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**Creature of the State?  
Homeschooling, the Law, Human  
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## **Creature of the State? Homeschooling, the Law, Human Rights, and Parental Autonomy**

*Abstract: The demarcation of authority between parents and the State regarding education of children has become an increasingly complex issue over the past three decades. During the same period the number of parents around the world choosing educational alternatives such as homeschooling has grown exponentially, causing significant legislative and jurisprudential shifts in the United States as well as other Western nations. If the State is responsible for education or has a significant interest therein, then it must have broad authority by which to prescribe the method, mechanism, and acceptable outcomes of education; it must also be able to review and enforce these desired outcomes. If parents, on the other hand, are responsible, then it is the State's duty to defer to parents absent a compelling reason to interfere. A survey of the philosophical foundations from ancient to modern times demonstrates the tension between the State and parents in the realm of education; however, modern human rights norms contained in post-1945 international human rights documents provide explicit grounds on which the State must defer to parental choice in education.*

*Keywords: Homeschooling, home education, parental autonomy, religious freedom, educational freedom, compulsory education, persecution*

### **I. Introduction**

This paper examines the relationship and appropriate demarcation between parental and State authority within the context of modern homeschooling and its 40-year history in the United States. In evaluating these relationships, we review current and historical paradigms and philosophies in North America and Europe regarding the role of the State in education, particularly homeschooling. We will look at how these paradigms have created regulatory frameworks today and the impact that these paradigms have had on the role of the State in education. We will also evaluate these paradigms from the perspective of modern human rights norms articulated in post-1945 human rights conventions. From this, we will conclude that not only is homeschooling a vibrant and effective, albeit controversial, method of education, but also that it demands acceptance under those norms.

We look to the U.S. primarily because homeschooling is an increasingly popular educational alternative with an estimated two million homeschooled children comprising between 3 and 4 percent of the school-age population.<sup>1</sup> Frequent legislative and court controversies over homeschooling reflect the friction that has accompanied the growth of the homeschooling movement. Initially, between 1929 and 1980, controversies were few, with only half a dozen court cases arising over the issue of parents teaching their children at home and not sending them to a state-approved school. However, as the movement grew, court and legislative conflicts occurred annually in every state and became increasingly frequent. These controversies expose the underlying conflict between competing views on the relationship between families and the State in the area of education.

In evaluating the continuum of possible relationships between State and parents, there are two poles—one where the State has absolute authority to prohibit or prescribe education for children, the other where the State defers almost exclusively to parental authority. The former scheme has been true at certain times in certain societies in history. However, the latter scheme has been the more traditional norm in world history as parents have been traditionally viewed by society as the natural guardians and educators of their children. The tension between the State and parents regarding the education of children can be seen from ancient times. For example, in Sparta, boys were taken from their parents at around age seven and handed over to “schools” to be turned into soldiers to defend the State from its enemies. In ancient Greece, Plato, Socrates, and Aristotle all viewed education as a critical component of perfecting the ideal political entity.<sup>2</sup>

However, with the rise of the modern nation-state and the increasing importance of education in our technology-driven world, issues over the demarcation of authority between parents and the State have become increasingly complex with tension between the State and parents running high at times.

These issues come sharply into focus in the homeschool setting. Parental influence is at its height when homeschooling. In a homeschool setting parents direct most, if not all, educational activities. They also establish the pedagogical, philosophical, religious, and overall educational framework in which children learn. Even where the State mandates curriculum and assessment mechanisms, the parents are supreme in influencing their child’s worldview comprised of beliefs,

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<sup>1</sup> Brian D. Ray, *2.04 Million Homeschool Students in the United States in 2010* (Salem, OR: National Home Education Research Institute, 2011), <http://www.nheri.org/HomeschoolPopulationReport2010.pdf> (accessed May 17, 2011).

<sup>2</sup> Nathan Tarcov, *Locke’s Education for Liberty* (Chicago: University of Chicago Press, 1984), 2.

values, politics, morality, religion, and more. In the homeschool setting, the State's influence in these areas is severely limited; to those who believe that it is the proper role of the State to "socialize" (read: influence the development of a child's worldview), this is cited as a cause for great concern.

One's beliefs about the State's role in education are influenced by one's views regarding the primary role of the State in society overall. Strong proponents of the State influencing and shaping society have no choice but to argue, as will be shown herein, that the State must take a leading role in educating children. After all, children *are* the future of the society and of the State. Indeed, if the State *is responsible* for education or has a significant interest therein, then it *must* have broad authority by which to prescribe the method, mechanism, and acceptable outcomes of education; it must also be able to review and enforce these desired outcomes. If parents, on the other hand, are responsible, then it is the State's duty to defer to parents absent a compelling reason to interfere.<sup>3</sup>

Much of the controversy over parental autonomy in education, and particularly reflected in homeschooling, is about where, how, and, in some cases, *if* these boundaries between State and parents should be drawn. Some argue that the State has no role in education, or, if any, a minimal one. They often recognize that the State may establish a public education system if it so desires and may, because it has the power to do so, even confiscate money through taxation to pay for it. But, they say, the State may *not* require a child to be subjected to the public education system contrary to a parent's convictions. This is the current law in America pursuant to United States Supreme Court jurisprudence. On the other hand, others argue that every child has a right to education and must receive a State-approved and State-funded educational experience. This, they argue, is vital to the transmission of "national values" and to ensure that every child is educated and safeguarded by trained professionals. This is the current view in Germany pursuant to its highest constitutional court's jurisprudence.

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<sup>3</sup> We will not engage in a lengthy "conflict of rights" analysis that some would point to in this area. That argument goes like this: Children, as independent beings, are also endowed with rights. Therefore, if a parent makes a decision that is "in conflict" with the "child's right" then the parent's authority is illegitimate. Those who argue this also tend to argue that is the duty of the State to "supervise" parents in their role as parents and to insure that the parents carry out their "duty" properly. The United Nations Convention on the Rights of the Child (CRC) is a cornerstone for those who argue that there is conflict between parents and children in the area of rights. The CRC gives explicit instructions to treaty parties that it is their responsibility to adjudicate rights conflicts. For example, in the context of education, the CRC sets forth that children have a "right to education." See U.N. Convention on the Rights of the Child art. 28, para. 1.

Advocating this latter position,<sup>4</sup> Emory University School of Law Professor Martha Albertson-Fineman makes the argument that it is not enough that children have the opportunity to experience a State-funded and State-controlled education; homeschooling and private schools must be banned so that all children go to public schools:

The more appropriate suggestion for our current educational dilemma is that public education should be mandatory and universal. Parental expressive interest could supplement but never supplant the public institutions where the basic and fundamental lesson would be taught and experienced by all American children: we must struggle together to define ourselves both *as a collective* and as individuals.<sup>5</sup> (emphasis added)

University of North Carolina law professor Dr. Maxine Eichner argues that civic virtues necessary for a “liberal democracy” are not “spontaneous” and that these values must be “nurtured” in citizens through education. Not going as far down the “statist” path as Fineman, Eichner recognizes that there are different constituencies and competing interests among those who appropriately have influence and authority over children.

