the letter of guarantee sent to the Mennonites on 23 July 1873 and the wording of the Order-in-Council issued three weeks later by the Federal Parliament. The Supreme Court interpreted the subtle difference to mean that Mennonite education was subject to provincial regulation.


638 One of the judges noted in his summation: “[the Lutherans] appear to have thought that in coming to this country they were coming to a land where... the liberty of the individual prevailed. They are unfortunately mistaken... There is no protection... unless the Legislature sees fit to expunge this tyrannous provision from the school law, or at least unless the Department adopt a less tyrannical policy of administration of the law.” (*Brooks*, p. 28).
Peregolkin v. British Columbia (Superintendent of Child Welfare),

focused on the Doukhobors, a Christian sect that settled in British Columbia and wished to educate their children in accordance with their religious principles. The provincial government disagreed and removed the children from their parents for the purpose of educating them in state schools. The parents claimed a violation of their religious freedom under the Canadian Bill of Rights, a predecessor to the Charter. The British Columbia Court of Appeal, however, ruled that education of children was not an aspect of religious freedom to be considered under the Bill of Rights.

Parental rights were finally upheld in R. v. Wiebe, decided just prior to the Charter’s establishment. There, an Alberta Provincial Court judge allowed a child attending a non-accredited religious school to be exempted from truancy provisions for religious reasons. In a case that could be described as Canada’s reply to Yoder, the historical Anabaptist attitude of separation from the world and independence from the state led a number of Mennonite families to remove their children from the local public school. The classes at the school set up by the Mennonite parents used a curriculum

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640 S.C. 1960, c. 44. The Canadian Bill of Rights, a statute passed by the federal Parliament, was accorded quasi-constitutional status until the coming into force of the Charter in 1982.


642 Canadian Mennonites have a long history of educating their children according to their own standards of Christian piety, pacifism, and Anabaptist-Mennonite tradition. This practice grew out of the block settlement pattern of the prairies and the local nature of schools in the frontier West.

643 At trial, Wiebe stated: “[T]he best years of their [lives], the molding years, were being lost because they were too close in contact with the low standards of today... we finally realized, if we don’t do something as parents, we will lose our only eternal heritage which is our children... we feared we would lose them; they would lose themselves and leave God.” Wiebe, trial transcript, 52-6, reproduced in A. Pigott, “Conflicting Worldviews in the Classroom: The Holdeman Mennonite School Trial (1978)” Past Imperfect Vol. 1 (1992), pp. 49-75 [hereinafter “Pigott, Conflicting Worldviews”].
for the most part similar to that required by the provincial Department of Education, but the school board charged that Wiebe and his fellow church members violated both the *School Act*, 644 which required all children to attend a government-recognized school, and the *Department of Education Act*, 645 which required that all children be taught by government-approved teachers. As the Mennonites believed that to protect their children it was essential to administer or influence elementary and junior high schools according to church standards, they choose their own church members to teach the classes. 646

The parents began negotiations with the Alberta Department of Education for permission to set up their own private elementary school. This was refused because they insisted on using non-certificated teachers. The Mennonites, for their part, claimed that they were willing to accept provincial curriculum guidelines and departmental testing in their school, but not teachers from outside the congregation with different values. The chairman of the school board acknowledged during the trial that the Mennonites would only accept certificated teachers provided that they met the board’s other requirements: to be a “born again” Christian and to possess both the aptitude and the desire to teach children. 647 Despite not being in accordance with the provincial regulations, the Department of Education had the power to approve any school or program.

Refusal by the Department to approve building plans or curriculum because of disagreement over teaching staff led the Mennonites in 1976 to proceed with the construction of the school and initiation of classes the

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644 R.S.A 1970, c. 329, s. 133-34 [amended 1971, c. 100, s.16]. Under the Act, children could be excused from attending a public school if they were “under efficient instruction at home or elsewhere.”

645 R.S.A 1970, c. 96, s.8 [amended 1971, c. 100, s.20].

646 Pigott, Conflicting Worldviews, p. 58, citing testimony of Elmer Wiebe, trial transcript, 64-5.

647 Pigott, Conflicting Worldviews, p. 58, citing testimony of Walter Unruh, trial transcript, 91-2.
following year, with or without official permission. Subsequently, the board voted to lay charges of truancy against the Mennonite parents. The outcome appeared likely to follow \textit{R. v. Hildebrand} and \textit{R. v. Ulmer} with the potential of causing a Mennonite migration in search of educational freedom. \textsuperscript{648} In 1978, however, the \textit{Alberta Bill of Rights}, \textsuperscript{649} which recognized freedom of religion among a number of “human rights and fundamental freedoms”, provided a powerful legal defense. More importantly, the government had also ruled invalid any provincial law that conflicted with the \textit{Bill of Rights} unless “expressly declared by an Act of the Legislature”. As a result, Wiebe argued that no provincial Act had been issued to limit the freedom of religion clause in the \textit{Bill of Rights} and therefore he was exempt from the regulations of the \textit{School Act} and the \textit{Department of Education Act}. Additionally, Wiebe claimed that the court possessed the power to order Departmental approval of the school and should do so; and secondly, that the Mennonites had been guaranteed educational independence by the federal government in 1873, thirty-two years before the creation of Alberta.

The court held that the \textit{Alberta Bill of Rights} guarantee of freedom of religion exonerated Wiebe from failure to comply with school attendance legislation. \textsuperscript{650}

Subsequently, the Education minister announced that the government would not appeal against its own \textit{Bill of Rights}; instead, Departmental regulations would be altered to provide for a new category of schools to permit the operation of schools using non-certificated teachers, but they

\textsuperscript{648} Alex Proudfoot, president of the teacher’s association, stated the government’s position bluntly: “When we get right down to the crunch, the child belongs to the state.” Pigott, Conflicting Worldviews, p. 62, citing \textit{Saint John’s Edmonton Report}, November 14, 1977, p. 26).

\textsuperscript{649} S.A., 1972, c. A-16, s. 1(c), 2.

\textsuperscript{650} In his decision, Judge Oliver concluded that the \textit{School Act} in this instance was “rendered inoperative by reason of the \textit{Bill of Rights} because it denies to the accused, Elmer Wiebe, freedom of religion, guaranteed by s. 2 of the \textit{Alberta Bill of Rights.” (Wiebe, p. 62).
would as a result receive no government funding. The \textit{Wiebe} decision forced the government to recognize the right of parents and religious groups to control the ideology and method of their children’s education to a much greater degree in their own private schools.

As Wiebe was decided under provincial law, the Canadian constitutional right of parents to direct the education of their children only developed under the activist courts interpreting the newly enacted constitutional document, the \textit{Charter of Rights and Freedoms}, in 1982.

\section*{2.2. Supreme Court of Canada}

In Chapter 4 we presented and analyzed the Canadian \textit{Charter}, the equivalent to the United States \textit{Bill of Rights}. Although the \textit{Charter} does not contain any specific language about freedom of religion and education, the general provision guaranteeing freedom of conscience and religion under section 2 has been relied upon to defend parental interests in this regard.\footnote{Section 2(a) reads: Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.}

\subsection*{2.2.1. The Charter and Education: Jones}

In \textit{R. v. Jones},\footnote{\textit{Jones}} the Supreme Court of Canada interpreted section 2(a), freedom of conscience, to infer that parents have the right to choose the schools their children will attend.

Jones, a pastor, ran a school in the basement of his Baptist church in the province of Alberta. The Alberta \textit{School Act} allowed children to be excused from attending a public school if a government inspector certified that the pupil was under efficient instruction elsewhere. Jones, however, refused to
apply for approval of, or even to request that officials inspect, his Western Baptist Academy, on religious grounds and was prosecuted for truancy by zealous education officials. He argued that to seek certification would contravene his religious belief that God, not the government, had final authority over the education of his children. Jones had no objection to the actual inspecting of the academy; rather his objection lay in having to obtain state approval of his activities.

