

## HOMESCHOOLING: THE FUTURE OF EDUCATION'S MOST BASIC INSTITUTION

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### I. INTRODUCTION

HOMESCHOOLING in the United States is “the fastest growing sector of K-12 schooling.”<sup>1</sup> The National Center for Education Statistics estimated that 1.1 million students received their schooling from home in the United States in 2003.<sup>2</sup> This number represents approximately 2.2% of the entire student body in America.<sup>3</sup> By contrast, only 15,000 students received home education 20 years ago.<sup>4</sup>

Although homeschooling in America dates back to colonial times, advocates express concern for its future.<sup>5</sup> A recent California case, *In re Rachel L.*,<sup>6</sup> shocked homeschooling advocate groups such as the Home School Legal Defense Association because the decision questioned parents’ right to homeschool their children.<sup>7</sup> The court stated that “parents do not have a constitutional right to homeschool their children.”<sup>8</sup> The court later recanted its position and granted a petition for rehearing as a result of the “immediate public outcry” caused by its ruling in *Rachel*.<sup>9</sup> In its rehearing, the court of appeals

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1. Rob Reich, *Homeschooling Should Be Regulated*, in HOME SCHOOLING 29 (Heidi Williams ed., 2007).

2. *Introduction* to HOME SCHOOLING, *supra* note 1, at 7.

3. *Id.*

4. SHELDON MARCUS & PHILIP D. VAIRO, HOT-BUTTON ISSUES IN TODAY’S SCHOOLS: WHAT EVERY PARENT NEEDS TO KNOW 144 (2006).

5. Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 76-77 (2002); *Coming Together in California*, HOME SCH. LEGAL DEF. ASS’N, (Mar. 26, 2008), <http://www.hslda.org/hs/state/ca/200803260.asp>.

6. *Rachel L. v. Superior Court (In re Rachel L.)*, 73 Cal. Rptr. 3d 77 (Ct. App. 2008).

7. *Coming Together in California*, *supra* note 5.

8. *In re Rachel L.*, 73 Cal. Rptr. 3d at 79.

9. Chad Olsen, Note, *Constitutionality of Home Education: How the Supreme Court and American History Endorse Parental Choice*, 2009 BYU EDUC. & L.J. 399, 399.

reversed its decision and assured California residents of their right to homeschool.<sup>10</sup>

While the opinion issued in the rehearing dispelled immediate fears for homeschooling's future, threats remain.<sup>11</sup> This article explores these threats to homeschooling and offers homeschooling advocates options for overcoming them. Part II of this article addresses homeschooling as it has developed throughout America's history, stemming from compulsory attendance laws and evolving into its current state of universal legality with differing forms of regulation in each state. Part III focuses on the current homeschooling environment and discusses homeschooling regulation among the states. Part IV examines two potential threats to homeschooling in America: the potential ratification of the United Nations Convention on the Rights of the Child, and increases in homeschooling regulation through changes in state compulsory attendance laws. Finally, Part V summarizes homeschooling regulation and presents a brief conclusion. Although parents may homeschool their children in all 50 states, threats to the practice continue to require diligent efforts by its advocates to preserve homeschooling's status as America's most basic institution.

## II. THE DEVELOPMENT OF HOMESCHOOLING IN AMERICA

A favorable public perception surrounded homeschooling from the founding of the United States until the middle of the nineteenth century.<sup>12</sup> In the years following the adoption of the Constitution, people viewed homeschooling as a parental right and responsibility.<sup>13</sup> Well into the nineteenth century, parents commonly used homeschooling as part of the educational process for their children.<sup>14</sup> In general, this educational approach finds support in much of human history.<sup>15</sup>

Although Americans historically viewed homeschooling favorably, compulsory attendance laws limited the use of home-based education in favor of public education.<sup>16</sup> The first U.S. compulsory attendance law dates back to 1852, when Massachusetts enacted a statute requiring children to attend at least 12 weeks of school unless they could not afford to do so.<sup>17</sup> By 1918, all states had enacted compulsory attendance laws, largely in an effort to bridge income gaps and to assimilate new immigrants into the American system.<sup>18</sup> These laws gained

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10. Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 576 (Ct. App. 2008).

11. Olsen, *supra* note 9, at 400 ("[T]he debate of 'home schooling versus public schooling' is unnecessary, because home education's validity in America is unquestionable.").

12. *Id.* at 415-16.

13. *Id.* at 416.

14. McMullen, *supra* note 5, at 76.

15. ANNA DiSTEFANO, KJELL ERIK RUDESTAM & ROBERT SILVERMAN, *ENCYCLOPEDIA OF DISTRIBUTED LEARNING* 221 (2004).

16. Olsen, *supra* note 9, at 416-17.

17. *Id.* at 416 & n.149.

18. Scott Woodruff, *Compulsory Threats to Education, Freedom*, WASH. TIMES (Apr. 17, 2001), available at <http://www.hslda.org/docs/news/washingtontimes/200104170.asp>.

strong support and universal acceptance by the early twentieth century.<sup>19</sup> Expectations of institutionalized, public education directly corresponded to the push for compulsory attendance laws.<sup>20</sup>

Compulsory attendance laws negatively affected homeschooling by leading to a shift from the use of homeschooling to a preference for public education.<sup>21</sup> By requiring children to attend public schools, compulsory attendance laws allowed public education advocates to flout the traditional parental right to determine the appropriate education for children.<sup>22</sup>

In 1923, the U.S. Supreme Court granted certiorari in *Meyer v. Nebraska* to address compulsory attendance laws, and to decide the extent of parents' rights to control their child's upbringing.<sup>23</sup> In this case, the trial court convicted Meyer of violating a Nebraska law that prohibited all persons from teaching any subject in a language other than English to any person who had not passed the eighth grade.<sup>24</sup> Meyer allegedly "unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of ten years, who had not attained and successfully passed the eighth grade."<sup>25</sup> Upon review, the Supreme Court of Nebraska affirmed the lower court's judgment and declared the statute constitutional.<sup>26</sup> The court held that the statute complied with the Fourteenth Amendment as a valid exercise of the legislature's power to regulate for the people's health, safety, and morals<sup>27</sup> because the court decided that the statute promoted the English language as the primary language of Nebraska's children.<sup>28</sup>

Examining the statute's constitutionality, the U.S. Supreme Court first highlighted education as a matter of "supreme importance."<sup>29</sup> Instead of agreeing with the Nebraska Supreme Court, which viewed the statute as a legitimate exercise of the state's police power, the U.S. Supreme Court characterized the statute as an interference with parents' ability to control their children's education.<sup>30</sup> The Court reversed the Nebraska Supreme Court, classified the statute as an arbitrary and unreasonable exercise of legislative power, and struck down the Nebraska law as unconstitutional.<sup>31</sup>

*Meyer* established a parental right to control the upbringing of one's children.<sup>32</sup> In fact, in 2000 the Supreme Court emphasized that the right

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19. McMullen, *supra* note 5, at 77.

20. *See id.*

21. *Id.*

22. *See* Olsen, *supra* note 9, at 416.

23. 262 U.S. 390 (1923).

24. *Id.* at 396-97.

25. *Id.*

26. *Id.* at 397.

27. *Id.*

28. *Id.* at 398.

29. *Id.* at 400.

30. *Id.* at 401.

31. *Id.* at 403 (finding the statute unconstitutional as it was applied to *Meyer*).

32. *See* *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (characterizing *Meyer*'s holding as establishing a parental right "to direct the upbringing and education of children under [parental] control"). *See also* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer*

established by *Meyer* is “perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>33</sup> After *Meyer*, however, questions remained regarding the extent to which parental rights empowered parents to choose the location of their children’s education.