In a liberal democracy, it is inevitable that there will be conflicts among parents, children, and the state’s interests with respect to education. Given the legitimacy of claims by the community to have a say in how its future citizens should be educated; the equally legitimate claims of parents to have a say in how their own children should be educated; the need for children to develop the autonomy that liberalism demands; and the needs of the polity to ensure that children come to possess the civic virtues necessary to perpetuate a healthy liberal democracy, none of these interests can be allowed completely to dominate education in public schools. Instead, a vigorous liberal democracy must develop a framework for education that gives all of these interests some accommodation.<sup>6</sup>

But Eichner is still wrong when she makes the parents’ interests merely “equally legitimate” with those of the State and education. In homeschooling, these competing interests are highly visible even in the very brief history of homeschooling that this paper provides. We review this history

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<sup>4</sup> To be accurate, Germany does allow for private schools. However, private education in Germany must be state approved and use a state-approved curriculum. The number of private schools in Germany is relatively few in comparison to some other countries where regulations are less stringent.

<sup>5</sup> Martha Albertson-Fineman and Karen Worthington, *What is Right for Children?* (Burlington: Ashgate Publishing Company, 2009), 235.

<sup>6</sup> Maxine Eichner, “Who Should Control Children’s Education?: Parents, Children, and the State,” (Berkley Electronic Press Legal Series, Paper 1644, 2006):

<http://law.bepress.com/cgi/viewcontent.cgi?article=7668&context=expresso&sei-redir=1#search=Does+the+state+have+an+interest+in+children's+education+at+all?> (accessed May 16, 2011).

prior to our discussion about the philosophical foundations for the diverse views in some Western democracies regarding the demarcation of the State authority and parental autonomy in education.

## **II. Brief History of Homeschooling in America**

As an attorney for the world's largest homeschool advocacy organization,<sup>7</sup> whose history has spanned most of the growth of the modern homeschooling movement, the author has professional awareness regarding much of the history of the movement. In the spirit of full disclosure, the author is also a homeschooling parent and thus not a disinterested observer. To argue that these views do not influence the author's conclusions would be foolish; however, he hopes that this bias does not obscure his scholarly objectivity. Those interested in a more complete history of the homeschooling movement are encouraged to consult *Homeschool: An American History* by Dr. Milton Gaither, associate professor of education at Messiah College.

Pointing to notable homeschooled heroes in history like George Washington, Abraham Lincoln, and Theodore Roosevelt; Generals George Patton and Douglas MacArthur; scientists Albert Einstein, Blaise Pascal, and Booker T. Washington; and many others, homeschool advocates assert that, historically, parents were primarily responsible for their children's education by either personally providing or arranging for it.<sup>8</sup> After all, it was not until the early 20th century that all American states even had laws requiring that children attend some form of State-sanctioned school. After this, parents who did not send their child to school at all could be prosecuted for truancy, a criminal offense in most states. But compulsory attendance ages were still only from about age 8 until around 14. Over the next century, however, the compulsory attendance age range would expand until today where most states have compulsory attendance ages ranging from as early as 5 to as high as 18. This is true in most Western democracies.

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<sup>7</sup> HSLDA (Home School Legal Defense Association) is an U.S.-based nonprofit association with over 80,000 member families. For more information see [www.hslda.org](http://www.hslda.org).

<sup>8</sup> Bridgeway Academy, "Famous Homeschoolers," Homeschool Academy, <http://www.homeschoolacademy.com/famoushomeschoolers.htm> (accessed May 16, 2011).

### *1. Lighting the Fuse*

In the 1960s, two influential education researchers and practitioners in the U.S. were becoming increasingly critical of the public education system. In his books *How Children Fail*, *How Children Learn*, and *Deschooling Society*, John Holt, a Yale graduate and longtime teacher and teacher trainer, wrote scathing condemnations of “institutional schooling.”<sup>9</sup> Holt was a true sixties individualist whose basic contention was that compulsory schooling destroys a child’s natural curiosity and replaces subject matter learning with skill learning and a desire to please the teacher rather than to explore his own interests.<sup>10</sup> Dr. Raymond Moore, a Seventh-day Adventist, also published several critiques against public education in the 1960s. Then in the mid-1970s, Moore wrote *Better Late than Early* and *Schooling Can Wait* to argue against the current push to get children into school earlier via early education and prekindergarten programs. The Moores had homeschooled their own children in the 1940s and 1950s.<sup>11</sup> Both Holt and Moore became strong advocates for homeschooling. Both men made important contributions to the start of this dynamic educational movement.

In 1978, Holt, considered one of the more popular educational writers in America, appeared on the television talk show *Donahue* to discuss homeschooling. Produced against the backdrop of increasingly famous cases of parents being prosecuted for homeschooling, the show was among the very first mainstream media appearances about homeschooling. The result of this media appearance was an immediate increase in the prestige and awareness of homeschooling.<sup>12</sup> A similar event happened within the Christian community in 1979 and again in 1982 when Dr. James Dobson, a child psychologist and former teacher who founded the evangelical ministry *Focus on the Family*, hosted Dr. Raymond Moore on a series of his daily radio programs. Dobson’s influence within the growing evangelical community meant that thousands of parents tuned in to the 200 radio stations that then broadcast his show. Many Christian homeschooling pioneers point to Dr. Moore’s appearances on Dr. Dobson’s programs as the first time they heard about the concept of homeschooling.

In retrospect, it appears that these two personalities and their respective mainstream media appearances struck a chord with groups of parents who were unhappy with public education in America at the time for their own reasons. As these parents explored the idea of home education,

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<sup>9</sup> Milton Gaither, *Homeschool: An American History* (New York: Palgrave Macmillan, 2008), 123.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, 129.

<sup>12</sup> *Ibid.*, 126.



they were, however, immediately confronted with the realities of compulsory attendance laws. Because homeschooling was only tolerated in a handful of states, homeschooling meant, for most parents, not only attempting a new “untested” form of education, but also possible civil disobedience with the potential for criminal prosecution. Today, homeschooling pioneers relay tales to newer homeschoolers about the “old days” where they had to have elaborate escape plans or procedures to hide should a truant officer or social worker appear at their door. Such pressure was untenable and homeschoolers organized in order to address the intractable legal challenges.

During the early years of the movement, few American states had any laws addressing homeschooling.<sup>13</sup> Thus, prior to 1980, homeschooling was largely an “illegal” undertaking with an uncertain future.<sup>14</sup> Earlier court rulings had not favored homeschoolers. For example, in 1929, the New Hampshire Supreme Court ruled that children tutored at home missed out on important “association with all classes of society,” thus disallowing homeschooling.<sup>15</sup> Similar rulings are found in California in 1953<sup>16</sup> and Kansas in 1963.<sup>17</sup> One of the earliest positive cases for homeschooling, *People v. Levisen* (1950), in Illinois was a hint of what would come later, albeit nearly 40 years later.

But even as homeschooling laws and regulations were passed by various legislative bodies in the 1980s allowing for homeschooling, increasing numbers of homeschoolers resulted in increasing conflicts between homeschooling parents and authorities. These “showdowns” ranged from tense meetings between parents and superintendents, truant officer visits to homes, social worker visits with threatened removal, and in some cases actual removal, of children from a home, to at least one documented incident of homicide where a homeschooling father’s death resulted from an altercation with local law enforcement where homeschooling was one of the issues. These showdowns turned into hundreds of cases throughout the U.S. over several decades. As homeschool historian Milton Gaither notes, “local officials by the mid-1980s typically [did] not harbor goodwill toward homeschoolers . . .”<sup>18</sup>

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<sup>13</sup> *Ibid.*, 179–199. See also Christopher J. Klicka, *Homeschooling: The Right Choice* (Gresham: Noble Publishing Associates, 1995), 380.

<sup>14</sup> Many homeschoolers argued that they had a fundamental constitutional right under the United States Supreme Court’s cases to homeschool their children. Thus, they argued, even if state laws did not explicitly provide an exception to compulsory attendance laws for homeschooling, Supreme Court case law, they argued, granted one.