He was acquitted at trial, but convicted at the Alberta Court of Appeal. In affirming the conviction, the Supreme Court nevertheless found that a province must accommodate private or home schools within its education regime, especially for parents motivated by religious convictions. The Court explained that the Alberta legislation being challenged:

[D]oes not offend religious freedom; it accommodates. It envisages the education of pupils at public schools, private schools, at home or elsewhere. The legislation permits the existence of schools such as the appellant’s which have a religious orientation. It is a flexible piece of legislation which seeks to ensure one thing — that all children receive an adequate education.

Moreover, the Court expressed support for parental freedom to choose home instruction:

[The School Act] defers to parental authority by allowing home instruction and instruction in private schools, thereby accommodating the state purpose to the preferences of individual parents.

A majority of the justices held that the certification requirement did not violate Jones’ constitutional freedom, that is, the state regulation of

654 Jones, para 64.
655 Jones, para 69.
homeschooling did not infringe the freedom of religion of a pastor who operated a private religious school. 656

The pastor also unsuccessfully sought protection for parental rights under section 7 of the Charter.657 Justice Wilson, writing in dissent and thus for the sake of future caselaw, offered qualified support for parental rights by interpreting section 7’s “right to liberty” in light of European and American jurisprudence:

I should perhaps make clear at this point that while I accept the appellant’s submission that the liberty interest under s. 7 includes the right as a parent to bring up and educate one’s children, I do not agree with him that it is the right to bring up and educate one’s children “as one sees fit”. I believe that is too extravagant a claim. He has the right, I believe, to raise his children in accordance with his conscientious beliefs. The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual’s sense of self and of his place in the world. The right to educate his children is one facet of this larger concept. This has been widely recognized. Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950), states in part “Everyone has the right to respect for his private and family life...” Particularly relevant to the appellant’s claim is Article 2 of Protocol No. 1 of the Convention:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

656 The minority held that requiring Jones to seek certification was a prima facie violation of section 2(a) but that it was saved by section 1, i.e. the law was “demonstrably justified in a free and democratic society.”

657 Section 7 reads: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
Similarly, in the United States the constitutionally protected status of family relations has been recognized: *Griswold v. Connecticut*; 658 *Prince v. Massachusetts*; 659 *Paris Adult Theatre I v. Slaton*. 660 Further, the court has specifically protected the right of the parent to educate the child: *Meyer v. State of Nebraska; Pierce v. Society of Sisters;* 661 *Wisconsin v. Yoder*.662 However, the appellant’s proposition that he has a right to educate his children “as he sees fit” goes too far. Having regard to the structure of the Constitution and the values it explicitly identifies as worthy of protection, I believe that the liberty interest protected is the parent’s right to educate his children in accordance with his conscientious beliefs and I think this is in fact the right the appellant is asserting in this case.

*Jones*, decided a few years after the enactment of the Charter, provided the Supreme Court with the opportunity to discuss the implications of sections 2 and 7 on parental rights. For this reason, the Court's respectful deference to United States jurisprudence is noteworthy.

### 2.2.2. The Charter, Education and Religious Freedom: B. (R.) and Adler

*B. (R.) v. Children’s Aid Society of Metropolitan Toronto*663 concerned Jehovah’s Witness parents who refused medical intervention on their infant daughter. In that 1995 case, the Supreme Court recognized the parental rights to educate their children according to their religious beliefs as an integral element of freedom of religion guaranteed under section 2(a).

658 381 U.S. 479 (1965).
661 268 U.S. 510 (1925).
Writing for the majority, La Forest stated:

In *R. v. Jones*, I observed that freedom of religion encompassed the right of parents to educate their children according to their religious beliefs. In *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, a case involving a custody dispute in which one of the parents was a Jehovah’s Witness, L’Heureux-Dubé J. stated that custody rights included the right to decide the child’s religious education. It seems to me that the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is an equally fundamental aspect of freedom of religion.664

Justices Iacobucci and Major, dissenting on other grounds, likewise found that section 2(a) encompasses a parental educational component, stating:

[The parents’] constitutional freedom includes the right to educate and rear their child in the tenets of their faith. In effect, until the child reaches an age where she can make an independent decision regarding her own religious beliefs, her parents may decide on her religion for her and raise her in accordance with that religion.665

Justice La Forest also clarified the general content of parental education rights:

While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society...[T]he common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children.

...

664 *B. (R.),* para. 105.

665 *B. (R.),* para. 223.
Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself.

... In other words, parental decision-making must receive the protection of the Charter in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the Charter.

... If one considers the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. In fact, we must accept that parents can, at times, make decisions contrary to their children’s wishes – and rights – as long as they do not exceed the threshold dictated by public policy, in its broad conception. For instance, it would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or which school he or she will attend. 666

While Justice La Forest thus understands parental rights as freedom to choose for the child and uses the expression “protected sphere” to signify the extent of parental decision-making, Chief Justice Lamer instead views parental liberty as falling outside of section 7 protection. He wrote:

[T]he liberty interest protected by s. 7 has not been infringed because it includes neither the right of parents to choose (or refuse) medical treatment for their children nor, more generally, the right to bring up or educate their children without undue interference by the state. While this type of liberty (“parental liberty”) is important and

666 B. (R.), paras. 85-86.
fundamental within the more general concept of the autonomy or integrity of the family unit, it does not fall within the ambit of s. 7.\footnote{B. (R.), para. 1.}

Thus B. (R.)*s holding on the protection afforded parental rights under sections 2 and 7 of the Charter repeated the initial observations made in Jones, recognizing constitutional rights for parents very similar to those enunciated by the United States Supreme Court in Meyer, Pierce, Yoder, and Troxel.

In Adler v. Ontario,\footnote{[1996] 3 S.C.R. 609 [hereinafter “Adler”].} parents, who for religious reasons sent their children to private religious schools, challenged the absence of public funding for these schools especially given that public funding was provided to the separate (Catholic or Protestant minority) schools in Ontario. Although the case is focused on funding, the Court made observations on the right of parents under the Charter. Justice Sopinka, in a concurring judgement stated:

There is no disputing the fact that the appellants enjoy a fundamental constitutional right to send their children to the religious school of their choice. This Court has recently reiterated that parents have the right to educate their children in the religion of their choice: [citation from B. (R.).] The appellants cannot, however, complain that the Ontario Education Act prevents them from exercising this aspect of their freedom of religion since it allows for the provision of education within a religious school or at home.\footnote{Adler, pp. 699-700. Emphasis added.}

Justice McLachlin, also concurring on this point, upheld parents’ right to home instruction:

If the Education Act, R.S.O. 1990, c. E.2, required all children to go to either secular or Roman Catholic schools, it would impinge on the religious freedom of those whose beliefs require non-Roman Catholic religious education. The Education Act does not do this. Section 21 excuses children from school attendance if they are receiving
satisfactory instruction elsewhere. Parents whose beliefs do not permit them to educate their children in the secular or Roman Catholic school systems are free to educate their children in other schools or at home. The requirement of mandatory education therefore does not conflict with the constitutional right of parents to educate their children as their religion dictates.670

The Court’s finding in Adler effectively affirms parental constitutional rights to provide home instruction, in furtherance of their religious beliefs.

2.2.3. Defense of Parental Autonomy: Chamberlain

In 2002, the Supreme Court decided Chamberlain v. Surrey School District No. 36671 which concerned judicial review of the rejection of books promoting same-sex families by an elected school board. The Court took occasion to revisit parental rights in the public educational context, producing two different viewpoints.