The Court addressed this very issue in 1925 in *Pierce v. Society of Sisters*.<sup>34</sup> In *Pierce*, the Court used *Meyer*’s idea of the parental right to control a child’s upbringing.<sup>35</sup> Unlike the statute at issue in *Meyer*, however, *Pierce* dealt with a statute mandating public education.<sup>36</sup> Two private schools (Society of Sisters and Hill Military Academy) brought suit and challenged the constitutionality of Oregon’s Compulsory Education Act.<sup>37</sup> The challenged statute required every child between the ages of eight and sixteen to attend public school,<sup>38</sup> and made a parent’s failure to send the child to public school a misdemeanor.<sup>39</sup>

The Society of Sisters operated private religious schools.<sup>40</sup> These schools taught all the material covered in public schools, in addition to religious material according to the doctrine of the Roman Catholic Church.<sup>41</sup> Hill Military Academy operated a military school, providing military training coupled with an education curriculum that met the Oregon Board of Education’s requirements.<sup>42</sup> Inevitably, the Oregon compulsory attendance statute resulted in parents refusing to send their children to schools such as those operated by the plaintiffs.<sup>43</sup> In fact, the statute forced parents to withdraw children enrolled in private schools.<sup>44</sup> The trial court granted the plaintiffs’ preliminary injunction,<sup>45</sup> applying property law and a parental right to “direct the education of children by selecting reputable teachers and places.”<sup>46</sup>

The U.S. Supreme Court applied the parental right first articulated in *Meyer* and affirmed the trial court’s ruling.<sup>47</sup> The Court recognized that the statute interfered with parents’ ability to “direct the upbringing and education of children under their control.”<sup>48</sup> The Court further stated:

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v. *Nebraska* for the proposition that *Meyer* established the right control “the education and upbringing of one’s children”).

33. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

34. 268 U.S. at 535.

35. *Id.* at 534-35.

36. *Id.* at 530.

37. *Id.* at 532-33.

38. *Id.* at 530.

39. *Id.*

40. *Id.* at 531-32.

41. *Id.* at 532.

42. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 532-33 (1925).

43. *Id.* at 533.

44. *Id.*

45. *Id.* at 533-34.

46. *Id.* at 534.

47. *Id.*

48. *Id.* at 534-35.

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.<sup>49</sup>

In *Pierce*, private schools brought suit, emphasizing *business interests* in maintaining educational institutions.<sup>50</sup> Fifty-two years after *Pierce*, the Supreme Court's decision in *Maher v. Roe* summarized *Meyer* and *Pierce* as "invalidat[ing] substantial restrictions on constitutionally protected liberty interests: in *Meyer*, the parent's right to have his child taught a particular foreign language; in *Pierce*, the parent's right to choose private rather than public school education."<sup>51</sup> Although the Court made it clear that parents enjoyed constitutional protection in their decisions regarding the content and location of their child's education, a question remained concerning the connection between the *Meyer* rights and the First Amendment Free Exercise Clause.<sup>52</sup> The Supreme Court answered that question in *Prince v. Massachusetts*.<sup>53</sup>

In *Prince*, the defendant, Sarah Prince, appealed her conviction under Massachusetts' child labor laws.<sup>54</sup> Prince argued that the child labor laws unconstitutionally interfered with her religious convictions as a Jehovah's Witness.<sup>55</sup> Prince had two children and custody of a third child, all of whom were Jehovah's Witnesses.<sup>56</sup> Prince regularly distributed publications of her faith in Brockton, Massachusetts.<sup>57</sup> Despite warnings given by local school authorities that such activity violated child labor laws, her children also occasionally participated in the distributions.<sup>58</sup>

The Supreme Court needed to decide the constitutionality of the child labor laws.<sup>59</sup> These laws made it a crime for parents to furnish any material to children "with the knowledge that the minor intend[ed] to sell [the material]."<sup>60</sup> The Court stated at the outset that Prince's claim implicated not only parental rights secured by the Fourteenth Amendment's Due Process Clause, but also First Amendment freedom of religion.<sup>61</sup> The coupling of these fundamental rights highlighted the gravity of the issue.<sup>62</sup> Specifically, the Court stated, "The parent's conflict with the state over control of the child and his training is serious

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49. *Id.* at 535.

50. *Id.* at 532.

51. *Maher v. Roe*, 432 U.S. 464, 476 (1977).

52. *See generally id.*

53. 321 U.S. 158 (1944).

54. *Id.* at 159.

55. *Id.*

56. *Id.* at 161.

57. *Id.*

58. *Id.* at 161-62.

59. *Id.* at 163.

60. *Id.* at 161.

61. *Id.* at 164.

62. *Id.* at 164-65.

enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters.”<sup>63</sup>

Realizing the importance of the issue in the case, the Court balanced parental interests against societal interests.<sup>64</sup> After conceding the state’s broad powers to regulate the welfare of children, the Court affirmed the lower court’s ruling and upheld the challenged child labor laws.<sup>65</sup> The Court reasoned that street preaching presented dangers to the child’s well-being, allowing the state to interfere with the parental rights asserted.<sup>66</sup>

Almost three decades after the Supreme Court applied the parental right established by *Meyer v. Nebraska* to the religious context in *Prince v. Massachusetts*, the Court directly addressed the issue of homeschooling in *Wisconsin v. Yoder*.<sup>67</sup> *Yoder* concerned a Wisconsin compulsory attendance law that required children to attend a public or private school until they reached the age of 16.<sup>68</sup> The compulsory attendance laws applied to the respondents, a group of Wisconsin residents.<sup>69</sup> In addition to their status as Wisconsin residents, the respondents were members of the Old Order Amish religion and the Conservative Amish Mennonite Church.<sup>70</sup> In accord with their religious beliefs, the respondents refused to send their children to a public or private high school.<sup>71</sup> The respondents argued that by sending their children to high school they would risk discipline by the church and the potential loss of their salvation.<sup>72</sup>

The Court determined that the respondents’ refusal to comply with the compulsory attendance statute centered on their religious convictions.<sup>73</sup> In making this determination, the Court stated that Amish communities “are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.”<sup>74</sup> In connection with this “fundamental belief,” the Court recognized that Amish objections to higher education (including high school) stemmed from the Amish perception that such settings expose children to an unacceptable “worldly influence” in discord with Amish teachings.<sup>75</sup>

The Court began its analysis by acknowledging Wisconsin’s interest in “universal education.”<sup>76</sup> Despite Wisconsin’s interests, the Court set forth a “balancing process” to apply when the state’s interest in universal education

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63. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

64. *Id.* See also *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 995 n.7 (1976) (characterizing the balancing process as a “duty”).

65. *Prince*, 321 U.S. at 171.

66. *Id.* at 167-69.

67. 406 U.S. 205 (1972).

68. *Id.* at 207.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 209.

73. *Id.* at 210.

74. *Id.*

75. *Id.* at 210-11.

76. *Id.* at 214.

conflicted with other fundamental rights.<sup>77</sup> Utilizing language reminiscent of *Prince* and *Meyer*, the Court recognized two fundamental rights at issue: First Amendment free exercise rights and the parental right to control the upbringing of children.<sup>78</sup>

After establishing the “balancing process,” the Court analyzed whether the Wisconsin statute interfered with the respondents’ free exercise of their religion.<sup>79</sup> The Court concluded that the compulsory attendance statute inescapably interfered with the respondents’ Amish faith because “the Wisconsin law affirmatively compel[led] them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.”<sup>80</sup> The state agreed that the compulsory attendance statute infringed upon the respondents’ free exercise of their religion,<sup>81</sup> but argued that its interest in “universal compulsory education” trumped respondents’ free exercise claims.<sup>82</sup> The Court refused to characterize the state’s interest as paramount to respondents and stated:

[T]he Court’s holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.<sup>83</sup>

Ultimately, the Court held that the challenged statute unlawfully infringed upon the respondents’ constitutional rights and struck down the compulsory attendance statute.<sup>84</sup>

From its 1923 decision in *Meyer v. Nebraska* to the *Wisconsin v. Yoder* decision handed down in 1972, the Supreme Court established two broad rights: the parental right under the Fourteenth Amendment to control the upbringing of children in many areas including education, and the right to homeschool one’s children under the Free Exercise Clause when a religious motivation to do so exists.<sup>85</sup> These rights, however, remain subject to state compulsory attendance laws.<sup>86</sup> With these rights in mind, the current situation regarding various state regulations illustrates the success and vibrancy of homeschooling.

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77. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

78. *Id.*

79. *Id.*

80. *Id.* at 218.

81. *Id.* at 219.

82. *Id.*

83. *Id.* at 233.

84. *Id.* at 234.

85. *See generally id.*

86. Robert C. Cloud, *Balancing Parental Rights and State Interests in Homeschooling*, 235 EDUC. L. REP. 697, 704 (2008).