<sup>15</sup> *State v. Hoyt*, 146 A. 170 (N.H. 1929).

<sup>16</sup> *People v. Turner* (1953) 121 Cal. App. 2d Supp. 861.

<sup>17</sup> *State v. Lowry*, 383 P.2d 962 (Ks. 1963).

<sup>18</sup> See Gaither (note 9), 181.

## *2. Overcoming Objections*

As homeschoolers organized to exert influence on their elected officials both at the state and national level, there were three primary areas of resistance that had to be overcome. The first, as observed, was the legal status of homeschooling. This will be examined in more detail later. The other major objections to the concept of homeschooling were raised in regard to academic outcomes: The second objection concerned teacher competency and the third was socialization. The teacher competency objection essentially asserted that mothers (who, in nearly all cases, did the teaching at home) were not qualified to teach their children. How, the question went, could an unqualified mother who had, in most cases, no specialized training in education or even a college degree in many cases, possibly match educational outcomes that would result from the focused attention of a college-educated, trained, and state-certified public school teacher? The third objection, socialization, was usually couched in terms of the need for children to go to school with children their own age in order to learn how to get along. This objection came with a related, although relatively infrequently raised, corollary about the lack of oversight and concomitant potential of latent physical abuse or neglect of homeschooled children who were “off the radar.”<sup>19</sup>

Somewhat incredulous education professionals observed the burgeoning homeschooling movement with varying degrees of concern. National Education Association’s Robert McClure said that “it’s important for children to move outside their families and learn how to function with strangers,” expressing fear that home education would undermine commitment to American pluralism.<sup>20</sup> Omar Norton of the Maine Department of Education stated that “instruction in isolation cannot compare with a child being educated in a group.” Texas Federation of Teachers President John Cole observed that “if anyone can teach, teaching will, indeed, no longer be a profession.”<sup>21</sup> Donald Venus, a supervisor of public instruction in Michigan, put it this way: “If you need a license to cut hair, then you should have one to mold a kid’s mind.”<sup>22</sup> Education professionals were not alone. When asked in a Gallup survey whether homeschooling was a good or bad thing, only 16% of the American public in 1985 said that it was good. That number rose to 41% in 2001. However, as the 16% in 1985 illustrates, not many people were enthusiastic about

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<sup>19</sup> “Off the radar” means that the children were not being seen outside their family on a regular basis. Therefore, argued some, there was no way for an independent set of eyes to see them and interact with them to determine whether or not they were being abused.

<sup>20</sup> See Gaither (note 9), 181.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, 182.

homeschooling in the early years.<sup>23</sup> Now, after 30-plus years of increasing experience, scientific research is providing strong evidence exposing the flaws in these criticisms.

### 3. Making the Grade

According to a website maintained by Dr. Robert Kunzman, professor of education at Indiana University, more than 1500 articles have been written since 1919 about homeschooling, most since 1975.<sup>24</sup> Dr. Kunzman's website shows that nearly 200 have been written on the academic performance of homeschooled students. Addressing the issue of academic performance, and thereby dealing with the objection of teacher competency, several researchers have surveyed tens of thousands of homeschooled students dating back to 1990. These works include a study by Dr. Brian Ray (1990), then professor at Seattle Pacific University, and Dr. Lawrence Rudman (1999), director of the ERIC clearinghouse on assessment and evaluation, and Dr. Ray again in 2000 and 2010.<sup>25</sup> These studies showed that homeschooled students' academic performance on standardized tests is generally as much as 25 to 35 percentile points higher than the average public school students'.<sup>26</sup> Critics of the studies, including Dr. Kunzman, have expressed concerns with data collection and methodology, primarily with respect to self-selection in the data population. Dr. Brian Ray, a longtime homeschool researcher and founder of the National Home Education Research Institute (NHRI) has analyzed several of these studies and produced reports about them. These reports can be accessed at the Home School Legal Defense Association's website ([www.hslda.org/research](http://www.hslda.org/research)). Interestingly, Dr. Ray's studies also found that there is no or only minimal correlation between a homeschool teacher's credentials or qualifications and the academic performance of the child. Essentially, this meant that a homeschooling mother who did

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<sup>23</sup> It does not appear that the poll question has been repeated more recently. However, it is probably not a stretch to suggest that the results of a current poll question would likely top the 50% "good" barrier.

<sup>24</sup> Robert Kunzman, Homeschooling Research & Scholarship, [http://www.indiana.edu/~homeeduc/research\\_homepage.html](http://www.indiana.edu/~homeeduc/research_homepage.html) (accessed May 17, 2011).

<sup>25</sup> Brian D. Ray, "Home schooling: The ameliorator of negative influences on learning?" *Peabody Journal of Education*, 75, No. 1/2 (2000): 71–106. See also Brian D. Ray, "Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study," *Academic Leadership Journal*, 8, No. 1, (2010):

[http://www.academicleadership.org/emprical\\_research/Academic\\_Achievement\\_and\\_Demographic\\_Traits\\_of\\_Homeschool\\_Students\\_A\\_Nationwide\\_Study.shtml](http://www.academicleadership.org/emprical_research/Academic_Achievement_and_Demographic_Traits_of_Homeschool_Students_A_Nationwide_Study.shtml) (accessed February 10, 2010). See also Lawrence M. Rudner, "Scholastic Achievement and Demographic Characteristics of Home School Students in 1998," *Educational Policy Analysis Archives*, 7, No. 8 (1999): <http://epaa.asu.edu/ojs/article/viewFile/543/666> (accessed January 21, 2010).

<sup>26</sup> Home School Legal Defense Association and Brian Ray, "Home School Progress Report 2009: Academic Achievement and Demographics," (2009): [http://www.hslda.org/docs/study/ray2009/2009\\_Ray\\_StudyFINAL.pdf](http://www.hslda.org/docs/study/ray2009/2009_Ray_StudyFINAL.pdf).

not have a high school diploma and any homeschooling mother who had a Ph.D. would, on average, achieve similar results. Students taught by both were 25 to 35 percentile points higher than the national average representing public school students.

It is important to note that even severe critics of homeschooling usually acknowledge that homeschooling can be and probably is *usually* successful. In a severe critique of “unregulated homeschooling,” Georgetown Professor of Law Robin West recognizes this while pointing to some of the underlying structural factors that make homeschooling successful.

. . . although I will be criticizing the right to completely deregulated homeschooling, I do not mean to deny for a moment that homeschooling itself is often—maybe usually—successful, when done responsibly. Passionately involved and loving parents, whether religious or not, can often better educate their children in small tutorials at home, than can cash-strapped, under-motivated, inadequately supported, and overwhelmed public school teachers with too many students in their classrooms. Results bear this out, as homeschool advocates repeatedly point out (and as critics virtually never deny): the homeschooled children who are tested, or who take college boards, whether or not religious, perhaps surprisingly, perhaps not, do very well on standardized tests, and on the average, they do better than their public school counterparts.<sup>27</sup>

West, Eichner, and others argue that society has such an interest in regulating the education of children because these children are the future of “their” democratic society. Therefore the State should be able to significantly regulate homeschooling. They do not go quite as far as calling for its outright prohibition, like Fineman, but generally point to the need for registration, curriculum oversight, and mandatory state-sponsored testing—which, however, are not required by most American states.