Writing for the majority, Chief Justice McLachlin discussed the role of parents in the context of the British Columbia School Act as follows:

The Act recognizes that parents are entitled to play a central role in their children’s education. Indeed, the province encourages parents to operate in partnership with public schools and, where they find this difficult, permits them to homeschool their children or send them to private or religious schools where their own values and beliefs may be taught. Moreover, the curriculum at issue in this case emphasizes, through the advice it gives to teachers in the section on “Planning Your Program”, that “[t]he family is the primary educator in the development of children’s attitudes and values” (PP curriculum, at p. 6).672

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670 Adler, p. 711.
672 Chamberlain, para. 30.
While the case concerned the interpretation of a legislative provision which affects only public school curriculum, the Supreme Court considered parental rights in the broader picture of community standards for morality. Justice Gonthier presented cogent and well developed reasons in support of the “paramount role of parents in the education of children”, and although lengthy, are worthy of full citation:

In my view, the general nature of the interplay of the roles of parents and the state is clear... parents are clearly the primary actors, while the state plays a secondary, complementary role.

... Parents, exercising choice in how to raise their children, acting on the basis of their conscience, religious or otherwise, however, will be presumed to be acting in the “best interests” of their children. Generally, it is only when parental conduct falls below a “socially acceptable threshold” that the state may properly intervene: B. (R.). Thus, the role of the state is properly construed as generally providing assistance to parents to nurture and educate their children, a good example being public schools, and in extreme cases intervening to take over the parental function where the parents have failed to act in their children’s “best interests”.

Parental decision making about what is in their children’s “best interests” concerns the core of the private sphere. In B. (R.), La Forest J., for a majority of the Court, clearly situated the right of parents to rear their children according to their conscience, religious or otherwise, as a fundamental aspect of freedom of conscience and religion, protected by s. 2(a) of the Charter.

673 Section 76 of the School Act provides that “[a]ll schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.” It also emphasizes that “[t]he highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school.”

674 Gonthier dissented from the Court decision as to the correct standard of review to be applied to the School Board. His review of parental rights is in line with the majority’s holding.
I was then, and I am still of the view that the above overview is a correct statement of the law: parents clearly have the right, whether protected by s. 7 or s. 2(a) of the Charter, to nurture, educate and make decisions for their children, as long as these decisions are in the children’s “best interests”. Parents will be presumed to be acting in their children’s “best interests” unless the contrary is shown. That having been said, it is clear that, whether rooted in s. 2(a) or s. 7 of the Charter, the paramount parental right to nurture, make decisions for and direct the moral education of their children, like all rights protected by the Charter, is obviously not absolute: see B. (R.) and Jones.675

Gonthier’s judicial reasoning reflects our discussion above in Chapter 1 of the natural right of parents to act in favour of their children, prior to any state intervention or limitation. In this respect, the judge also stated that “the general approach taken by this Court is consistent” with Article 18(4) of the International Covenant on Civil and Political Rights. Referencing the experience of American courts we have reviewed in Chapter 5, he continued:

The Canadian approach is also loosely analogous to the situation in the United States, where the notions of parental rights and the integrity of the family unit have been granted constitutional status as a result of judicial interpretation of the First and Fourteenth Constitutional Amendments: see Meyer v. Nebraska, Pierce v. Society of Sisters, and Wisconsin v. Yoder, amongst numerous others...

Justice Gonthier then explained how under Canadian law the parental role is, in legal terms, delegated to schools and teachers to further the educational task, under the condition that parents ultimately possess the right to choose the environment in which their children will be educated, including at home.676

675 Chamberlain, paras. 102-104, 108 and 110 (Gonthier J.).

676 Chamberlain, paras. 111-112 (Gonthier J.): “Other cases of this Court have reiterated the paramount parental role by construing the nature of the authority schools and teachers have over children as a “delegated authority”: see R. v. Audet, 1996 CanLII 198 (S.C.C.), [1996] 2 S.C.R. 171, para. 41. In that case, La Forest J., for
He then concluded his review of the parental role in their children’s education by attaching significance to parents’ better informed understanding of what serves the well-being of their children over state developed policies or programs:

Why are parents guaranteed a paramount role in their children’s education and moral development? As was quoted above from B. (R.), the primacy of parents is “rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself”...

A parental determination of what is appropriate subject matter for their children’s education involves an examination of the psychological age or maturity of their children, as well as a parental reflection upon what conscience-based guidance they seek to impart. As one parent's affidavit puts it: “As my children’s mother, I feel I am in the best position to determine their ability to understand and deal with complex and contentious value-based issues involving human sexuality.” This evaluation is individualized, and, in my view, preferable, when possible, to assumptions which root child readiness or capability in an undifferentiated chronological analysis. In many, if not most, educational policy situations, however, general chronologically based decisions are unavoidable as a practical matter.

a majority of the Court, cited with approval a passage from Cosgrove J. in R. v. Forde, [1992] O.J. No. 1698 (QL) (Gen. Div.): “In our society the role of the teacher is second in importance only to the parent.”... In Adler, 1996 CanLII 148 (S.C.C.), [1996] 3 S.C.R. 609, at para. 196, McLachlin J., in dissent on a different point, reiterated the paramountcy of the parental role by confirming the right of parents to remove their children from the public school system and place them in an environment which is more suited to the belief system which the parents want to impart, whether that be at home or in a parochial school. The notion of a school’s authority being “delegated”, if it permits the parental control response of removing a child from the public school system, also entails that parents must be guaranteed the role of having input with regard to the values which their children will receive in school.
Even these general decisions, however, are still the result of a consensus which has been developed by the community.\textsuperscript{677}

Following Chamberlain, it appears well-settled law in Canada that the privileged role of parents in directing their children’s education, and by extension, to choose homeschooling, is constitutionally protected both under sections 2(a) and 7 of the Charter.

\section*{2.3. Provincial Jurisprudence}

\subsection*{2.3.1. Québec: Defense of the Natural Law?}

As we have seen in Chapter 4, parental education rights were guaranteed in the Québec Charter of Rights and Freedoms until very recently. Prior to the Charter, these rights had been enunciated in Québec caselaw most famously in the 1957 case of \textit{Chabot} v. School Commissioners of Lamorandière.\textsuperscript{678} \textit{Chabot} provides an excellent illustration of the use of the natural law in judicial decision-making.

A Jehovah’s Witness sought to have his children exempted from compulsory Roman Catholic religious instruction at the public school. The Québec Court of Appeal held that the provincial \textit{Education Act} could not deny the right to control the religious education of his children.

Justice Pratte quoted Lord O’Hagan of the Privy Council with approval:\textsuperscript{679}

\begin{quote}
The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law. It is not to be abrogated or abridged, without the most coercive reason.
\end{quote}

\textsuperscript{677} Chamberlain, para. 117 (Gonthier J.).

\textsuperscript{678} (1957), 12 D.L.R. (2d) 796 (Québec Q.B.) [hereinafter “Chabot”].

\textsuperscript{679} Chabot, p. 802, citing Lord O’Hagan in \textit{Re Meades} (1871), I.R. 5 Eq. 98, p. 103.
Next, Justice Casey evoked the natural law to uphold the parental right to education, stating:

What concerns us now is the denial of appellant’s rights of inviolability of conscience, a denial that is coupled with or effected by... active interference with his right to control the religious education of his children... the rights of which we have been speaking, find their source in natural law... if these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law.680

Both judges based their result in the case on the natural law principle of the primacy of parental rights; Casey adding that the principle prevails over any positive law which restricts them. Although it has not been cited in Supreme Court cases, the Chabot dicta receives deferential treatment by legal scholars. Foster has written, “After all, it has long been accepted in Québec that it is a fundamental right of parents to control the religious education of their children (Chabot) – a right now embodied in the Québec Charter.”681

Canadian legal scholar Fairweather, writing about the current section 2 Charter protections that protect parental rights, hesitated to classify them as “inalienable” in the way Casey spoke of them, but agreed that they are more fundamental than ordinary positive law.682

2.3.2. Ontario: Primacy of Children’s Rights over Parents?

The principles enunciated in Ontario education caselaw are focused less on parental rights, than affirming children’s rights.