## III. THE CURRENT HOMESCHOOLING ENVIRONMENT

All 50 states allow homeschooling in one form or another.<sup>87</sup> However, all fifty states regulate homeschooling in various ways.<sup>88</sup> For example, every state employs compulsory attendance laws to regulate their education systems.<sup>89</sup> States regulate homeschooling using statutes that fall into three distinct categories: “private school laws, equivalency laws, and home education laws.”<sup>90</sup> Part III addresses each of these methods of regulation in turn. Section A explains how states regulate homeschooling using private school laws. Section B describes the process states use to regulate homeschooling through equivalency laws. Section C highlights states that have adopted laws specifically tailored to address homeschooling.

*A. Regulation of Homeschooling Through the Use of Private School Laws*

Private school laws comprise the first category of homeschooling laws. States using these laws regulate homeschooling as an arm of the private school system.<sup>91</sup> California provides one example of a private school law state.<sup>92</sup> Under current California law, parents have four options for homeschooling their children.<sup>93</sup> These options include: filing an annual private school affidavit;<sup>94</sup> forming a private school satellite program;<sup>95</sup> hiring a certified private tutor;<sup>96</sup> or offering an independent study program.<sup>97</sup>

Under California law,<sup>98</sup> the first option allows parents wishing to homeschool their children to obtain exemption from California’s compulsory

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87. McMullen, *supra* note 5, at 87. See also *Introduction to HOME SCHOOLING*, *supra* note 2, at 7.

88. McMullen, *supra* note 5, at 87. See also *generally State Laws*, HOME SCH. LEGAL DEF. ASS’N, <http://www.hslda.org/laws/default.asp> (last visited June 24, 2010) (providing access to each state’s homeschooling laws, including private school laws).

89. McMullen, *supra* note 5, at 87.

90. *Id.* (quoting Linda Dobson, *THE HOMESCHOOLING BOOK OF ANSWERS* 7 (1998)).

91. McMullen, *supra* note 5, at 7.

92. See *generally State Laws*, *supra* note 88.

93. *Home Schooling in the United States: A Legal Analysis: California*, HOME SCH. LEGAL DEF. ASS’N, <http://www.hslda.org/laws/analysis/California.pdf> (last visited June 24, 2010).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. CAL. EDUC. CODE § 48222 (West 2010). The statute reads:

Children who are being instructed in a private full-time day school by persons capable of teaching shall be exempted. Such school shall, except under the circumstances described in Section 30, be taught in the English language and shall offer instruction in the several branches of study required to be taught in the public schools of the state. The attendance of the pupils shall be kept by private school authorities in a register, and the record of attendance shall indicate clearly every absence of the pupil from school for a half day or more during each day that school is maintained during the year.



Fall 2010]

## HOMESCHOOLING

235

attendance laws by filing an annual private school affidavit.<sup>99</sup> The affidavit qualifies the homeschool as a private school.<sup>100</sup>

The second option is an extension of the first option, allowing families who wish to homeschool their children to group together to form a “private school satellite program.”<sup>101</sup> This program functions as a private school under California Education Code § 48222.<sup>102</sup> These groups may consist of “anywhere from two and several hundred families.”<sup>103</sup> The option became available because of a Second Appellate District Court of Appeal decision, which overruled two prior cases that had been used against homeschoolers<sup>104</sup> and concluded that “California statutes permit home schooling as a species of private school education.”<sup>105</sup>

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Exemptions under this section shall be valid only after verification by the attendance supervisor of the district, or other person designated by the board of education, that the private school has complied with the provisions of Section 33190 requiring the annual filing by the owner or other head of a private school of an affidavit or statement of prescribed information with the Superintendent of Public Instruction. The verification required by this section shall not be construed as an evaluation, recognition, approval, or endorsement of any private school or course.

*Id.*

99. *Home Schooling in the United States: A Legal Analysis: California*, *supra* note 93. The California Education Code requires “private schools” to include the following information in the affidavit:

- (a) All names, whether real or fictitious, of the person, firm, association, partnership, or corporation under which it has done and is doing business.
- (b) The address, including city and street, of every place of doing business of the person, firm, association, partnership, or corporation within the State of California.
- (c) The address, including city and street, of the location of the records of the person, firm, association, partnership, or corporation, and the name and address, including city and street, of the custodian of such records.
- (d) The names and addresses, including city and street, of the directors, if any, and principal officers of the person, firm, association, partnership, or corporation.
- (e) The school enrollment, by grades, number of teachers, coeducational or enrollment limited to boys or girls and boarding facilities.
- (f) That the following records are maintained at the address stated, and are true and accurate:
  - (1) The records required to be kept by Section 48222.
  - (2) The courses of study offered by the institution.
  - (3) The names and addresses, including city and street, of its faculty, together with a record of the educational qualifications of each.
- (g) Criminal record summary information has been obtained pursuant to Section 44237.

CAL. EDUC. CODE § 33190 (West 2010).

100. *Home Schooling in the United States: A Legal Analysis: California*, *supra* note 93.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, 576 (Ct. App. 2008).

The third option allows parents to homeschool their children through a certified private tutor's instruction.<sup>106</sup> This option is more burdensome than the others, since it requires the teacher to hold a valid state credential for the child's grade level.<sup>107</sup>

California law's final option for parents wishing to homeschool their child<sup>108</sup> provides for the child's enrollment in an independent study program, which utilizes the public school curriculum.<sup>109</sup> This option's disadvantage lies in the fact that the student still must abide by the public school's rules and policies,<sup>110</sup> because California law's fourth option treats the homeschooled student as a public school student.<sup>111</sup>

*B. Regulation of Homeschooling Through the Use of Equivalency Laws*

The second category of homeschooling state regulation falls under the heading of equivalency laws.<sup>112</sup> These laws exempt children from compulsory attendance laws so long as they receive "'equivalent instruction' elsewhere."<sup>113</sup> States utilizing equivalency laws<sup>114</sup> find it difficult to define equivalency, and the burden to prove the instruction's equivalency falls on the states.<sup>115</sup> Although not

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106. *Id.*

107. CAL. EDUC. CODE § 48224 (West 2010). The statute reads:

Children not attending a private, full-time, day school and who are being instructed in study and recitation for at least three hours a day for 175 days each calendar year by a private tutor or other person in the several branches of study required to be taught in the public schools of this state and in the English language shall be exempted. The tutor or other person shall hold a valid state credential for the grade taught. The instruction shall be offered between the hours of 8 o'clock a.m. and 4 o'clock p.m.

*Id.*

108. The law mandates:

(a) Commencing with the 1990-91 school year, the governing board of a school district or a county office of education may offer independent study to meet the educational needs of pupils in accordance with the requirements of this article. Educational opportunities offered through independent study may include, but shall not be limited to, the following:

- (1) Special assignments extending the content of regular courses of instruction.
- (2) Individualized study in a particular area of interest or in a subject not currently available in the regular school curriculum.
- (3) Individualized alternative education designed to teach the knowledge and skills of the core curriculum. Independent study shall not be provided as an alternative curriculum.
- (4) Continuing and special study during travel.
- (5) Volunteer community service activities that support and strengthen pupil achievement.

CAL. EDUC. CODE § 51745(a) (West 2010).

109. *Home Schooling in the United States: A Legal Analysis: California*, *supra* note 93.

110. *Id.*

111. *Id.*

112. McMullen, *supra* note 5, at 88.

113. *Id.*

114. *See generally State Laws*, *supra* note 88.

115. McMullen, *supra* note 5, at 88.

a complete list, Connecticut, Massachusetts, and New Jersey are three examples of states that use equivalency laws.<sup>116</sup>

1. *Connecticut's Equivalency Law*

Connecticut law provides in pertinent part:

[E]ach parent or other person having control of a child five years of age and over and under eighteen years of age shall cause such child to attend a public school regularly during the hours and terms the public school in the district in which such child resides is in session, unless such child is a high school graduate or the parent or person having control of such child is able to show that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools.<sup>117</sup>

Teacher qualification requirements or standardized test requirements do not apply under Connecticut law.<sup>118</sup> In addition, Connecticut law does not require parents to notify school officials of their intent to homeschool.<sup>119</sup> Although no teacher qualifications or standardized tests apply, parents wishing to homeschool in Connecticut must participate in an annual portfolio review with school officials to ensure the provision of equivalent instruction.<sup>120</sup>

Connecticut law provides additional protection to parents who homeschool their children for religious reasons.<sup>121</sup> This increased protection requires the state to prove that restrictions on homeschooling further a compelling governmental interest and use the least restrictive means in furthering that compelling governmental interest.<sup>122</sup> Referred to as the Religious Freedom Act, "[t]his act restores the protection of the individual's right to freely exercise his religious beliefs."<sup>123</sup> Unfortunately, the U.S. Supreme Court effectively removed these protections in 1997 with its decision in *City of Boerne v. Flores*.<sup>124</sup>

In *Flores*, a Catholic Archbishop challenged a local zoning ordinance concerning historic preservation.<sup>125</sup> Local zoning authorities used the ordinance to deny the Archbishop's request for a building permit to enlarge a church.<sup>126</sup> The Archbishop used the Religious Freedom Restoration Act of 1993 to

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116. N.J. STAT. ANN. § 18A:38-25 (West 2010).