#### *4. Can't We Just Get Along?*

Dr. Kunzman reports that over 220 articles have been written regarding socialization of homeschooled students since 1984.<sup>28</sup> One 2003 study by Dr. Ray surveyed nearly 5000 homeschool graduates. In *Home Educated and Now Adults*, Dr. Ray found that homeschooled students were more civically active and participated in more extracurricular activities than the average public school student.<sup>29</sup> Dr. Ray's research shows that homeschooled children go to

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<sup>27</sup> Robin L. West, “The Harms of Homeschooling,” *Philosophy & Public Policy Quarterly* 29, No. 3/4 (Summer/fall 2009): 9.

<sup>28</sup> Kunzman (see note 24), Topic: Socialization (accessed November 15, 2011).

<sup>29</sup> Brian D. Ray, *Home Educated and Now Adults: Their Community and Civic Involvement, Views about*

college, enter the workforce, become active in politics and are highly involved in their communities at rates equal to or higher than their peers in other educational settings. Another study performed by Dr. David J. Francis and Dr. Timothy Keefe, published in 2004, found that the social skills and competencies of homeschooled children, as measured on standardized tests, were as good as or better than those of public school children.<sup>30</sup> Dr. Richard Medlin offers the most recent synthesis of research on the social, emotional, and psychological development of the home educated. In his work, Dr. Medlin found that home educated students are active and well-adjusted.<sup>31</sup> These findings make sense when one looks below the surface to see how homeschooling works.

In homeschooling, children are not tied to a set schedule or physical brick-and-mortar location. Homeschooling is in many cases as much a lifestyle as it is a form of education. It allows for far greater flexibility for children to follow their own interests—to a much greater extent than most public school children are able to do. News reports frequently highlight homeschooled students who have made notable accomplishments in large part because they were not tied to a traditional educational setting. For example, in July 2009, homeschooled teenager Zac Sunderland became the youngest person to circumnavigate the world. Actor Will Smith and his wife Jade explained to *Essence* magazine that they homeschool their children because it allows “for flexibility so they can stay with us when we travel and also because the school system in this country—public and private—is designed for the industrial age. We’re in the technological age. We don’t want our kids to memorize. We want them to learn.”<sup>32</sup> Homeschoolers have also won a disproportionate number of national science, math, spelling, geography, and other academic competitions.<sup>33</sup>

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*Homeschooling, and Other Traits*, (Salem, OR: National Home Education Research Institute, 2004).

<sup>30</sup> David J. Francis and Timothy Z. Keith, “Social Skills of Homeschooled and Conventionally School Children: A Comparison Study,” *The Homeschool Researcher* 16, No. 1 (2004): 15–24.

<sup>31</sup> Richard G. Medlin, “Homeschooled Children’s Social Skills,” *Home School Researcher*, 17(1) (2006): 1–8.

<sup>32</sup> See Gaither (note 9), 221.

<sup>33</sup> Brief of Amicus Curiae Home School Legal Defense Association, Christian Home Educators Of New Hampshire, and Catholics United For Home Education In Support Of Petitioner, *In The Matter Of Martin F. Kurowski, and Brenda A. Kurowski*, Supreme Court of New Hampshire (2010), (No. 2009-0751). Slip opinion at <http://www.courts.state.nh.us/supreme/opinions/2011/2011026kurowski.pdf>. [http://www.hsllda.org/hs/state/nh/NH\\_Amicus\\_Brief\\_5\\_19\\_2010.pdf](http://www.hsllda.org/hs/state/nh/NH_Amicus_Brief_5_19_2010.pdf) (accessed May 17, 2011), 9–14.

## 5. *We Fought the Law and We Won*

Research finding that this form of education can produce such outcomes would not have been possible if homeschoolers had been unsuccessful in their legal defense in courts and state legislatures. In the early 1980s, homeschoolers formed organizations, hired lobbyists, and attended hundreds of state and local regulatory hearings in order to exert grassroots political influence. To this day, homeschooling hearings and votes at state legislatures are the stuff of legend. In at least two recent examples, homeschoolers broke all records of public attendance at hearings in Nebraska and Illinois when their rights to homeschool were threatened.<sup>34</sup> State legislators and public policy officials have come to know that homeschoolers are a potentially powerful political force. This was not always the case, however.

During the early years, individuals and small groups of homeschoolers had to hire their own lawyers or depend on the goodwill (of which there was usually very little, as noted) of legislators or local school officials. In 1983, a national organization called the Home School Legal Defense Association (HSLDA) was founded. This national organization defended individual homeschoolers and influenced state and federal legislatures. This organization, along with many state and local homeschool organizations, helped to shift the power imbalance. Although many homeschoolers argued that they had a federal constitutional right to homeschool, only a handful of American states made an exception to compulsory attendance laws for homeschooling. Homeschoolers in each state had to discover an appropriate strategy as they went along.

In some states, individual families attempted to comply with the laws by forming individual private schools. Others came together to form “umbrella” private schools. In most states, stemming in part from the 1925 United States Supreme Court’s landmark decision *Pierce v. Society of Sisters* and historical practice, private school laws were quite minimal.<sup>35</sup> However, this practice was tested in court. One of the earliest favorable homeschooling cases, as previously mentioned, was in Illinois in 1950. In *People v. Levinsen*, the Illinois courts recognized that home instruction was properly recognized under the private school law. In 1967, the New Jersey State Supreme Court reversed its earlier ruling that children could not be homeschooled and wrote that

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<sup>34</sup> This information is from personal observation in testimony. In February 2008, I attended a hearing in Lincoln, Nebraska about LB 1141, a bill that would have imposed restrictions on homeschooling parents. Capital officials told me that the number in attendance, well over 1200 individuals, broke attendance records for a hearing at the Capitol. A similar occurrence happened in early 2011 in Springfield, Illinois. HSLDA Staff Attorney Scott Woodruff testified against SB136. Attorney Woodruff reported that according to officials in Springfield, attendance was astonishing and record-breaking.

<sup>35</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

“to hold that the statute requires equivalent social contact and development would emasculate this alternative and allow only group education, thereby eliminating private tutoring for home education.”<sup>36</sup> Overall, courts seemed to focus more on academics and minimum educational standards than socialization—although socialization was certainly an issue and continues to be in individual court cases.<sup>37</sup> By the 1980s, “rulings tended in the general direction of finding that homeschools do count as private schools, and that they should be only evaluated by academics, not social standards.”<sup>38</sup> This strategy met with success. Today, 14 states, including California, Colorado, Illinois, and Texas recognize the right of parents to educate their own children under the auspices of their private school statutes.<sup>39</sup>

However, for parents in states without amenable private school statutes, other solutions were required. In these states, conflicts arose over the implementation or interpretation of statutes and regulations. One way homeschoolers often challenged laws was to allege that a law or regulation was unconstitutionally vague—meaning that a reasonable person could not reasonably understand how to interpret the law. Another tactic was for homeschoolers to assert that a law or regulation violated parents’ fundamental federal and/or state constitutional rights. Homeschoolers would argue that laws interfered with their fundamental constitutional rights to direct their child’s education or unreasonably infringed upon their religious convictions. However, the United States Supreme Court’s decision in *Pierce* recognized that parents had a federally protected constitutional right to direct the education and upbringing of their children.

The fundamental theory of liberty upon which all governments of this Union repose exclude any general power of the state to standardize its children by forcing them to accept teaching 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>40</sup> (emphasis added)

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<sup>36</sup> *State v. Massa*, 95 N.J. Super. 382 (Morris County, 1967). New Jersey parents did not have to form private schools, but were simply required to provide “equivalent instruction.”

<sup>37</sup> See *In Matter of Martin F. Kurowski and Brenda A. Kurowski*, Case No. 2009-751 (NH S.Ct., Mar. 16, 2011).