The Ontario Court of Appeal in *Eaton v. Brant (County) Board of Education* 683 held that parents are solely the proxies of their children and must pursue what is in their children’s best interests from the perspective of the children, and not from their own perspective. The Court stated:

> Although the appellants in this case are the parents..., the interest that they advance is her interest, not their own. When it comes to asserting their daughter's constitutional right..., as provided by... the Charter, they represent her, and their own submissions to the Court are made for her and on her behalf. They are entitled to do so and their position on the Charter issue must not be confused with their position as parents in opposing the school board on what is best for their daughter's education.684

Provincial and federal courts across Canada have repeated, in cases arising from custody disputes, that children have rights independent of their parents and all decisions regarding children must be made in their “best interests.”685 The Supreme Court in *B. (R)*. stressed that “the nature of the parent-child relationship is thus not to be determined by the personal


684 Eaton, p. 12. On appeal, the Supreme Court made similar comments, observing educational decision-making in the child’s best interests is properly determined “from a subjective child-centred perspective, one which attempts to make equality meaningful from the child’s point of view as opposed to adults in his or her life,” [1997] 1 S.C.R. 241, p. 278.

desires of the parent, yet rather by the ‘best interests’ of the child.” Moreover, Iacobucci wrote:

To hold otherwise would be to risk undermining the ability of the state to exercise its legitimate *parens patriae* jurisdiction and jeopardize the *Charter’s* goal of protecting the most vulnerable members of society.” 686

Children are presumed to be incapable of making informed choices and therefore incapable of exercising their rights in an effective and meaningful manner. During this time of “diminished autonomy”, 687 the parent’s exercise their rights on their behalf and in their interests. As children mature they can acquire the capacity to exercise their rights for themselves. This fact has been recognized, for example, in the family law legislation and caselaw of various provinces. 688

In the vast majority of cases, courts acknowledge that parents act in the best interests of the children and traditionally the state has been reluctant to interfere in the private ordering of family life except in cases where the child’s well being is clearly “at risk.” 689

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687 The prevailing view is based on the idea that a child’s *maturity* many times arrives before his *majority.* B. Dickens, “The Modern Function and Limits of Parental Rights” (1981), 97 Law Quarterly Review 462, p. 485 writes: “modern function of parental rights [as being]... to prepare children and adolescents for maturity, and as minors come to achieve maturity and to exercise autonomy, this may be seen not as a limitation or defeat of parental control, but as a successful discharge of parental responsibility.”


689 *B.(R.),* para. 83 (Justice La Forest), and *Chamberlain,* para. 103 (Justice Gonthier).
As this discussion has made evident, Canadian law currently presumes parents act in their children’s “best interests” with respect to education. At times, however, judges will set aside parental rights and justify direct state interference on behalf of “children’s rights” when they decide that parents are not properly exercising their authority.

3. Homeschooling Caselaw

3.1. English Canada

As noted in Chapter 4, Ontario’s Education Act allows for homeschooling under the provisions that permit parents to exempt their children from school attendance if they are receiving “satisfactory instruction at home or elsewhere”. In the early days of homeschooling, this elastic concept resulted in conflicts between homeschooling parents and district school boards who were tasked with enforcing compulsory school attendance. Prior to the issuance of Memorandum 131 in 2002, parents’ only recourse was to seek a judicial interpretation of “satisfactory instruction”. Two decisions from this period considered the meaning of the term in the course of judging parents who were charged under the Education Act for refusing to bring their children to school.691

In Lambton County Board of Education v. Beauchamp,692 the parent educated her child at home using correspondence materials from a Christian academy in the United States. Due to a disagreement with the

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690 Chapter 4 discusses the content of Memorandum 131 and the current practice in Ontario.


local school board over the quality of instruction, the mother was charged failure to comply with compulsory school attendance. The court acquitted the homeschooling parent and expanded on the meaning of “satisfactory instruction”. While the Education Act does not provide clarification on what is acceptable, the court found that the Ontario Legislature intended that “the alternative program be of a quality comparable to that of the public school system”. 693 The court also took note of the competing interests of parents and the state in the education of the child, and the necessity to balance these interests, saying:

I have no doubt that the legislature of Ontario, in enacting the Education Act, intended a purpose with which the majority of the population agrees, and that is to maintain at least a minimum degree or standard of education for its citizens; and to that end the state is accorded the right to interfere with the rights of parents to educate their children as they wish.

Obviously, there will always be persons who for religious, cultural, or other sectarian purposes reject all of part of the public educational system, and pressing against them will be the intent of the state to protect their children from what may be the ignorance, excess, or folly of their parents which may in turn deprive their children of the right to full and free development and may result in them becoming a burden and a charge upon society as a whole.

It is very important that there be a fine balance between these contending rights and interests. 694

Evidently, the court views the public school system as the model of “satisfactory instruction” and implies that exercise of parental rights to homeschool is akin to “ignorance, excess or folly”. The rights of the state and the children appear paramount over any views the parents may have on education. That said, the court made clear that any enforcement of compulsory attendance provisions against parents requires the government to prove its case through substantial, detailed and if necessary, expert

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693 Lambton County, p. 356.
694 Lambton County, p. 361. Emphasis added.
testimony. The reports submitted in Lambton County regarding the home instruction indicated that adequate progress so the court ruled that the school board had failed to establish the parent’s guilt beyond a reasonable doubt.

R. v. Prentice, involved parents who registered their children at a private school and then classified their home as a “home campus” of the private school. In considering whether the parents failed to provide “satisfactory instruction”, the court took a different approach from the Lambton County decision. First, it noted that the Education Act’s general intent is to ensure that every child receive competent teaching “wherever and under whatever auspices it occurs and whoever is the teacher”. Secondly, the court found that while section 30 creates a “strict liability” offence, it allows parents to put forward a defense of “due diligence”. That is, parents can disprove liability by showing that they took all reasonable care in the education of their children. While the judge did not define “satisfactory instruction”, his comments implied that a program of study must possess some structure and organization: there must be adequate record-keeping procedures, periodic evaluation to determine whether a child demonstrates progress, and some purpose and direction to the instructional plan, i.e. a specific daily time schedule and a curriculum.

In a more recent Newfoundland case, Butler v. Director of Child Welfare, a religious family presented a homeschooling plan for approval but were refused by two school boards. The parents, Seventh Day Adventists, were given no reasons for the refusal, and subsequently charged and convicted of failing to provide adequate education for their children. As

695 Lambton County, p. 362.
697 Prentice, para 5.
698 Prentice, paras. 21-23.
the Butlers declined to register their children in the public school, child welfare authorities placed them in foster care. On appeal, the child welfare actions were overturned because provincial authorities could not demonstrate by proof that the children were not receiving an adequate education. Apparently, the child welfare authorities considered the parents’ religious zeal to be opposed to the interests of the children.

While an extreme example of state interference, nonetheless it shows that Canadian appellate courts will not hesitate to redress wrongs committed against parental rights. As we saw in the review of Jones and B. (R.), the Supreme Court’s interpretation of section 2(a) of the Charter indicates that freedom of religion includes the right to educate and bring up children according to one’s faith.