117. CONN. GEN. STAT. § 10-184 (2010) (emphasis added).

118. *Home Schooling in the United States: A Legal Analysis: Connecticut*, HOME SCH. LEGAL DEF. ASS'N, <http://www.hslda.org/laws/analysis/Connecticut.pdf> (last visited June 24, 2010).

119. *Id.*

120. *Id.*

121. CONN. GEN. STAT. § 52-571b.

122. *Id.*

123. *Summary of Home School Laws in the Fifty States*, HOME SCH. LEGAL DEF. ASS'N, at viii, [http://www.hslda.org/laws/summary\\_of\\_laws.pdf](http://www.hslda.org/laws/summary_of_laws.pdf) (last visited June 24, 2010).

124. 521 U.S. 507 (1997).

125. *Id.* at 512.

126. *Id.*

challenge the zoning ordinance's constitutionality.<sup>127</sup> The Court examined the Religious Freedom Restoration Act of 1993,<sup>128</sup> and stated that it:

Prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'<sup>129</sup>

The Court determined that the Act violated the separation of powers principles<sup>130</sup> and struck it down.<sup>131</sup> In response to the Supreme Court's decision in *Flores*, several states enacted their own "Religious Freedom Acts."<sup>132</sup> In fact, more than a quarter of the states enacted these statutes by the end of August 2008.<sup>133</sup>

## 2. *Massachusetts's Equivalency Law*

Like Connecticut, Massachusetts utilizes equivalency laws to regulate homeschooling.<sup>134</sup> Parents wishing to homeschool their children in Massachusetts must obtain approval from the local school superintendent or school committee.<sup>135</sup> In *Care and Protection of Charles*, the Supreme Judicial Court of Massachusetts interpreted the Massachusetts private schooling statute as providing the same standard for approving both home schools and private schools.<sup>136</sup> Massachusetts law codified the standard referred to in *Charles* and states:

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 ....<sup>137</sup>

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127. *Id.*

128. *See generally id.* at 515-16.

129. *Id.* (citing 42 U.S.C. § 2000bb-1 (2006)).

130. *Id.* at 536.

131. *Id.*

132. *See Hyde v. Fisher*, 203 P.3d 712, 717 (Idaho Ct. App. 2009) (concerning an Idaho statute designed to protect Idaho citizens with Free Exercise Clause claims).

133. *Religious Freedom Is Endangered But States Are Fighting Back*, HOME SCH. LEGAL DEF. ASS'N (Aug. 29, 2008), <http://hslsda.org/docs/nche/000000/00000029.asp> ("Rhode Island, Connecticut, Florida, Illinois, Arizona, South Carolina, Texas, Idaho, New Mexico, Missouri, Pennsylvania, Washington, Nevada, Virginia, and Oklahoma have passed their own state Religious Freedom Acts.").

134. MASS. GEN. LAWS ANN. ch. 76, § 1 (West 2010).

135. *Id.*

136. *Care and Protection of Charles*, 504 N.E.2d 592, 597 (Mass. 1987).

137. MASS. GEN. LAWS ANN. ch. 76, § 1 (emphasis added).

When seeking the superintendent or school committee's approval, parents have the burden of proof to show that the instruction provided by homeschooling will equal the instruction available at public schools in the same town.<sup>138</sup> If the superintendent or school committee rejects the proposal, they must state reasons for the rejection.<sup>139</sup> Additionally, the superintendent or school committee must provide the parent an opportunity to alter the proposal to "remedy its inadequacies."<sup>140</sup> When examining a homeschooling proposal, the superintendent or school committee may not condition approval on mandatory home visits.<sup>141</sup>

*Charles* outlined four areas a superintendent or school committee may look to when approving homeschooling proposals.<sup>142</sup> First, the school superintendent or school committee may consider the length of the proposed school year and the amount of time spent in each subject.<sup>143</sup> Second, the school may consider the competency of the parents to teach the child.<sup>144</sup> The school may not, however, subject the parent to the same requirements as teachers in public schools; namely, parents are not required to be certified in the same manner as Massachusetts public school teachers.<sup>145</sup> Third, the school may examine the type of subjects taught and the grade level at which they are taught by looking at lesson plans, textbooks, and other instructional aides.<sup>146</sup> Finally, the school may measure progress through standardized tests or periodic progress reports.<sup>147</sup> Although Massachusetts law supports homeschooling, local school boards and superintendents enjoy broad discretion over the use of homeschooling.<sup>148</sup>

### 3. *New Jersey's Equivalency Law*

In addition to Connecticut and Massachusetts, New Jersey also provides for homeschooling under an equivalency law.<sup>149</sup> The New Jersey courts have stated that "parents do have a constitutional right to choose the type and character of education they feel is best suited for their children, be it secular or sectarian."<sup>150</sup> New Jersey law states:

Every parent, guardian or other person having custody and control of a child between the ages of six and [sixteen] years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction

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138. *Care and Protection of Charles*, 504 N.E.2d at 600-01.

139. *Id.* at 601.

140. *Id.*

141. *See Brunelle v. Lynn Pub. Schs.*, 702 N.E.2d 1182, 1184 (Mass. 1998).

142. *Care and Protection of Charles*, 504 N.E.2d at 601-02.

143. *Id.* at 601.

144. *Id.*

145. *Id.*

146. *Care and Protection of Charles*, 504 N.E.2d 592, 601-02 (Mass. 1987).

147. *Id.* at 602.

148. *See id.* at 601.

149. N.J. STAT. ANN. § 18A:38-25 (West 2010).

150. *W. Morris Reg'l Bd. of Educ. v. Sills*, 265 A.2d 162, 167 (N.J. Super. Ct. Ch. Div. 1970).

equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.<sup>151</sup>

Although New Jersey law does not question the right to homeschool, a 1967 New Jersey Superior Court decision outlines a burden shifting analysis that places the initial burden on the parent to provide evidence of equivalent instruction.<sup>152</sup> Upon a showing of equivalent instruction, the burden shifts to the state<sup>153</sup> to prove beyond a reasonable doubt that the parent did not provide equivalent instruction.<sup>154</sup>

### C. Regulation of Homeschooling Through Homeschool Statutes

Home education laws constitute the third category of state homeschooling regulations.<sup>155</sup> States utilizing home education laws use statutes that directly regulate homeschooling.<sup>156</sup> This type of regulation explicitly addresses homeschooling, which is the primary difference between this category of regulation and the other two categories.<sup>157</sup> Several states have homeschooling statutes, including Ohio, Michigan, Iowa, and Pennsylvania.<sup>158</sup>

#### 1. Ohio's Homeschooling Statute

In Ohio, where the state's Supreme Court classified homeschooling as a fundamental right,<sup>159</sup> children may receive home education "by a person qualified to teach the branches in which instruction is required."<sup>160</sup> Additionally, parents must provide extensive information to the superintendent, including notification that the parents wish to homeschool their children; assurance that parents will teach certain subjects; an outline of the intended curriculum; and assurance of the parent's qualifications to teach the children.<sup>161</sup>

In terms of standardized testing, Ohio law requires parents to send the child's "academic assessment report" for the prior school year to the superintendent.<sup>162</sup> Parents may satisfy this requirement in one of three ways.<sup>163</sup>

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151. N.J. STAT. ANN. § 18A:38-25.

152. *State v. Massa*, 231 A.2d 252, 254-55 (N.J. Super. Ct. Law Div. 1967).

153. *Id.* at 255.

154. *Id.* at 257.

155. McMullen, *supra* note 5, at 87.

156. *Id.* at 89.

157. *Id.*

158. *See generally State Laws*, *supra* note 88 (providing access to each state's homeschooling laws).

159. *State v. Whisner*, 351 N.E.2d 750, 769 (Ohio 1976) ("[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.").