<sup>38</sup> See Gaither (note 9), 180. (e.g. the academic product, child’s evidence of learning rather than the process, curriculum or parental qualifications)

<sup>39</sup> See *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, Cal. App. 2 Dist., 2008; *People in Interest of D.B.*, 767 P.2d 801 (Colo. App. 1988); *People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950); *Leeper v. Arlington Indep. School Dist.*, No. 17-88761-85 Tarrant County 17th Judicial Ct. Apr. 13, 1987). See also Christopher J. Klicka, *Untangling The Red Tape: The Details You Need To Homeschool in the 50 States* (Purcellville: HSLDA, 2009), iv.

<sup>40</sup> *Pierce v. Society of Sisters*, 268 U.S. 510.

Some parents argued that their federal constitutional First Amendment right to freedom of religious expression was violated by laws that were too restrictive. These laws clashed with parents' religious convictions that parents were responsible to God for the education of their children and any state regulation interfered with that right by interfering with the parents' and children's relationship with God.

In some states, certain qualifications were required for parents such as teacher certification or possessing a high school diploma. In West Virginia, for example, the law required that a homeschooling parent have at least four years more education than the grade level of the child they were teaching. This requirement was altered by the legislature in 2005 after which only a high school diploma was required. Until 1993, Michigan required all teachers to be certified by the state. Teacher qualifications were a common requirement in the early days of the homeschooling movement. Today, however, only eight states require parents to have either a high school diploma or a GED.<sup>41</sup>

State courts usually found ways to rule in favor of homeschoolers without addressing the religious freedom arguments.<sup>42</sup> However, one of the most significant victories for homeschoolers came in Michigan on this very claim. In *People v. DeJonge*, the Michigan Supreme Court ruled that it was an unconstitutional infringement on religious expression to require teacher certification for parents who homeschool their children for religious reasons. In that case, the Michigan Supreme Court declared:

In summary, we conclude that the historical underpinnings of the First Amendment to the U.S. Constitution and the case law in support of it compels the conclusion that the imposition of the certification requirement upon the DeJonges violates the Free Exercise Clause. We so conclude because we find that the certification requirement is not essential to nor is it the least restrictive means of achieving the State's claimed interest. Thus, we reaffirm that sphere of inviolable conscience and belief which is the mark of a free people. [ . . . ] We hold that the teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified teachers. Such

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<sup>41</sup> Christopher J. Klicka, *Untangling the Red Tape*. GED means general equivalency diploma. The GED is an equivalent to a high school diploma issued to a student who takes and passes a state-approved test. It is beyond the scope of this paper to look at the regulatory regimes of all 50 states, HSLDA has created a four-level framework to analyze state regulations depending upon four key attributes of state laws. Every state is ranked according to whether they require notice, evaluation of student progress, teacher credentials, approval by public officials, or home visits. This analysis may be found at [www.HSLDA.org/laws](http://www.HSLDA.org/laws).

<sup>42</sup> See Gaither (note 9), 179.



families, therefore, are exempt from the dictates of the teacher certification requirements.<sup>43</sup>(internal citations removed)

As of 1993, homeschooling had become legal and increasingly popular in every state in the United States. Victories came at great effort and expense, but homeschoolers were greatly helped by American cultural values which respect pluralism, individuality, and religious freedom. Initially, there were only a few states where American homeschoolers could safely homeschool. The fact that there were other states that had explicit provisions for homeschooling was a good legal argument for homeschooling. Such a fact also provided evidence that homeschooling existed as a legitimate and legally recognized form of education. Because other states had experience with homeschooling, a favorable context existed for judges and legislatures in other states to evaluate homeschooling and make their own determination about whether and how to provide for it in their law.

### **III. Demarcation**

We turn now to analyze various educational philosophies and frameworks that originate in large part from European thinkers. As we do, we see a similar picture beginning to emerge. Cultures grappling with increasingly ineffective public education systems find some parents seeking alternatives. Homeschooling is among them. And as parents seek to explore homeschooling, they are finding resistance based in the philosophies we will discuss. These parents are few in number—like American homeschoolers during the early days. They are seeking to change the minds of public policy makers and public opinion. However, they do not have the same cultural traditions or experience as in America or other English-speaking societies where homeschooling has flourished with relative ease. By understanding the historical roots of these philosophies the author hopes that policymakers will be able to think critically about their response to homeschooling.

In their three-volume work, *Balancing Freedom, Autonomy, and Accountability in Education*, Dr. Charles Glenn and Dr. Jan de Groof agree with the United States Supreme Court’s decision in *Pierce* that the right of parents to guide the development of their children and to choose the appropriate form of education for them is *fundamental*. They write that “to deny that

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<sup>43</sup> See *People v. DeJonge*, 501 N.W.2d 127, 144 (Mich. 1993), in: Christopher J. Klicka, *The Right to Homeschool: A Guide to the Law on Parents’ Rights in Education* 3d ed. (Durham: Carolina Academic Press, 1995), 66–67.

choice . . . is unjust and unworthy of a free society.”<sup>44</sup> They also remind their readers that the fundamental right of parents to educational freedom is recognized internationally.<sup>45</sup> A review of several foundational human rights documents shows that the right of parents to control and direct their children’s education is a tenet of human rights doctrine and is not only recognized, but is also superior in relation to the claims of the State in educating children.

Article 26, part 3, of *The Universal Declaration of Human Rights of 1948* states that “parents have a *prior right* to choose the kind of education that shall be given to their children” (emphasis added). The fact that the word “prior” is used is indicative of the hierarchy and primacy of the right of parents in relation to the State. The 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* provides in Article 2 that,

In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

In 1966, the United Nations General Assembly opened the *International Covenant on Economic, Social and Cultural Rights* for signature. The covenant entered into force in 1976. Article 13.3 states:

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

Even though this covenant allows the State to create certain “minimum educational standards,” it reaffirms the *Human Rights Declaration’s* recognition of parents’ rights. That same year, 1976, the *International Covenant on Civil and Political Rights* went into effect, providing in Article 18, paragraph 4 that:

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<sup>44</sup> Charles Glenn and Jan De Groof, *Balancing Freedom, Autonomy and Accountability in Education* (Nijmegen, Netherlands: Wolf Legal Publishers, 2005), 1.

<sup>45</sup> *Ibid.*, 6.

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

Without quibbling over or parsing what it means to “ensure . . . education in conformity with their own convictions,” it seems eminently clear, *as a foundational principle*, that the right of parents to direct their children’s education is considered a human right that must be respected by states professing an allegiance to the human rights set forth in these documents.

Why is it, then, as Glenn and de Groof write, that the concept of educational freedom today enjoys “far less support” from progressive elites “than do other human rights, such as the freedoms of speech, the press, religious belief, and voluntary association”?<sup>46</sup> Why is it that progressive elites “see family as a source of resistance to social progress and put their trust in government-sponsored schooling to make children more progressive and more enlightened than their parents”?<sup>47</sup> Why then, are there countries like Germany, Sweden, Brazil, the Canadian province of Quebec, and others that claim to respect human rights norms, yet ban, actually or effectively, homeschooling, or persecute parents who engage in it? Why is it that the education of a child is so controversial? Why is there such a struggle between parents and governments over how, what, when, and where a child learns?

To answer these questions, we will observe philosophically how several countries, including the United States, Canada, England, France, and Germany, have addressed and now address the issue of parental authority versus State authority in education. We commence with the American experience, beginning with the initiation of compulsory attendance laws and the eventual takeover of public education by the humanist movement. This takeover contributed significantly to conflicts between parents and government schools over values, which, as much as methodology and lackluster performance, led to widespread dissatisfaction, thereby helping to create a fertile environment for the homeschooling movement in America.