A number of provincial cases involving homeschooling approval or oversight followed this reasoning.700

By and large, provincial authorities generally have not interfered with the practice of home based education. This may be explained by geographical factors such as distance to the nearest school, fewer state resources to make home visits or truancy investigations, or sociological factors such as less confrontational attitudes between individual and state.

Canadian provincial jurisprudence have not entered into the mechanics of homeschooling; instead judges consider it as one factor in determining the “best interests of the child” in custody disputes and child protection claims.701 Courts have long recognized parental authority, that is, that

parents have the right to make decisions about children as they see fit. Today, however, parental authority is meant to be exercised, not over the child, but on behalf of the child.

A typical case in this respect is *Christie v. Edmundson*. Following a divorce settlement, the former spouses advanced opposing views on the education of their child. The court found that the parental right to education is outweighed by the best interests of the child: here, the unilateral parental choice to homeschool was considered “uninformed” so the judge preferred the evidence of a school principal to the parent. He stated:

> Clearly, parents should have the right to choose the form of education for their children. This case however is not about whether Mrs. Edmundson has or has not the right to choose for her child. This case centres on what is or is not in the best interest of the child.

Thus, when the courts dispense with the natural rights of parents, they will impose what the individual judge considers, based on a number of factors that adhere to “neutral” state objectives, to be the best decision for the child.

### 3.2. Québec

There is very much a statist approach to education that differentiates Québec from the rest of Canada. To cite one example, the mandatory Éthique et Culture Religieuse (ECR) course was designed and implemented by the Ministry of Education as a means of exposing children to a wide spectrum of belief systems by inculcating in them “absolute respect for every religious position”. This course applies not just to public schools but

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702 Ontario, 2002 CanLII 45545 (ONT. C.J.) [hereinafter “Christie”].

703 *Christie*, para. 8. Unsurprisingly, the judge in *Christie v. Edmundson* decided that it is not in the child’s best interest to be homeschooled.
also to all private institutions, without exemptions.\textsuperscript{704}

A 2002 judicial decision by the Cour du Québec which tested this “state knows best” mentality in Québec is \textit{Dans la situation de D. (A.)}.\textsuperscript{705} The Director of Child Protection sought a declaration over the care of four minor children, claiming that the security and development of the children was compromised by the parents’ decision to homeschool them, effectively “isolating” from society. Under the provincial statute, a child can be dispensed from compulsory attendance if he receives home instruction and undergoes an educational experience, subject to evaluation by the school board, equivalent to the school instruction.\textsuperscript{706}

In \textit{D. (A.)}, the Director was unable to provide sufficient proof of “threat” to the children’s mental or character development as required by the law for removal of minor children.\textsuperscript{707} The judge held that the parents’ act of establishing their household far from any neighbours did not in itself

\textsuperscript{704} Parents upset with the usurpation of their freedom of education to choose what their children are taught initiated court challenges against ECR. In June 2010, a Québec Superior Court ruled in favour of parents and the Jesuit School attended by their children: \textit{Loyola High School c. Michelle Courchesne, en sa qualité de Ministre de l’éducation, du loisir et du sport, 2010 QCCS 2631} (decision reported on 18 June 2010), currently on appeal. The Court ruled that the state imposition of the ECR course denied the religious values espoused by the parents and therefore violated the Québec \textit{Charter}. The Québec Superior Court decided that the state is obliged to provide an exemption from the ECR course for a school offering an equivalent program, albeit with a different pedagogical approach that does not dilute religious identity.

\textsuperscript{705} 2002 CanLII 30210 (QC C.Q.).

\textsuperscript{706} \textit{Loi sur l’instruction publique}, L.R.Q. chap. I-13-3, s. 15(4). The original reads: “un enfant peut être dispensé de cette obligation si cet enfant reçoit à la maison un enseignement et y vit une expérience éducative qui, d’après une évaluation faite par la commission scolaire ou à sa demande sont équivalent à ce qui est dispensé ou vécu à l’école.”

\textsuperscript{707} \textit{Loi sur la protection de la jeunesse}, article 38 b). The original reads: “si son développement mental ou affectif est menacé par l’absence de soins appropriés ou par l’isolement dans lequel il est maintenu ou par un rejet affectif grave et continu de la part de ses parents.”

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constitute such a threat, although indicative of the parents’ failure to understand the importance of socializing their children and manifesting a tendency to “close in on themselves.” The judge found insufficient proof to substantiate a “threat”, understood as “an immediate danger”, that required the removal of the children. The court had the good sense to uphold the parental education rights despite concern over the “isolation” of the children.

A more recent case *Dans la situation de l’enfant X*\(^{708}\) considered an application by the Director of Child Protection and upheld the parents’ defense. The court cited *B. (R.*) in support of the proposition that in Québec, despite changes to the provincial Charter, parents continue to have the right to choose how to raise and educate their children.

### 4. The Canadian Approach to Homeschooling Abroad

Concurrently with the United States, Canada received an immigration asylum petition involving a German homeschooling family.\(^{709}\) In a reported decision of the Immigration Review Board, a woman and her family sought unsuccessfully to home school her children in their native country. Germany has strict compulsory attendance requirements and aggressively enforces the law as against parents in the interests of fostering diversity and mutual tolerance through the public educational system.\(^{710}\)

Although the children had received exemption for health reasons, the state overturned a doctor’s decision to carry out the public objectives.

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708 2009 QCCQ 17187 (CANLII).
709 *In re Immigration X*, 2010 CanLII 80881 (I.R.B.) [hereinafter “Immigration X”].
710 See A. Martin, Homeschooling, previously cited, for a comprehensive review of homeschooling in Germany.
Following several years of persecution by state officials for illegally homeschooling their children, X and her family fled to the Canada and sought political asylum on the grounds of religious freedom. In 2010, a federal immigration adjudicator in Calgary rejected their claim, distinguishing the United States immigration decision concerning the Romeike family, discussed in Chapter 5.

The adjudicator initially found that homeschooling families are a “particular social group” under both United Nations criteria and Supreme Court of Canada jurisprudence. However, she went on to reject the argument that Germany’s mandatory school attendance law, which effectively prohibits homeschooling, creates a well-founded fear of persecution and risk of harm. The adjudicator also ruled that penalties imposed by German law for refusing mandatory school attendance are not persecutory and do not violate basic human rights.

Based on the comparison of the Romeike decision and the Canadian Immigration case, it would appear that the treatment of homeschooling asylum claimants in the United States and Canada will meet with diverse results.

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713 Immigration X, paras. 28-56. The tribunal carried out a lengthy review of Germany’s human rights record and respect for democratic values to determine the legitimacy of its laws on education.

714 Immigration X, paras. 57-78.
5. The Present State of Homeschooling Regulation in Canada

As reviewed in Chapter 4, homeschooling is legal in all provinces and territories of Canada, although regulated in varying degrees. The only situation where courts have adjudicated on specific regulatory requirements is Jones, discussed above. Justice La Forest found the provincial teacher certification to be consistent with Charter values, stating:

A requirement that a person who gives instruction at home or elsewhere have that instruction certified as being efficient is, in my view, demonstrably justified in a free and democratic society. So too, I would think, is a subsidiary requirement that those who wish to give such instruction make application to the appropriate authorities for certification that such instruction complies with provincial standards of efficiency. Such a requirement constitutes a minimal, or as the trial judge put it, peripheral intrusion on religion. To permit anyone to ignore it on the basis of religious conviction would create an unwarranted burden on the operation of a legitimate legislative scheme to assure a reasonable standard of education.715

Jones therefore recognizes that professional educators are the most qualified individuals to determine whether instruction is satisfactory. Despite this ruling, many homeschooling parents and their associations refuse to accept the authority of the school board’s right to monitor their children’s education.