160. OHIO REV. CODE ANN. § 3321.04(A)(2) (West 2010).

161. OHIO ADMIN. CODE 3301:34-03 (2010).

162. OHIO ADMIN. CODE 3301:34-04.

First, parents may subject the child to a “nationally normed, standardized achievement test” conducted by a certified teacher, authorized administrator of the test, or someone mutually agreed upon by the parents and the superintendent.<sup>164</sup> Second, parents may satisfy this requirement by supplying the school with a written narrative provided by a certified teacher.<sup>165</sup> Someone mutually agreed upon by the parents and the superintendent may also write the narrative.<sup>166</sup> The narrative must provide sufficient evidence that the child’s instruction has been adequate.<sup>167</sup> Finally, parents may satisfy this requirement through an alternative academic assessment agreed upon by the parents and the superintendent.<sup>168</sup>

## 2. *Michigan’s Homeschooling Statute*

Like Ohio, Michigan explicitly provides parents the right to homeschool their children through a homeschooling statute.<sup>169</sup> Section (3)(f) of Michigan’s compulsory attendance statute provides an exception for public school attendance when “[t]he child is being educated at the child’s home by his or her parent or legal guardian in an organized educational program in the subject areas of reading, spelling, mathematics, science, history, civics, literature, writing, and English grammar.”<sup>170</sup>

Michigan law leaves a parent’s right to homeschool largely unrestricted.<sup>171</sup> Parents do not need to notify or seek approval from the school district.<sup>172</sup> Further, standardized testing requirements do not apply.<sup>173</sup> Finally, parents do not need teacher qualifications prior to homeschooling their children.<sup>174</sup> In fact, the Michigan Supreme Court held in *People v. DeJonge* that teacher qualifications are unconstitutional when they interfere with a parent’s free exercise clause rights.<sup>175</sup>

Favoring the use of homeschooling, Michigan places the burden of proof on the state rather than on the parents to prove they are qualified to teach.<sup>176</sup> Michigan’s Parental Rights Act further bolsters a parent’s right to homeschool in

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163. *See id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. MICH. COMP. LAWS ANN. § 380.1561(3)(f) (West 2010).

170. *Id.*

171. *See generally Home Schooling in the United States: A Legal Analysis: Michigan*, HOME SCH. LEGAL DEF. ASS’N, <http://www.hslda.org/laws/analysis/Michigan.pdf> (last visited June 24, 2010).

172. *Id.*

173. *Id.*

174. *Id.*

175. 501 N.W.2d 127, 129 (Mich. 1993).

176. *Home Schooling in the United States: A Legal Analysis: Michigan*, *supra* note 171.

Michigan.<sup>177</sup> This Act classifies a parent's right to control the education of his or her children as a "natural, fundamental right."<sup>178</sup>

Section (3)(a) of Michigan's compulsory attendance statute establishes another option for Michigan parents wishing to homeschool their children,<sup>179</sup> allowing education in a nonpublic school approved by the state.<sup>180</sup> To qualify as a nonpublic school, the homeschool must meet the requirements of the Private and Parochial Schools Act.<sup>181</sup> Meeting these requirements presents a somewhat arduous task. For example, the Private and Parochial Schools Act requires all teachers of nonpublic schools to be certified.<sup>182</sup> However, *DeJonge* provides an exception to this requirement when sincerely held religious convictions create an objection to teacher certification.<sup>183</sup> The Private and Parochial Schools Act also burdens the parents' ability to homeschool by affording the local school superintendent great latitude in overseeing the nonpublic school.<sup>184</sup>

### 3. *Iowa's Homeschooling Statute*

In Iowa, homeschooling is legal so long as the parent or legal guardian provides "competent private instruction."<sup>185</sup> Three aspects apply to the statutory definition of competent private instruction.<sup>186</sup> First, parents must provide instruction on a daily basis.<sup>187</sup> Second, children must receive at least 148 days of instruction per year, with at least 37 days of instruction provided each quarter.<sup>188</sup> Third, the instruction's design must result in the student making "adequate progress."<sup>189</sup>

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177. MICH. COMP. LAWS ANN. § 380.10 (West 2010).

178. *Id.*

179. MICH. COMP. LAWS ANN. § 380.1561(3)(a).

180. *Id.*

181. *People v. Bennett*, 501 N.W.2d 106, 119 (Mich. 1993).

182. MICH. COMP. LAWS ANN. § 388.553.

183. *DeJonge*, 501 N.W.2d at 129.

184. MICH. COMP. LAWS ANN. § 388.555 (West 2010). The statute reads:

The superintendent of public instruction by himself, his assistants, or any duly authorized agent, shall have authority at any time to investigate and examine into the conditions of any school operating under this act as to the matters hereinbefore set forth and it shall be the duty of such school to admit such superintendent, his assistants or authorized agents and to submit for examination its sanitary condition, the records of enrollment of pupils, its courses of studies as set forth in section 1 of this act and the qualifications of its teachers. Any refusal to comply with provisions herein on the part of such school or teacher shall be considered sufficient cause to suspend the operation of said school after proceedings taken as stated in section 4 of this act.

*Id.* (citations omitted).

185. IOWA CODE ANN. § 299A.1 (West 2010).

186. *See id.*

187. *Id.*

188. *Id.*

189. *Id.*



In addition to the requirement that parents provide competent private instruction, only a licensed instructor<sup>190</sup> or the child's parent or guardian may provide instruction under Iowa's homeschool statute.<sup>191</sup> Parents must meet three requirements if they wish to instruct the child.<sup>192</sup> First, parents must provide a detailed report for the local school district that includes an outline of course study, the child's immunization records and blood lead test results, and a list of textbooks that are used.<sup>193</sup> Second, parents must evaluate the child annually to determine the child's academic progress.<sup>194</sup> Finally, the parents must report to the local school district the results of the child's annual performance review no later than June 30 of each school year.<sup>195</sup>

Despite the three requirements placed on parents wishing to homeschool their children, Iowa law does not require parents to obtain teacher certification.<sup>196</sup> However, teacher certification requirements do apply if the parent wishes to utilize a "supervising teacher."<sup>197</sup> Using a supervising teacher has an advantage despite the extra requirement: supervising teachers do not need to provide annual reviews to the local school district.<sup>198</sup> However, in order to qualify as a supervising teacher, a parent must be a licensed instructor.<sup>199</sup> Otherwise, the parent must employ an instructor who holds a license for the appropriate level of instruction being provided.<sup>200</sup>

If parents wish to receive special education benefits, services, or evaluations from the public school while homeschooling children with special needs, they must seek approval from the public school.<sup>201</sup> Prior to 2009, parents were required to obtain approval for homeschooling special-needs children regardless of their desire to seek public school benefits.<sup>202</sup> However, because of a recent Eighth Circuit case<sup>203</sup> and the federal regulations adopted pursuant to that decision,<sup>204</sup> parents do not need to seek approval unless they request public school benefits.<sup>205</sup>

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190. IOWA CODE ANN. § 299A.2 (West 2010).

191. IOWA CODE ANN. § 299A.3.

192. *See id.*

193. *Id.* § 299.4.

194. *Id.* § 299A.3.

195. IOWA CODE ANN. § 299A.3 (West 2010).

196. *See id.*

197. *Id.* § 299A.2. *See also Home Schooling in the United States: A Legal Analysis: Iowa*, HOME SCH. LEGAL DEF. ASS'N, <http://www.hslda.org/laws/analysis/Iowa.pdf> (last visited June 24, 2010).

198. *Home Schooling in the United States: A Legal Analysis: Iowa*, *supra* note 197.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Fitzgerald v. Camdenton R-III Sch. Dist.*, 439 F.3d 773, 777 (8th Cir. 2006).

204. 34 C.F.R. § 300.300 (West 2010).

205. *Home Schooling in the United States: A Legal Analysis: Iowa*, *supra* note 197.