### *1. United States of America*

In 1979, the United States Supreme Court in *Parham v. J.R.* articulated the enduring philosophy of American jurisprudence with respect to parental autonomy when it wrote that “fit parents are

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<sup>46</sup> Ibid., 7.

<sup>47</sup> Ibid.

deemed to act in the best interests of their children.”<sup>48</sup> Absent behavior to the contrary, parents are free to make decisions about and for their children without government intrusion or oversight. The Court wrote eloquently:

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; our constitutional system long ago rejected any notion that a child is “the mere creature of the State” and, on the contrary, asserted that parents generally “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations” . . . Surely, this includes a “high duty” to recognize symptoms of illness and to seek and follow medical advice. 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.<sup>49</sup> (internal citations omitted)

Yet the legal future of homeschooling—in many ways a reaction to what was happening in America’s public schools at that time—remained in doubt. This was true despite the Court’s assurances that parental autonomy in education was an enduring tradition of Western civilization. By 1979, public schools in America had become, by judicial order, explicitly and exclusively secular. This, however, was not the case for the first one hundred years or so of public education in America—nor was it the vision of a primary founder, Horace Mann.

Mann served as the first commissioner of education in Massachusetts (the first in the country), where compulsory education was first legislated in 1642. He believed that religion and morality were indispensable in the public schools, where he envisioned national unity would be forged by shared national values and fostered through common education.

Directly and indirectly, the influences of the Board of Education have been the means of increasing, to a great extent, the amount of religious instruction given in our schools. Moral training, or the application of religious principles to the duties of life, should be its inseparable accompaniment. No community can long subsist, unless it has religious principle as the foundation of moral action; nor unless it has moral action as the super structure of religious principle.<sup>50</sup>

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<sup>48</sup> *Parham v. J.R.* 442 U.S. 584, 600 (1979).

<sup>49</sup> *Ibid*, internal citations: *Pierce v. Society of Sisters*, 268 U.S. 510, 268 U.S. 535 (1925). See also *Wisconsin v. Yoder*, 406 U.S. 205, 406 U.S. 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 321 U.S. 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 262 U.S. 400 (1923), 1 W. Blackstone, Commentaries \*447; 2 J. Kent, Commentaries on American Law \*190

<sup>50</sup> *Ninth Annual Report of the Secretary of the Board* (Boston: Dutton & Wentworth, 1846), 157.

But in 1947, just a century after Mann pioneered compulsory attendance in Massachusetts, the United States Supreme Court wrote that in public education the government must observe a “wall of separation between church and state.”<sup>51</sup> Over the next 30 years, an active federal judiciary would utterly dismantle Mann’s vision of a religion-based morality in the public schools. Key rulings include prayer being unconstitutional in public schools,<sup>52</sup> the elimination of Bible reading,<sup>53</sup> and the prohibition of teaching theories of creation science or intelligent design in addition to the theory of evolution.<sup>54</sup>

Glenn writes that Mann may have missed the controversy his vision would later provoke:

Apparently Mann could not see that, for some of his opponents, the confidence in human goodness and improvability that he wished the common school to teach represented a false doctrine, corrosive of the basis of their faith.<sup>55</sup>

Initially, the controversy Glenn refers to was *between* religious denominations. Most parents objected to the nonsectarian religious instruction Mann contemplated. They wanted their children to receive doctrinal instruction in their own religion. Ultimately it would not be those who disagreed with Mann’s *religious doctrine*, but rather those who disagreed with the inclusion of *any religion at all* in schools who would dismantle Mann’s vision and impose a form of secular humanism in the public schools, thereby effectively replacing Mann’s religion-based morality. This replacement of Mann’s religion-based morality with a religion of secular humanism,<sup>56</sup> which has as one of its primary objectives the liberation of humanity from antiquated and superstitious notions about God and religion, would become an important ingredient in the disaffection between many parents and public schools. This became a leading factor in the initiation and growth of the American homeschooling movement beginning in the 1980s.

Leading proponents of secular humanism saw the public school system as a natural building block in the establishment of their worldview and their vision for future American society.

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<sup>51</sup> See *Reynolds v. United States*, 98 U.S. 145, 164, in *Everson v. Board of Education*, 330 U.S. 1 (1947), 16.

<sup>52</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>53</sup> *School Dist. of Abington TP. v. Schempp*, 374 U.S. 203 (1963).

<sup>54</sup> *Mozert v. Hawkins City Board of Education* 827 F.2d 1058 (1987)

<sup>55</sup> See Glenn and De Groof (note 44), 169.

<sup>56</sup> In footnote 11 in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the United States Supreme Court noted that Secular Humanism is a religion. See also discussion, “Is Secular Humanism Religion”, [http://vftonline.org/Patriarchy/definitions/humanism\\_religion.htm](http://vftonline.org/Patriarchy/definitions/humanism_religion.htm) (accessed May 24, 2011).

Charles Francis Potter, founder of the First Humanist Society of New York, wrote and signed the Humanist Manifesto along with others, such as his contemporary and influential architect of the modern American public school system, John Dewey. Potter, in 1930, wrote:

Education is thus our most powerful ally of humanism, and every public school is a school of humanism. What can the theistic Sunday school, meeting for an hour once a week, and teaching only a fraction of the children, do to stem the tide of a five-day program of humanistic teachings?<sup>57</sup>

Harvard Professor of Education Chester Pierce reaffirmed this vision for public education 40 years later:

Every child in America entering school at the age of five is mentally ill because he comes to school with certain allegiances to our Founding Fathers, toward our elected officials, toward his parents, toward a belief in a supernatural being, and toward the sovereignty of this nation as a separate entity. It's up to you as teachers to make all these sick children well—by creating the international child of the future.<sup>58</sup>

To be sure, many homeschooling families have held and do hold that religion has nothing to do with their decision to homeschool, but the above-expressed hostility toward religious instruction and traditional values—which most parents deemed important, if not essential in the education of their children—caused many religious parents to look for alternatives.

Interestingly, for those parents to whom religion is important, religious considerations are in many cases not the only, or even the most important factor in their decision to homeschool. In 2008, the National Center for Education Statistics released a report showing that the most important reason parents chose to homeschool was a “concern for the environment.”

Many who have attempted to study the homeschooling movement have come to understand its diversity both in motivation and method. Homeschoolers have many reasons for wanting to homeschool. Some stress their desire for strong family relationships. Other researchers, like Michael Apple, Robert Reich, and Chris Lubienski, see homeschooling as an extreme form of the “secession of the successful” from engagement with public life.<sup>59</sup> Others attempt to describe homeschooling as either antifeminist modernism or purely antimodernist. Some say it is

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<sup>57</sup> Charles F. Potter, “Humanism: A New Religion” (New York: Simon and Schuster, 1930).

<sup>58</sup> See Chester M. Pierce, presented at the Childhood International Education Seminar, Boulder, Colorado, 1973, in: John Taylor Gatto, *The Underground History of American Education* (New York: Oxford Village Press, 2000), Chap. 13: “Bending the Student to Reality.”

<sup>59</sup> See Gaither (note 9), 225

libertarian or simply escapism. While in other countries religion may not be as important or a prevailing motivation to homeschool, in the United States it has been a leading factor contributing to the rapid growth of the movement.