Speaking for the Court, Justice La Forest refrained from setting limits on homeschooling regulation and enunciated the law in Canada as follows:

How far the province could go in imposing conditions on the way the appellant provides instruction, if he had applied for registration of his academy as a private school or for certification of the efficiency of his instruction, I need not enter into. Certainly a reasonable accommodation would have to be made in dealing with this issue to

715 Jones, para. 28. Emphasis added.
ensure that provincial interests in the quality of education were met in away that did not unduly encroach on the religious convictions of the appellant. In determining whether pupils are under “efficient instruction”, it would be necessary to delicately and sensitively weigh the competing interests so as to respect, as much as possible, the religious convictions of the appellant as guaranteed by the Charter. Those who administer the province’s educational requirements may not do so in a manner that unreasonably infringes on the right of parents to teach their children in accordance with their religious convictions. The interference must be demonstrably justified.716

The Court’s balancing of parental and state interests in home education as set out in the “unreasonable infringement” test allows for parents to determine the method and content of their children’s education with minimal state intrusion. To date this balance has not been challenged judicially, as school board officials have meager resources to carry out any significant monitoring of homeschoolers. Nor do the school authorities necessarily wish to interfere with parents who have actively decided to opt out of the publicly funded education system.717 With some exceptions, school boards do not receive specifically targeted government funds to cover the costs of monitoring homeschoolers.718

Conclusions

This Chapter has addressed the status of parental rights and homeschooling in Canada. Since the 1982 constitutional enactment of the

716 Jones, para. 25. Emphasis added.
718 Under British Columbia’s School Act, the school district where homeschooled children are registered receives CAN$250 per child for administering the registration process and offering educational resources and assessment instruments to parents.
Charter of Rights and Freedoms, the Supreme Court has enunciated principles which explicitly guarantee the right of parents to independent and homeschooling. The protection of these rights flows from the freedom of conscience and religion under section 2, and the liberty interest under section 7. Thus it can be said that Canada’s constitution protects the educational rights of parents to ensure the religious education of their children in conformity with their own convictions. It must be said, however, that the Court’s repeated interpretation of “tolerance” and “secularism”, as visibly demonstrated in the Chamberlain case may lead to state intrusion in family affairs concerning education.

Nevertheless, federal and provincial courts have not adjudicated as to the question of how much regulation or monitoring is constitutionally permissible, or interpreted the ambit of the homeschooling regulations in force across Canada.

Provincial caselaw does show that the homeschooling right is accepted generally, although in the context of custody proceedings and child protection actions courts may make value judgements as to whether such education is in the “best interests of the child”.

As a result of this review, we can fashion a series of propositions supported by Canadian caselaw.

1. Parents have constitutionally protected liberty interests in their relationship with their children.\(^ {719}\) This includes recognition of the natural law principle of parents as the first educators.\(^ {720}\)

2. Provincial regulation supports the right of the state to regulate

\(^{719}\) Jones found that the 1982 Constitution guarantees the freedom of parents to direct the upbringing and education of children; B.(R.) and Chamberlain went further by affirming the freedom of parents to choose the moral education of their children.

\(^{720}\) Chabot still stands as good law for the principle that parents have the innate (that is, not given them by the state) right to direct the moral education of their children. The Gonthier dissent in Chamberlain likewise repeats the primary role of parents arising from their act of giving life.
homeschools, acknowledged by the Supreme Court.721

3. The Supreme Court has upheld state approval of curriculum plans and certification of teachers.722

4. With respect to parental autonomy, courts have acknowledged religious protection for homeschooling.723

5. Where an absence of regulation could result in abuse of children’s rights, the courts will favour the state’s compelling interest over parental rights.724

The Canadian context for homeschooling manifests a lower profile and reflects the less confrontational attitudes of parents. The 1982 Constitution has provided an opportunity to define parental rights and clarify the place of homeschooling as another schooling option. The state’s duty is properly balanced with supportive provincial regimes for homeschooling. Compromise is a preeminent Canadian virtue and this is manifested in the current state of the law. It may be that future judicial decisions may interpret specific homeschooling legislation to the detriment of parents, but at the moment a large measure of parental choice is guaranteed for families dissatisfied with institutional schooling, whether public or private.

721 Jones or B.(R.) also stated that the state has the power to reasonably regulate all schools, inspect, supervise, and examine them, their teachers and pupils.

722 Jones and B.(R.). held that provinces can require application for approval of homeschool plans and teacher certification.

723 Jones, B.(R.), and Adler all upheld parental rights to homeschooling for religious reasons under section 2(a) of the Charter.

724 B.(R.) reiterated the parens patriae jurisdiction of the state, Young v. Young and P. (D.) v. S. (C.), both upheld the constitutionality of the “best interests of the child” standard.
OVERALL CONCLUSIONS

This thesis began by posing a series of questions. Is it for the state or for parents to decide what and how the child studies? Can a balance be achieved between a state-imposed liberal education and the rights of communities and families to promote their cultural and religious values? How can parents retain their critical role of transmitting their moral and religious convictions and conserving their proper cultural identity to the next generation?

We have seen that parents must take seriously their children’s education, more so given a value-neutral public education and morally suspect school environment. For this reason, some parents have undertaken alternative methods of ensuring that their children receive a good education and a proper moral upbringing. This study has focused on the choice of homeschooling, whereby children receive their formal education directly from parents at home. These parents must reconcile their decision with the state’s legitimate interest in the education of its future citizens. This thesis has described the situation and made recommendations for striking a balance between the state’s interest in education and the prior rights of parents. The balancing of competing interests will not satisfy everyone, but good public policy is usually the fruit of reasoned debate and a fair bit of compromise.

Our study indicates that states have the obligation to permit structures or methods outside the public school system such as private schools and homeschooling, although they retain the right to regulate such schooling. After all, without some type of monitoring for basic literacy and scientific achievement, how will parents and schools be cognizant of the quality or shortcomings of the child’s academic achievement?
Parental rights affirmed

In this context, the natural right of parents to the education of their children is especially important today. As we saw in Chapter 1, we can find valuable support in contemporary human rights declarations which explicitly recognize the parental right to choose the means to educate their children intellectually, morally, and socially. In addition to this internationally enshrined right, we have seen in Magisterial teaching that parents have an accompanying responsibility to promote educational alternatives that protect their family’s cultural and moral identity in the face of encroaching state secularization. The exercise of this right-duty, whether through the establishment of private educational institutions or the undertaking of a homeschooling program, constitutes a manifestation of private initiative in the educational field and is, moreover, a sign of a healthy democratic society. In this respect, the exercise of parental rights to education is a mature expression of social freedom. While international law has moved decidedly towards protecting the children’s own rights, this need not lessen the principle that parents possess a great measure of discretion to choose the best education for their children.

The natural law informs the Church’s Magisterium and the education canons of the Code of Canon Law concerning the primary role of parents in providing a Christian education to their children. The Church supports the integral development of the human person, expressed in the Code of Canon Law as a process wherein the parents act in harmony with the Church and the state. Parents, who have received a unique responsibility by virtue of generation, have the right to direct the formation of their children freely, that is without external constraints. The state should provide an environment that furthers parental freedom to choose the best educational project for their children, with minimal interference.

Homeschooling is a growing movement

We have seen in Chapter 2 that homeschooling represents a specific parental choice for the education of their children, for a host of documented reasons. We also saw how the favourable legal and political climate of the past two decades has notably aided homeschooling’s expansion throughout the United States and, to a lesser extent, Canada. Homeschooling facilitates the teaching of values, religious and non-religious, that responsible parents
seek to inculcate in their children: in this respect, it is less a matter of "protection" from negative socialization in the public school system than an affirmation of particular identity and an inculcation of a critical attitude to conformist mores. Perhaps the most valuable lesson that can be drawn from the rise of homeschooling in English and French-speaking North America is that parental encouragement, and by extension direct parental involvement, is extremely influential for cultivating moral character and intellectual maturity in today’s youth.