#### 4. *Pennsylvania's Homeschooling Statute*

Like Iowa and Michigan, Pennsylvania offers multiple options to parents who wish to homeschool their children.<sup>206</sup> The first option utilizes Pennsylvania's homeschooling statute, which allows parents to homeschool their children so long as they meet numerous requirements.<sup>207</sup> To qualify under the homeschooling statute, parents must provide the local school district with an affidavit including an assurance that all subjects are taught in English, an outline of the educational objectives, and proof of immunization.<sup>208</sup> A licensed special education teacher or a clinical or school psychologist must approve home education programs for children with disabilities (as defined by the Individuals with Disabilities Education Act<sup>209</sup>). This requirement presents a further limitation on parents' ability to homeschool their children.<sup>210</sup> Finally, under the homeschooling statute, parents must submit an annual review of the student's academic progress and a portfolio of records and materials by June 30 of each year to the local superintendent.<sup>211</sup> The review of the student's academic progress must include an interview of the child.<sup>212</sup>

Parents who qualify as "properly qualified private tutor[s]" may take advantage of the second option under Pennsylvania law.<sup>213</sup> Pennsylvania law defines a properly qualified private tutor:

[A] person who is certified by the Commonwealth of Pennsylvania to teach in the public schools of Pennsylvania; who is teaching one or more children who are members of a single family; who provides the majority of the instruction to such child or children; and who is receiving a fee or other consideration for such instructional services.<sup>214</sup>

The third option available to Pennsylvania parents concerns situations involving a relationship between the home and a religious school.<sup>215</sup> The

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206. See *Home Schooling in the United States: A Legal Analysis: Pennsylvania*, HOME SCH. LEGAL DEF. ASS'N, <http://www.hslsda.org/laws/analysis/Pennsylvania.pdf> (last visited June 24, 2010).

207. 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 2010). A prior homeschool statute was ruled unconstitutionally vague in *Jeffery v. O'Donnell*, 702 F. Supp. 516, 518 (M.D. Pa. 1988). The statute at issue in that case "required the parent to be 'properly qualified' and the curriculum 'satisfactory.'" *Home Schooling in the United States: A Legal Analysis: Pennsylvania*, *supra* note 206.

208. 24 PA. CONS. STAT. ANN. § 13-1327.1. See also *Home Schooling in the United States: A Legal Analysis: Pennsylvania*, *supra* note 206.

209. 24 PA. CONS. STAT. § 13-1327(d).

210. *Id.*

211. *Home Schooling in the United States: A Legal Analysis: Pennsylvania*, *supra* note 206. The superintendent may not require parents to furnish these reports mid-year without evidence of non-compliance. *Stobaugh v. Wallace*, 757 F. Supp. 653, 656 (W.D. Pa. 1990).

212. 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(2) (West 2010).

213. 24 PA. CONS. STAT. ANN. § 13-1327(a).

214. *Id.*

215. *Home Schooling in the United States: A Legal Analysis: Pennsylvania*, *supra* note 206.

religious school must meet several requirements to qualify for this option, including academic hour requirements,<sup>216</sup> requirements relating to subjects taught (grouped according to the education level being taught),<sup>217</sup> and reporting requirements (furnish a list of names and addresses of all students enrolled between six and eighteen years of age).<sup>218</sup>

According to the Homeschool Legal Defense Association, the third option allows parents of homeschooled children to group together with the support of their local church.<sup>219</sup> If parents elect to take this approach, “[a]n administrator could be chosen to keep records, the teachers would be the parents, and the school campus would be divided up into each home.”<sup>220</sup>

*D. A Proposal for More Effective Homeschooling Legislation*

As the numerous state approaches demonstrate, today’s homeschooling environment varies widely depending upon the state in which the parents reside. States like California choose to regulate homeschooling by treating it as an arm of private schools.<sup>221</sup> Doing so, these states use statutes dealing with private schools in their regulation of homeschooling.<sup>222</sup> States such as Connecticut and Massachusetts choose to regulate homeschooling using “equivalency laws” that require parents to provide education the substantial equivalent of education in the public school system.<sup>223</sup> Other states, such as Ohio and Michigan, provide explicit protection for homeschoolers by using statutes that directly apply to homeschooling.<sup>224</sup>

With each state regulating homeschooling using various methods, a question remains: Which method yields the optimum results? Even though all 50 states allow homeschooling, only the explicit protection found in homeschooling statutes (the third method of regulation) places homeschooling in its rightful place as a respected alternative to public education. Sometimes, even homeschooling statutes fail in their efforts to protect certain groups of homeschoolers from unreasonable state interference, such as homeschoolers acting in accord with their religious beliefs.<sup>225</sup> With this in mind, the ideal homeschooling statute should include, at a minimum, the following elements to protect adequately the parental rights established by the Supreme Court:

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216. 24 PA. CONS. STAT. § 13-1327(b) (requiring 180 days of instruction or 900 hours of instruction per year).

217. *Id.*

218. 24 PA. CONS. STAT. § 13-1332 (West 2010).

219. *Home Schooling in the United States: A Legal Analysis: Pennsylvania*, *supra* note 206.

220. *Id.*

221. *See supra* Part III.A.

222. *Id.*

223. *See supra* Part III.B.

224. *See supra* Part III.C.

225. *See supra* Part III.A-C.

- Requirement that state regulations bearing upon the practice of homeschooling be narrowly tailored to serve a compelling state interest;<sup>226</sup>
- Added protection for parents and children engaged in homeschooling for religiously-motivated reasons;<sup>227</sup>
- Liberal parental qualification standards, to prevent the statute from effectively disqualifying a large group of parents wishing to homeschool;<sup>228</sup> and
- Annual standardized testing requirements that allow the state to ensure adequate academic progress, with multiple avenues for assessing the child.<sup>229</sup>

#### IV. POTENTIAL THREATS TO HOMESCHOOLING

All 50 states currently protect homeschooling in some respect or another.<sup>230</sup> However, several parent and interest groups in the homeschooling field express concern that the comfortable position they enjoy may be in jeopardy.<sup>231</sup> For example, a 2006 European Court of Human Rights decision upheld Germany's ban on homeschooling, troubling homeschooling advocates who fear the decision might pave the way for a homeschooling ban in the United States.<sup>232</sup> Increases in homeschooling regulation and a looming United Nations Convention provide examples of imminent threats to homeschooling.<sup>233</sup> As Americans, we must examine these threats to homeschooling, especially since our nation embraces diversity. If we are to pride ourselves on diversity, we should fight for educational diversity. After all, education helps shape the individual. Further, some of our best and brightest minds in history, including George Washington and Thomas Edison, received their educations at home.<sup>234</sup> As one of America's oldest practices, homeschooling should remain protected in the face of these threats.

##### A. *Increases in Regulation*

Proposed increases in regulation represent the greatest threats to homeschooling.<sup>235</sup> Proponents of regulation argue that such regulations serve the

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226. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-571b (West 2010).

227. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-571b(c).

228. *See, e.g.*, IOWA CODE ANN. § 299A.3 (West 2010).

229. *See, e.g.*, OHIO ADMIN. CODE 3301:34-04 (2010).

230. *The Big Questions*, HOME SCH. LEGAL DEF. ASS'N, <http://www.youcanhomeschool.org/starthere/questions.asp#CAN> (last visited June 24, 2010).

231. *Introduction to HOME SCHOOLING*, *supra* note 2, at 8.

232. *Id.* at 7.

233. *See id.* at 8.

234. *See Famous Homeschooled People*, EADSHOME MINISTRIES (Feb. 9, 2005), <http://www.eadshome.com/Famoushomeschooled.htm>.

235. *See generally* Reich, *supra* note 1, at 32.

legitimate government concern of a well-informed citizenry and foster a diverse democracy.<sup>236</sup> Although these advocates do not seek to ban homeschooling altogether, they insist on strict regulation of homeschooling.<sup>237</sup> Within the category of increased regulation, compulsory attendance statutes particularly concern homeschooling advocates.<sup>238</sup> Changes in compulsory attendance laws seek to increase the maximum compulsory age and lower the minimum compulsory age.<sup>239</sup> In fact, these statutes often require parental cooperation starting immediately at the child's birth—sometimes before parents bring the child home from the hospital.<sup>240</sup>

Those opposed to compulsory attendance legislation argue that forcing parents to educate their children in a manner consistent with the state's values as opposed to the parents' values undermines the parents' ability to make decisions concerning the timing of their children's education.<sup>241</sup> Pointing to the public schools' alleged failure and homeschooling's success, these people argue that legislators need to reevaluate compulsory attendance statutes and, if necessary, eliminate the statutes.<sup>242</sup>

On the other side of the debate, opponents of homeschooling make several arguments in favor of its elimination (or heavy regulation).<sup>243</sup> These arguments stem from concerns over children's social development and autonomy.<sup>244</sup> Furthermore, proponents of increased homeschooling regulation question parents' ability to educate their children effectively in an isolated environment without the oversight of so-called "qualified" professional educators.<sup>245</sup>

A common argument against homeschooling concerns homeschooling's social impact on children.<sup>246</sup> This argument centers on the effect of education in an isolated environment.<sup>247</sup> Explaining this position, one commentator stated that "[d]uring the course of the school day, [children] need to interact with their peers, to learn with their peers, and to eat with their peers."<sup>248</sup> Accordingly, the National Education Association finds homeschooling inadequate in providing the student with a comprehensive educational experience.<sup>249</sup>

Contradicting the position taken by groups such as the National Education Association, evidence relating to a homeschooled child's social exposure

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236. *Id.* at 33.