## *2. European Influence: England, France, Germany, and Canada*

In Europe, we must go back to earlier times to study the thinkers who influenced the views on the relationship between family and State. Enlightenment philosophers John Locke and Jean-Jacques Rousseau were both social contract theory philosophers whose contributions echo in political institutions today—not just in Europe but throughout the world. Locke’s theories of limited government and separation of powers were integral inputs into the American Declaration of Independence of 1776 and the U.S. Constitution of 1789. Rousseau heavily influenced the bloody revolution which would move France from monarchy to republic. Yet despite their common reliance on the notion of a social contract, their views on the role of the State in educating children were quite different. The manifestation of their opposing views can be seen in national educational frameworks and cultural dynamics around the globe.

### *a) England*

Locke’s view was that nature “grants instruction solely to parental power, not to civil government.”<sup>60</sup> In England today, the law regarding education is quite Lockean. Section 7 of the Education Act of 1996, which applies to England and Wales, states that:

The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—to his age, ability and aptitude, and to any special educational needs he may have, either by regular attendance at school *or otherwise*. (emphasis added)

The “or otherwise” qualification allows for private education including homeschooling. England’s law is among the least restrictive homeschooling laws in the world. English authorities recognize their own limitations in official guidance to local education authorities:

Local authorities should keep a record of children who are known to be educated at home by parents. Parents are not, however, required to inform the local authority if they decide to home educate a child who has not previously attended school.<sup>61</sup>

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<sup>60</sup> See Tarcov (note 2), 5.

*b) France*

Rousseau, on the other hand, viewed the State as the supreme authority with respect to children. He firmly understood the importance of education and its role in shaping society. It was necessary, he thought, to compel parents to give up their children to receive an education that reflected the enlightenment values of the impending French Revolution. The State, in Rousseau's world, must control education.

From the first moment of life, men ought to begin learning to deserve to live; and, as at the instant of birth we partake of the rights of citizenship, that instant ought to be the beginning of the exercise of our duty. If there are laws for the age of maturity, there ought to be laws for infancy, teaching obedience to others: and as the reason of each man is not left to be the sole arbiter of his duties, government ought the less indiscriminately to abandon to the intelligence and prejudices of fathers the education of their children, as that education is of still greater importance to the State than to the fathers: for, according to the course of nature, the death of the father often deprives him of the final fruits of education; but his country sooner or later perceives its effects. Families dissolve but the State remains.<sup>62</sup>

For Rousseau, the State was the stabilizing force in society and thus had to take control of the education of children in order to enable them—and the State—to fulfill their ultimate potential. Revolutionaries maintained that parents would have to give way in order for France to discard the monarchy for republican values. One revolutionary official at that time wrote to colleagues in Paris: “Citizen Minister . . . don't expect anything without regenerative violence, since the stubbornness of parents is such that it can only be overcome by conquering it.”<sup>63</sup>

France has made significant progress from the days of the revolution with respect to home education. France does not ban homeschooling but does heavily regulate the practice. Regional officers assigned by the national education ministry annually inspect homeschooling families, who must also register annually with their local political authority. In France, there are estimated to be just a few thousand homeschooled students, whereas in the United Kingdom there are tens of thousands.

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<sup>61</sup> 2009 Statutory Guidance on Children at Risk of Not Receiving Suitable Education: <http://www.education-otherwise.org/cme.htm> (accessed May 17, 2011).

<sup>62</sup> Jean Jacques Rousseau, *A Discourse on Political Economy and Considerations for the Government of Poland*, (1755), 148–149. See also Charles Glenn, *The Myth of the Common School* (Amherst: University of Massachusetts Press, 1988), 18.

<sup>63</sup> Glenn, 29.



### c) Canada

It is interesting to observe that in Canada these two philosophies express themselves in one modern nation-state. In English-speaking Canada, home education legal requirements are minimal, whereas in more heavily French-influenced and French-speaking Québec, homeschooling laws are far more restrictive and homeschooling is viewed with greater suspicion. A review of the website of the Association of Parent-Educators of Québec shows that while homeschooling is legal in Québec, there has been great controversy over the practice. Québec's education law states that a compulsory school exemption applies to "a student who receives homeschooling 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."<sup>64</sup> The controversies appear to be the different interpretations of the various school boards in Québec as well as the different interpretation of the ministry of education in Québec regarding the mechanics of evaluation which the law makes allowance for.

Advocates for homeschoolers in Québec argue that the *Canadian Charter of Rights and Freedoms* requires that parents be provided with options to satisfy the evaluation requirement.<sup>65</sup> These advocates further complain that the local authorities have attempted to require the use of particular curriculum as well as to force the use of a particular evaluation methodology. Advocates for homeschoolers also complain that local authorities are quick to involve the protective services organization against homeschooling families. Thus, while homeschooling is legal in Québec, there is conflict between local and central authorities and homeschoolers.<sup>66</sup>

### d) Germany

For Germany, Rousseau had some impact on educational philosophy. However, it was Prussian uniformity and bureaucracy that brought efficient public education systems to a unified Germany where, until 1938, private education and home education were generally permitted. In 1938, however, Germany outlawed private education of all forms (including homeschooling), making it a crime not to send children to school. Demonstrating the eerie philosophy that motivated the National Socialist party, the rewritten and uniform introduction to the manual for high school instructors in Germany read:

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<sup>64</sup> R.S.Q., chapter I-13.3-15(4). See [http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/I\\_13\\_3/I13\\_3\\_A.html](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/I_13_3/I13_3_A.html) (accessed June 9, 2011).

<sup>65</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982: <http://laws-lois.justice.gc.ca/eng/charter> (accessed June 9, 2011).

<sup>66</sup> For more information, see Association of Christian parent-educators of Québec, *Legal Aspect*, at [http://www.acpeq.org/en/legal\\_aspect.html](http://www.acpeq.org/en/legal_aspect.html), which describes a decade-long series of controversies and conflicts between homeschoolers and educational authorities in Québec.

The German school is a part of the National Socialist Educational order. It is its obligation to form the national socialistic personality in cooperation with the other educational powers of the nation, but by its distinctive educational means.<sup>67</sup>

The dictator's vision for Europe was grotesque, but his mechanism to gain control of the German people through education illustrates the role education plays in the quest for cultural dominion. Hitler understood this when he said that the "youth of today are the people of tomorrow."<sup>68</sup> He further demonstrated hostility towards parental involvement in educating children when he stated:

When an opponent declares, "I will not come over to your side," I calmly say, "your child belongs to us already . . . What are you? You will pass on. Your descendants, however, now stand in the new camp. In a short time they will know nothing else but this new community."<sup>69</sup>

Any government that seeks to control the education of children contrary to parental direction seeks the same kind of cultural and political domination and perpetuates the same kind of offense. Incredibly, faint echoes of these ideas remain in Germany where public policy makers and judges stubbornly refuse to permit parents to homeschool their children.

In 2003, the German court system reviewed a case of a German family who wished to homeschool their children. The family was denied an exception to the compulsory school law by local education authorities and received a civil fine. The family appealed the fine to the German Constitutional Court, which upon review wrote that the "general public has a justified interest in counteracting the development of religiously or philosophically motivated 'parallel societies' and in integrating minorities in this area."<sup>70</sup> Despite the assertion to the contrary in the United Nations' *Universal Declaration of Human Rights*, the German court said that parents do not have a prior right, but rather share an equal claim with the State in the education of children:

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<sup>67</sup> The Nizkor Project, *Nazi Conspiracy & Aggression*, Volume I, Chapter VII, Means Used by the Nazi Conspirators in Gaining Control of the German State (Part 44 of 55) A(1): <http://www.nizkor.org/hweb/imt/nca/nca-01/nca-01-07-means-44.html> (accessed May 13, 2011).