**State regulation varies**

In Chapters 3 and 4, our review of state legislation in the United States and Canada shows that both governments see homeschooling as an acceptable alternative to the public school system. While jurisdictions in both countries require that every child receive a minimum level of education, they have developed diverse rules to allow parents to choose homeschooling. State laws and regulations accept the basic premise of parental responsibility, but also impose varying levels of regulation, in many cases dependant on the socio-cultural preferences of their own citizens. More remote, traditional communities tend to advocate homeschooling with few rules, while the more state-centralized, politically liberal areas have placed increased statutory limitations on homeschooling parents. In some Canadian jurisdictions, public funding for homeschooling goes hand in hand with increased regulation, leading to debate over the right balance of state interference in parental educational choices.

Legislation in all states and provinces is focused on the development of technically competent, socially integrated citizens; the fact that some parents want to facilitate this objective for the state, by taking on the numerous tasks involved with educating their children at home, is legally and politically acceptable in twenty-first century United States and Canada. The state’s concern with truancy and with irresponsible parenting is a manifestation of the principle of the best interests of the child also present in the legal rules that clothe homeschooling. Parental rights to choose homeschooling are protected, although the debate as to the appropriate and constitutionally permissible level of regulation remains open. From our review, it would appear that the state’s compelling interest in the education of its citizens allows for regulations that least restrict parental rights. As a
result, states and provinces have in law and practice accepted that homeschoolers can provide a minimum quality standard of education within a range of approaches, subject to regular monitoring that includes standardized testing and curriculum requirements, but almost universally excludes teacher certification. Current regulations in most states give parents substantial control over both the choice to homeschool and what curriculum will be taught.

Courts provide both protection and uncertainty

The review and analysis of jurisprudence in Chapter 5 has shown that interpretation of state laws by the courts is not always consistent and creates uncertainty over which rights parents, have and where the state can intervene.

In United States jurisprudence, federal cases — and Supreme Court cases in particular — most often come down on the side of strong parental rights over the education of children. The basic legal precedents of Meyer v. Nebraska and Pierce v. Society of Sisters protect parental rights to control their children’s education. Meyer stands for the principle that the state cannot indiscriminately limit parental control. Pierce enunciated the Court’s general approach: “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” According to Yoder v. Wisconsin, these obligations have been judicially defined as “moral standards, religious beliefs, and elements of good citizenship.” Nevertheless, in the more than eighty years since Pierce, the Supreme Court has struggled to balance the educational interests of parents and the state, all the while claiming to be mindful of children’s best interests. While the Court has enunciated constitutional rights in favour of parents to send their children to private schools, it has refrained from granting constitutional protection to homeschooling (Runyon v. McCrary).

Both Meyer and Pierce, reinforced by the Troxel v. Granville decision, lend powerful support to parents’ fundamental right not only to direct the rearing of their children, but also to oversee their education. It is not educators, but parents, who have primary rights in the upbringing of children: school officials have only a secondary responsibility and must respect parental rights.
The principal arguments used to challenge homeschooling regulation in the courts are based on the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment. Some homeschooling parents claim a fundamental liberty interest in directing their children’s education protected by the substantive component of due process. Others claim that the religious content of their instruction and their belief that they have a moral obligation to personally teach their children render homeschooling a form of protected religious practice.

In the case of religious-based homeschoolers, federal and state courts have not found it easy to balance the state’s compelling interest in education with the Free Exercise Clause. The Supreme Court’s failure to clearly articulate the scope of, and protections for, parental rights when joined with the right to free exercise of religion has left the constitutional landscape uncertain. Following the decision in Employment Division, Department of Human Resources of Oregon v. Smith, the precedential value of Yoder involving the conjunction of parental and free exercise rights remains unclear. Lower courts continue to recognize Yoder’s strict scrutiny approach. As noted in Chapter 2, a large majority of students are homeschooled for religious reasons. Consequently, the existence of a special category of constitutional claims for religious homeschoolers is of particular importance to legislators, homeschooling parents, students, and the general public.

We have seen in this thesis that the United States has a long judicial tradition of support for parental rights. Such legal protection of parents’ right to control their children’s moral and educational upbringing is indispensable to the health of a liberal democracy. As parents have the primary responsibility for raising and educating their children, they are tasked with cultivating virtue and fitting their children for participation in social and political life. Pierce stressed the importance of requiring “that certain studies plainly essential to good citizenship… be taught, and that nothing be taught which is manifestly inimical to the public welfare.” What is not evident, however, is how courts can decide that a particular homeschooling curriculum promotes “good citizenship” or conversely, transmits “manifestly inimical” values.
In summary, judicial outcomes for homeschooling parents in the United States have generally been favourable, although courts have upheld some state requirements that might be taken to infringe on parental autonomy, such as curriculum evaluation or standardized testing. In the past three decades, democratic legislatures have largely acceded to the wishes of homeschooling parents, but courts have had little hesitation in rejecting attempts by parents to remove government intervention from home education entirely. The state’s compelling interest, taking into account heightened sensitivity to children’s rights, has led courts to uphold monitoring programs to ensure a basic level of education.

In Canada, homeschooling jurisprudence is less adversarial. Parental rights are protected under the Charter of Rights and Freedoms, in large part subject to a prior recognition of children’s rights. The regulation of homeschooling, possibly due to its smaller numbers, has received little direct judicial attention to date.

Children’s Rights vs. Parents’ Rights?

As we have seen in this thesis, the theme of children’s rights looms large in the context of homeschooling. Parental freedom of choice is limited, as it were, by the importance given in law and society at large to place the child’s interest above that of parents.

Critics of homeschooling discussed in Chapter 3 claim that the current level of regulation in many states leaves the education of homeschooled children largely or entirely unprotected. They would have legislators and judges take notice of the potential harm to children educated without standards or oversight and urge states to re-examine the appropriate level of regulation. In particular, they argue that removing children from institutional schools, public or private, damages the state’s interest in and systems for protecting the mental and physical welfare of children. Homeschooling parents have, in effect, received exemptions from laws designed to protect children, and have thwarted the state’s interest in the health and safety of its citizens that are applicable to students in any other educational setting. This position is most succinctly summed up in dicta from Yoder which supported Wisconsin’s strong interest in providing access to education in order to prevent children from “becom[ing] burdens on society because of educational shortcomings.”
Additionally, the Supreme Court has stated that, while parents have fundamental liberty interests in the upbringing of their children, these can be overridden, even to the point of deprivation of custody, by the state’s *parens patriae* interests in child welfare, given sufficient evidence of neglect or abuse (*Santosky v. Kramer*). Thus, if homeschooling monitoring mechanisms uncover “clear and convincing” evidence of abuse, neglect, or substantially unequal learning opportunities, the state has the authority to override parents’ choices and possibly to require that children be sent to institutional schools.

As Chapter 1 showed, the exercise of parental rights is more correctly viewed as preparing children and adolescents for maturity, and for this reason parental oversight of moral and cultural development occupies a privileged place. As their children grow, parents have the grave responsibility to act in their best interests with minimal interference from the state. The argument that granting parents the plenary authority to make educational determinations threatens to infringe upon the rights of the children themselves is intellectual posturing. Children’s rights are not a battle between children and parents as if the two were mutually opposed. Children are a gift; parents do not own them but must exercise stewardship, ensuring their proper upbringing among other means by shielding them from negative influences, whether the family is religious or not. It is a responsible parental choice, whereby parents act not only as teachers but also as guardians of their children’s moral development. Home education provides parents with a legal option to instruct their children with their own moral values.