237. *Id.*

238. Woodruff, *supra* note 18.

239. *Id.*

240. *Id.*

241. *See id.*

242. *Id.*

243. *See, e.g.,* MARCUS & VAIRO, *supra* note 4, at 145; Patrick Basham, *Home Schooling: From the Extreme to the Mainstream*, 51 PUB. POL'Y SOURCES 13, available at [http://www.fraserinstitute.org/commerce.web/product\\_files/HomeSchooling.pdf](http://www.fraserinstitute.org/commerce.web/product_files/HomeSchooling.pdf).

244. MARCUS & VAIRO, *supra* note 4, at 145.

245. *See id.*

246. *Id.*

247. *Id.*

248. *Id.* at 146.

249. Basham, *supra* note 243, at 13.

suggests that homeschooling provides adequate social interaction.<sup>250</sup> A 1992 study conducted by Professor Larry Shyers found “no significant difference between home schooled and non-home schooled children in terms of either self-concept development or assertiveness.”<sup>251</sup> Another study conducted in 1992 by Professor Thomas C. Smedley determined that homeschooled children are actually *better* socialized than children in public or private schools.<sup>252</sup> Finally, a recent *Washington Post* article cited author Robert Kunzman, who studied several homeschooling families and determined that homeschooling’s opponents overstate the social impact the practice has on children.<sup>253</sup> The article states:

I was impressed that he quickly dismissed what I have found to be among the most common and least justifiable concerns about home-schooled children—that without public education they will not be socialized and will not learn how to deal with the annoyances of the real world. Home schoolers go outside often and get just as big a dose of pain and joy and ignorance and wisdom as regular school kids.<sup>254</sup>

Because studies suggest that homeschooled children’s social development matches that of public schooled children, the argument that homeschooling curbs children’s sociality appears fruitless.

Another argument against homeschooling pits a parent’s right to control his or her child’s education against the child’s wishes, placing the child on equal footing with the parent.<sup>255</sup> The United Nations’ Convention on the Rights of the Child fosters this argument.<sup>256</sup> Individuals making this argument stress that children should control their own destinies.<sup>257</sup> On the other hand, how many children are capable of making long-term decisions regarding their futures? Interestingly, homeschooling parents often find that children receiving instruction at home are more likely to develop the ability to make personal decisions, due to the lack of peer pressure influencing the child’s decisions.<sup>258</sup>

Answering questions concerning the equality of parental rights and children’s rights, the Supreme Court established a presumption dating back to at least 1838 that parents acting on behalf of their children act in accordance with

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250. *Id.* See also *Your Child and Home Schooling: The Socialization Issue*, HOMESCHOOLINGEXPLAINED.COM, <http://www.homeschoolingexplained.com/Home-schooled-Socializing.asp> (last visited June 24, 2010) (stating that studies suggest that homeschooled children “show a greater tendency and ease in relating not only to children their age group, but to adults and younger children as well”).

251. Basham, *supra* note 243, at 14.

252. *Id.*

253. Jay Mathews, *Three Smart Rules for Homeschool Regulation*, WASH. POST, Aug. 21, 2009, available at [http://voices.washingtonpost.com/class-struggle/2009/08/three\\_smart\\_rules\\_for\\_home\\_sch.html](http://voices.washingtonpost.com/class-struggle/2009/08/three_smart_rules_for_home_sch.html).

254. *Id.*

255. See MARCUS & VAIRO, *supra* note 4, at 145.

256. See NANCY WALKER, CATHERIN BROOKS, & LAWRENCE WRIGHTSMAN, CHILDREN’S RIGHTS IN THE UNITED STATES 29 (1999).

257. See *id.* at 192.

258. *Important Aspects of Home Schooling*, HOMESCHOOLINGEXPLAINED.COM, <http://www.homeschoolingexplained.com/Why-homeschooling.asp> (last visited June 24, 2010).

the best interests of the child.<sup>259</sup> Further, in 1979, the Court rejected the notion of equality between parents' rights and children's rights.<sup>260</sup> In *Bellotti v. Baird*, the Supreme Court provided three reasons to treat the constitutional rights of children and adults differently.<sup>261</sup> These three reasons center on the Supreme Court's recognition that children usually cannot make well-informed decisions, due to their lack of maturity.<sup>262</sup> Additionally, the Supreme Court considered parents' roles in their children's upbringing.<sup>263</sup> By recognizing the inherent differences between children's rights and parents' rights, the Supreme Court correctly established parents as the ultimate decision-makers.<sup>264</sup>

Debates on homeschooling also focus on parents' fitness to educate their children, and on the home environment's adequacy for such education,<sup>265</sup> citing concerns about home distractions, lack of vision or hearing checks, and an overall inability of parents to live up to the educational rigors of homeschooling. This argument again attacks the credibility of homeschooling.<sup>266</sup> Although most opponents of homeschooling recognize that parents have the child's best interests at heart,<sup>267</sup> these arguments question the parent's capability to satisfy those interests.

In connection with these arguments, the National Education Association recently stated that "parents/guardians who are active participants in the education of their children increase the likelihood of the achievement of educational excellence."<sup>268</sup> In terms of parents' ability to educate their children at home, studies show that even parents without higher education, i.e., bachelor degree or higher, often succeed in homeschooling their children.<sup>269</sup> Admittedly, the rigors of homeschooling require parents to make adjustments to educate their children effectively.<sup>270</sup> However, parents may find changes such as income adjustments and alterations in lifestyle a small price to pay to provide a better

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259. See *Jenkins v. Pye*, 37 U.S. 241, 254 (1838) ("[T]he presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view...."). See also *Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("[T]he traditional presumption that the parents act in the best interests of their child should apply."); *Troxel v. Granville*, 530 U.S. 57, 68 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children.").

260. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

261. *Id.* (stating the three reasons were "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing").

262. *Id.*

263. *Id.*

264. *Id.*

265. *MARCUS & VAIRO*, *supra* note 4, at 145.

266. *Id.* at 147.

267. *Id.* at 148.

268. 2009-2010 *NEA Resolutions 2*, NAT'L EDUC. ASS'N, available at <http://www.nea.org/assets/docs/resolutions2009-2010.pdf>.

269. *Academic Statistics on Homeschooling*, HOME SCH. LEGAL DEF. ASS'N (Oct. 22, 2004), <http://www.hslda.org/docs/nche/000010/200410250.asp>.

270. Blythe Brown, *Homeschooling is Good for Families*, in *HOME SCHOOLING* 53, 56 (Heidi Williams ed., 2007).

education for their children. Further, studies suggest that the cost of homeschooling amounts to about \$546 annually, only about ten percent of the cost of a public education.<sup>271</sup> This evidence suggests that homeschooling presents a cost-effective option to education, and a more economically efficient approach than public education.<sup>272</sup>

*B. The United Nations Convention on the Right of the Child*

In addition to increased regulation, homeschooling advocates who fear a potential ban on homeschooling find reason for concern in the United Nations' Convention on the Rights of the Child ("UN Convention").<sup>273</sup> These advocates believe that if the Senate ratifies the UN Convention, a homeschooling ban may reach fruition.<sup>274</sup> The Homeschool Legal Defense Association, perhaps the most influential homeschooling advocate group, recently released an article, stating that "[they] have consistently warned that this treaty could be the vehicle opponents of home education could use to effectively ban or severely regulate homeschooling."<sup>275</sup>

The UN Convention's ratification would cause it to supersede all state laws concerning matters it addresses.<sup>276</sup> Although education in the United States has traditionally been regulated on a state-by-state level, this treaty's ratification would eliminate this federalist approach by empowering Congress to regulate education.<sup>277</sup> Upon ratification, Congress would "be obligated to follow the UN mandates contained in the [Convention on the Rights of the Child]."<sup>278</sup>

To date, only the United States and Somalia have not ratified the UN Convention.<sup>279</sup> Opponents of the UN Convention argue against its ratification because it charges an international committee of 18 people with determining the child's best interests.<sup>280</sup> The argument with respect to this committee concerns

271. *How Much Does it Cost to Homeschool?*, HOME SCH. LEGAL DEF. ASS'N (Feb. 11, 2003), <http://www.freetohomeschool.org/docs/hshb/43/hshb4307.asp>.