<sup>68</sup> Ibid.

<sup>69</sup> Adolf Hitler, in: William L. Shirer, *The Rise and Fall of The Third Reich* (New York: Simon and Schuster, 1960), 343.

<sup>70</sup> Ibid.

Social confidence in dealing with people who have different opinions, lived tolerance, the ability to assert oneself and the assertion of a conviction that differs from that of a majority opinion can be practiced more effectively if context was society and with the various views represented in society do not take place only occasionally, but rather are part of the everyday experience associated with regular school attendance.<sup>71</sup>

This is frightening language from a country with Germany's powerful educational history, particularly at university level. What is perhaps just as frightening is the result of an appeal to the European Court of Human Rights in 2006. The Court denied the family's application stating that Germany was within its "margin of appreciation" to ban homeschooling. In reviewing the case, the Court noted that the German position—that the State had an interest *equal* to the parents in the education of children—was not a problem. The Court stated that such an outcome was "justified under Article 8 § 2 and Article 9 § 2 respectively as being provided for by law and necessary in a democratic society and in the public interest of securing the education of the child."<sup>72</sup> Therefore, the court found that the Konrads' application was "manifestly ill-founded." In light of explicit treaty language, including and especially the 1948 *UN Declaration of Human Rights*, this author finds the *Court's ruling* to be manifestly ill-founded!

So, apparently, did a United States federal immigration judge.

In January 2010, United States Federal Immigration Judge Lawrence O. Burman granted political asylum to a family from Germany on the basis that they were persecuted because they were members of a particular social group—homeschoolers. Judge Burman is reported to have stated: "Homeschoolers are a particular social group that the German government is trying to suppress. This family has a well-founded fear of persecution . . . therefore, they are eligible for asylum . . . and the court will grant asylum."<sup>73</sup>

Attorneys for the family released a press document stating the following:

In his ruling, Burman said that the scariest thing about this case was the motivation of the government. He noted it appeared that rather than being concerned about the welfare of the children, the government was trying to stamp out parallel societies—something the judge called "odd" and just plain "silly." In his order the judge

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<sup>71</sup> *In the case relating to the constitutional complaint of Mr. Konrad*, German Federal Constitutional Court (1 BvR 436/03, decided April 29, 2003).

<sup>72</sup> European Court of Human Rights, application no. 35504/03, October 2006, by Fritz Konrad and Others against Germany, 9.

<sup>73</sup> Home School Legal Defense Association, "Homeschooling Family Granted Political Asylum: Immigration Judge Says Germany Violating Basic Human Rights" (January 26, 2010): <http://www.hsllda.org/hs/international/Germany/201001260.asp> (accessed May 16, 2011).

expressed concern that while Germany is a democratic country and is an ally, he noted that this particular policy of persecuting homeschoolers is “repellent to everything we believe as Americans.”<sup>74</sup>

#### **IV. Conclusion**

This paper has shown examples of the possible outcomes when governments treat children as “mere creature(s) of the state.” When the State imposes its authority to override the decisions of its parent-citizens regarding their choice of education for their children, conflict follows. We have also seen that the philosophy that the State has an equal or superior claim to the education of children stands in stark contrast with modern international human rights norms as articulated by landmark human rights conventions. These international human rights documents affirm the *prior right* of parents to determine the nature of their children’s education. Thus, when a court in a Western democracy, like Germany, rules as it did in its *Konrad* decision in 2003 that the State has an *equal* claim to the education of children, it demonstrates that it is operating outside the norm of internationally established human rights.

It is more than ironic that the German Constitutional Court, along with Fineman, Eichmann, Ross, and others, argues that pluralism requires the State to exercise a form of totalitarianism in education. They argue that it is the State’s responsibility to ensure the existence and continuation of the free society, for which certain values (as defined by them and the State) are necessary. Eichmann says that such “values” are not “spontaneous.” Thus, the State must ensure that these values are “nurtured” through compulsory government-directed education. Those who argue in this fashion, however, conflate “society” with “State.” State and society are not necessarily—and, in fact, are not usually—synonymous. Indeed, a government’s interest in expanding its power may very well be at odds with the people’s interest in freedom.

While Eichmann’s assertion that children are not born with fully developed values and beliefs about what is necessary for a free society may be true, the absence of an inherent understanding of the values of a free society on the part of children is surely *not* a justification for compelling citizens to subject themselves or their children to compulsory government-directed education. If such a proposition were true, America would not exist today. The values that made America a free society emerged within the families that made up society at the time—mostly Christian families whose education was *not* State-controlled. Homeschooling was the prevailing form of education at the time of America’s founding. The values that promote a free society

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<sup>74</sup> Ibid.

certainly can emerge and be sustained regardless of whether children are taught in a public school, private school, or homeschool.

America, with a long and robust experience with homeschooling, has shown that homeschooling can deliver superior academic results and that children who are homeschooled are not only well socialized, but are also more civically minded than their peers in other educational settings. Homeschooled children are demonstrably productive and contributing members of a free, pluralistic society. In a pluralistic society, individuals *must* be permitted to hold different value systems. To argue otherwise is to argue against the fundamental understanding of pluralism and to favor totalitarianism. In Germany and France, we have seen examples of how education can be used by the State for political purposes to reshape society in accordance with the values of those in power—with catastrophic outcomes. Even today in Germany, parents are prevented from exercising their prior right, as envisioned in the *UN Declaration on Human Rights*, to choose the kind of education their children should receive.

In America, the story is somewhat different. Even though the Supreme Court recognized, as early as 1925 and subsequently in 1979 in *Parham v. J.R.*, that it was an enduring tradition of Western culture that parents have a fundamental right to direct their children's education and make decisions about their care, custody, and control, there were many conflicts during the early homeschool movement. The conflicts in the legislatures and courts in every state, which lasted over the better part of two decades, were dramatic and far-reaching. These conflicts—really the operational processes of democracy in action—resulted in a patchwork of regulatory schemes that represented diverse views as to the role between the State and education; *but* (note well) *all of them made it possible for parents to homeschool their children*. The spirit of the *UN Declaration on Human Rights* was alive and well as parents, the public, and policy makers grappled with the issue of determining the proper demarcation and authority between parents and the State in the education of children. The American experience illustrates how a Western democracy can grapple with differing points of view and develop a diverse set of regulatory schemes across its geo-political subdivisions. There is no reason to think that this could not happen elsewhere. Indeed, it should—for this is the essence of democracy in a free pluralistic society. Yet, even as such a process unfolds, it *must* be regarded as *foundational* that parents have a prior and superior right to the State regarding the education of their children.

The State *must*, if it is to be faithful to international human rights norms, recognize and protect this right, which includes the right of parents to choose to educate their children at home

under their direction. This is not to say that the State may not legitimately serve in some regulatory or even oversight capacity. But to eliminate entirely the parental freedom to educate demonstrates a callous and totalitarian attitude that does not conform to modern international human rights doctrine, representing, as it surely does, the ideals of free society. Mao Tse-Tung was right when he said that “power comes from the end of a gun.”<sup>75</sup> The State has the power to compel its citizens to conform to its laws—including compelling children to attend a government school—but to prevent or severely restrict parents from choosing how a child shall be educated (as, for example, through homeschooling) must be regarded as “unjust and unworthy of a free society.”<sup>76</sup>

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<sup>75</sup> Mao Tse-Tung, *The Little Red Book*, (Beijing, China, 1964), Chapter 5.

<sup>76</sup> Glenn and De Groof (see note 44), 1.