As discussed in Chapter 2, serious academic studies have shown that homeschooling fully integrates children into society. Among other things, families that choose home education consider that this method assists children to be more autonomous or critical of conformist societal thinking and conduct. Moreover, social science research indicates what might be expected by common sense: that parents generally act in their children’s best interests and thus are properly entrusted with directing the child’s moral and religious training.
Parental and State Rights in Harmony?

Should homeschooling present a conflict between the constitutional right of parents to direct the education of their children and the state’s right to impose regulations in the interest of ensuring an educated citizenry? This thesis argues that there is no reason why harmony should not exist between the two, and that any proposed regulation ought to be reasonable. To cite a concrete example, while a state may be able to show that protecting the safety of children is a compelling interest, it would be hard to argue that home visits to every child are necessary to protect that interest.

The state’s interest is more appropriately described as enabling parents to provide for their children’s education—by either providing public schools or permitting parents to use alternative education. Perhaps, therefore, state and parental interests coincide more than would initially appear. As this study has shown, homeschooling truly serves a state’s interest in education, and therefore it is to the state’s advantage to ensure that parents remain free to homeschool their children if that is their choice.

Judicial decisions discussed above have for the most part resolved homeschooling cases through examination of whether state regulation unreasonably burdens the rights of parents. Those in favour of homeschooling argue, not unreasonably, that the state interest is rather the advancement of education, not the method by which it is achieved. Homeschooled children have certain evident advantages: homeschool educators deal with smaller class sizes and thus can provide a more hands-on approach to teaching; they are able to more easily adapt their methods to the particular characteristics of the student; and they have personal, rather than professional, incentives to educate each student. Additionally, many homeschooling parents consider that homeschooling protects their children from the “negative socialization” that occurs in institutional educational atmospheres, which can be severely detrimental to the learning process.

Moreover, as Chapter 2 indicated, empirical social science research demonstrates that homeschooling is successful, according to measurements of test scores, college admissions, and participation in civil life by those who have been homeschooled. This leads necessarily to the conclusion that teacher certification has no correlation to homeschooled student outcomes.
and would be an unreasonable burden on parents who choose homeschooling and deter the state’s interest in education.

Periodic formal assessment of homeschooled children, whether the standardized tests taken every year as the public school students in that state, testing in a form mutually acceptable to both parent and the state, or qualitative evaluations, may be the most suitable compromise between state and parents.

Periodic testing of homeschoolers favours a successful educational outcome by assuring a good education for children while also respecting a parent’s right to oversee their education and upbringing. If the real issue underlying homeschooling statutes and regulation is the education of children and not the manner in which that education is given, then these recommendations will ensure that children receive an education without undue state interference.

Critics who object to unlimited parental rights tend to consider the state’s compelling interest in ensuring that all children receive a basic education as sufficient justification for monitoring home educational programs. Since the state justifies its mandated approval or accreditation in the private school context to ensure compliance with minimum educational standards, opponents of unregulated homeschooling argue why should there be separate treatment for homeschooling? Others go further, urging the state to withdraw its consent to parents that flagrantly violate curriculum or testing requirements. More statist positions arise from more ideological concerns for tolerance, gender equality, and ensuring that homeschooled children have contact with mandated child abuse reporters and other social service providers.

This thesis supports a relatively laissez-faire approach to regulating homeschooling, in so far as most evidence indicates that parents are resourceful and sufficiently organized to provide a quality education. As such, the most sensible regulations would be minimal, that is, requiring home educated children to demonstrate competence in basic subject matters through state-administered achievement tests or an agreed-upon alternative means, as recommended in Chapter 3. Whatever the educational requirements on homeschooling imposed by legislature or courts, in general they should constitute options offered to parents that are rational.
and consistent with democratic ideals of ordered liberty and the exercise of virtue.

**The Current Status of Homeschooling and Recommendations**

In general lines, we can describe the current legal status of homeschooling in North America as follows. Both the United States and Canada recognize parental rights to educate their children at home and provide basic principles and specific policies that support homeschooling. In the United States, state legislation provides regulation of high variance while judicial decisions are largely conflicting. Based upon our review, it is fair to say that the law on homeschooling, while voluminous, is unsettled and there are signs of a trend towards re-regulation. For its part, Canada offers generally positive provincial legislation and few judicial decisions directly on regulatory issues. Homeschooling is secure for now.

In closing this study of parental education rights and their manifestation in homeschooling, we set out four recommendations that would aid the future growth of homeschooling in the United States and Canada.

1. While the state can impose compulsory education, parents ought to have free choice of school or other educational context and direct the education of their children according to their own beliefs and convictions.

2. A clear definition by the United States Supreme Court of the constitutional protections attached to homeschooling would provide a useful precedent to assist legislators and interested groups to act with greater certainty.

3. Legislatures have the obligation to address concerns that home education may be used as a cover for abuse, educational neglect, or deprivation of a threshold level of basic education for each child. They should, however, bear in mind that homeschooling unobstructed by regulation or subject only to minimal or unenforced oversight has been shown to lead to successful academic and social outcomes.

4. Each jurisdiction should engage in reasoned and deliberative dialogue about where the state’s interest ultimately lies with respect to the
appropriate level of homeschooling regulation that protect the interests of both parents and children.

**Final Thoughts**

To conclude as we began, the Church and international law both recognize that all parents have a primary responsibility to educate their children, which the state must respect and ought to facilitate by legal means. Education involves the development of the human person, beyond merely technical training, and includes preparation for citizenship and participation in civil society. In free societies like the United States and Canada, while the state has developed compulsory public schooling in order to form its citizens, parents retain the right to choose to organize their own educational program and thus form their children’s moral and social dimensions independently of the state. In addition to providing an individualized, focused education, these families nurture a strong identity in their children around a set of core values. The contribution these parents make to society goes beyond the direct education of their children: they also contribute to pluralism in society with their diverse points of view. That is, parental rights to choose alternative education do not diminish the body politic: rather, they invigorate healthy democratic societies. As has been recognized in the United States and Canada, parental rights to education are a positive contribution, not a weakening factor, in the social fabric.

Homeschooling has proven to be a successful educational alternative with substantial benefits for many students, and one that an increasing, though still small, proportion of the population chooses. Legislative and judicial protection have resulted in a flourishing homeschooling movement in the United States and Canada, based in large measure on the religious pluralism and social diversity of both countries. Parents unhappy with the public school system have real choices, and school officials who apply homeschooling regulations generally do so in positive and non-intrusive ways. The adversarial approach that may have been present in the early days of the movement has evolved into a legal situation that accepts parents’ rights over their children’s education, as long as these are in keeping with community and societal values of tolerance, diversity and integration. This reality, while still vulnerable in the face of judicial and legislative uncertainty, will allow the homeschooling movement continued
future growth to the extent that parents reject public or private institutional schooling in favour of home education.

In homeschooling, the child is educated in accordance with the parents’ wishes and the state’s interest is achieved. From our review of homeschooling outcomes, it would appear that when parents are motivated and well-organized, home education works better than public schooling. For statists and those favouring standard curricula, it is particularly difficult to accept that home education provides personal character education in addition to competitive academic results, as measured by state-sponsored assessment. Opponents and those skeptical of the true value of homeschooling seeking to reverse the de-regulation of homeschooling on the grounds that it masks educational deficiencies or promotes intolerant views unfit for democratic society ought to consider the movement on its merits rather than presenting a worst-case scenario. The evidence shows that their fears have little or no grounding in fact. This thesis has argued that while the line where parental rights “end” and where the state’s rights “begin” is not crystal-clear, it is in the state’s best interest to promote rather than constrain homeschooling.
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