272. *See id.*

273. *UN Treaty Jeopardizes Homeschool Freedom in Britain*, HOME SCH. LEGAL DEF. ASS'N (June 16, 2009), <http://www.hslda.org/docs/news/200906161.asp>. *See also United Nations Convention on the Rights of the Child*, PARENTALRIGHTS.ORG, [http://www.parentalrights.org/index.asp?Type=B\\_BASIC&SEC={30FF0076-5974-4B3C-B658-BBF7931E3EF8}](http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC={30FF0076-5974-4B3C-B658-BBF7931E3EF8}) (last visited June 24, 2010).

274. *Introduction to HOME SCHOOLING*, *supra* note 2, at 8.

275. *UN Treaty Jeopardizes Homeschool Freedom in Britain*, *supra* note 273.

276. *Id.* *See also* U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

277. *UN Treaty Jeopardizes Homeschool Freedom in Britain*, *supra* note 273.

278. *Id.*

279. *United Nations Convention on the Rights of the Child*, *supra* note 273.

280. *Id.*



the committee's apparent power to usurp parental rights by defining the child's best interests in a manner inconsistent with parents' wishes.<sup>281</sup>

A recent report from Britain (a signatory to the Convention) exemplifies this concern.<sup>282</sup> This report bases its recommendations on Britain's treaty obligations under the UN Convention.<sup>283</sup> Among other things, the report recommends that local authorities should have access to the home and the right to speak with children without their parents present to allow the authorities to "satisfy themselves that the child is safe and well."<sup>284</sup> The British Secretary of State for Children, Schools, and Families adopted this report in full.<sup>285</sup> Because the British Secretary of State for Children, Schools, and Families only recently adopted the report,<sup>286</sup> its effect on British homeschoolers remains unclear. Since the British government already adopted the report, however, it is only a matter of time before statutes enacted pursuant to the report's recommendations subject homeschooling parents in Britain to new restrictions.<sup>287</sup>

Opponents of the UN Convention argue for a constitutional amendment to provide explicitly for homeschooling.<sup>288</sup> Only a constitutional amendment would provide protection against the ratification of the UN Convention, since the UN Convention would supersede all other forms of legislation.<sup>289</sup> Two groups, the Homeschool Legal Defense Association and ParentalRights.org, are drafting a constitutional amendment.<sup>290</sup> This amendment, called the Parental Rights Amendment ("Amendment"), seeks to "uphold the current U.S. legal framework which only allows the state to intervene where there is credible evidence of abuse or neglect."<sup>291</sup> The Amendment presents an effective solution to the perceived problem posed by the United Nations Convention on the Rights of the Child.

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281. *Id.* See also *20 Things You Need to Know About the UN Convention on the Rights of the Child*, PARENTALRIGHTS.ORG, [http://www.parentalrights.org/index.asp?Type=B\\_BASIC&SEC={B56D7393-E583-4658-85E6-C1974B1A57F8}](http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC={B56D7393-E583-4658-85E6-C1974B1A57F8}) (last visited June 24, 2010) ("The best interest of the child principle would give the government the ability to override every decision made by every parent if a government worker disagreed with the parent's decision.").

282. *UN Treaty Jeopardizes Homeschool Freedom in Britain*, *supra* note 273.

283. *Id.*

284. GRAHAM BADMAN, REPORT TO THE SECRETARY OF STATE ON THE REVIEW OF ELECTIVE HOME EDUCATION IN ENGLAND 18 (2009), available at <http://www.freedomforchildrentogrow.org/8318-DCSF-HomeEdReviewBMK.PDF>.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. Joseph Abrams, *Boxer Seeks to Ratify U.N. Treaty that May Erode U.S. Rights*, FOXNEWS.COM (Feb. 25, 2009), <http://www.foxnews.com/politics/2009/02/25/boxer-seeks-ratify-treaty-erode-rights>.

290. H.J. Res. 42—"Proposing an Amendment to the Constitution of the United States Relating to Parental Rights", HOME SCH. LEGAL DEF. ASS'N (Apr. 14, 2009), <http://www.hslda.org/Legislation/National/2009/H.J.Res42/default.asp>.

291. *UN Treaty Jeopardizes Homeschool Freedom in Britain*, *supra* note 273.

Constitutional amendments require overwhelming public support,<sup>292</sup> demonstrating one problem with relying on an amendment to protect homeschooling. Further, proposing a constitutional amendment requires significant political support under Article V of the U.S. Constitution.<sup>293</sup> Article V establishes two ways to amend the U.S. Constitution.<sup>294</sup> First, a two-thirds vote in both houses of Congress suffices to propose an amendment.<sup>295</sup> Second, two-thirds of the State legislatures may call a constitutional convention to propose an amendment.<sup>296</sup> Even assuming the homeschooling amendment overcame these obstacles, it would still need to overcome the ratification process.<sup>297</sup> To ratify an amendment and make it effective, three-fourths of the States must agree to ratification.<sup>298</sup> With such stringent requirements for amending the Constitution, opponents of the ratification of the UN Convention may want to explore other options, such as increased lobbying efforts with their representatives.

In the event the United States adopts the UN Convention, homeschooling advocates may still look to Congress for relief<sup>299</sup> since federal law enacted after the ratification of an international treaty may supersede it.<sup>300</sup> Courts, however, may attempt to reconcile federal law and the treaty to avoid repealing the treaty.<sup>301</sup> Therefore, if Congress adopts the UN Convention, homeschooling advocates could still petition Congress to protect homeschooling by enacting laws limiting its effect.

## V. CONCLUSION

The U.S. Supreme Court's precedent supporting the constitutional right to homeschool one's child dates back to 1923, when the Court first established the

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292. See generally *The Constitutional Amendment Process*, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/constitution> (last visited June 24, 2010).

293. *Id.*

294. U.S. CONST. art. V.

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth clauses in the Ninth Section of the first Article; and that no state, without its Consent, shall be deprived of its equal Suffrage in the Senate.

*Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. See 74 AM. JUR. 2D *Treaties* § 14 (2010).

300. *Id.*

301. *Id.*

parental right to control the upbringing of one's children in *Meyer v. Nebraska*.<sup>302</sup> The Supreme Court supported this right throughout the twentieth century, eventually applying the right to the homeschooling context in *Wisconsin v. Yoder*.<sup>303</sup> In *Yoder*, the Court made it clear that parents who homeschool their children for religious reasons enjoy even greater protection under the Free Exercise Clause than parents who homeschool for non-religious reasons.<sup>304</sup>

Although regulated in various ways, homeschooling is currently legal in all 50 states.<sup>305</sup> However, recent events in the legal landscape threaten current homeschooling regulation and its treatment on a state-by-state basis.<sup>306</sup> The potential ratification of the United Nations Convention on the Rights of the Child poses the most dramatic threat to the legality of homeschooling.<sup>307</sup> On the other hand, proposed increases in homeschooling regulation through changes in states' compulsory attendance laws probably provide the most realistic and imminent threats to the current status of homeschooling in America, since such regulation does not require the nationwide support necessary to ratify an international treaty.<sup>308</sup>

In the face of such threats to homeschooling, parents and legal activists who support the practice must find creative ways to fight for the parental right to control the upbringing of one's children using homeschooling. Even those who do not wish to homeschool should understand the situation surrounding the institution, because homeschooling is one of America's traditional institutions. Threats to homeschooling place the stability of traditional values in jeopardy. If the practice of homeschooling can be questioned, Americans may find fundamental facets of their heritage also in jeopardy.<sup>309</sup>

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302. 262 U.S. 390, 400 (1923).

303. 406 U.S. 205, 214 (1972).

304. *Id.*

305. *The Big Questions*, *supra* note 230.

306. *UN Treaty Jeopardizes Homeschool Freedom in Britain*, *supra* note 273.

307. *Id.*

308. *See generally id.*

309. *See generally id.*

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