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Homeschooling in the United States: A Seismic Parental Rights Victory

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Abstract

Homeschooling has surged in popularity. It has a proven record of success. Yet that begs the question: how did we get here? How did our nation go from prosecuting homeschool parents a few decades ago to considering home education a viable and mainstream educational option? This Article explores the reasons why and concludes that it is because of the history and tradition of parental rights that has been recognized and accepted in the United States. This Article explores the history of parental rights from ancient times to the founding of the United States. That rich history and tradition, particularly the Judeo-Christian and English Common Law history, significantly influenced our Founders, and, eventually, the U.S. Supreme Court. When the Court wrestled with concepts related to government power and parental rights, the history and tradition of parental rights made the difference. It is why homeschooling has taken off in the United States while parents in other countries around the world have struggled to make homeschooling commonplace socially, judicially, and legislatively. The history and tradition of parental rights laid the foundation for homeschooling to become not only legal, but mainstream in the United States today.

Author

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The author wishes to thank Claire Bechter, a 3rd year law student at Liberty University School of Law, and an HSLDA legal intern, for her invaluable editing assistance and research in the drafting of this Article. The author additionally wishes to thank James R. Mason, President of HSLDA, Darren A. Jones, Senior Counsel at HSLDA, Rabbi Yaakov Menken, founding director of Coalition for Jewish Values, Jason Bedrick, Research Fellow at the Heritage Foundation's Center for Education Policy, and Michael P. Donnelly, Vice President of yes. every. kid foundation, for their gracious suggestions and recommendations. Any errors or omissions are solely the fault of the author.

ARTICLE

HOMESCHOOLING IN THE UNITED STATES: A SEISMIC PARENTAL RIGHTS VICTORY

William A. Estrada[†]

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I. INTRODUCTION

Parental rights have become the topic *du jour*. We hear politicians, media personalities, and academics regularly discuss parental rights, whether in broad strokes or in some more narrow context, such as parental rights in the context of public education. But less discussed has been how one aspect of parental rights—homeschooling—went from relative obscurity to a well-respected institution in the realm of education and law in less than forty years.

This Article explores the history of parental rights in the Abrahamic religions and among the ancient Greek philosophers. It then reviews how that rich and ancient history impacted English legal scholars, who in turn influenced our nation's Founders. It then details how the U.S. Supreme Court ultimately adopted this historical respect for parental rights into our nation's jurisprudence.[1] This Article then concludes with an analysis of how the Court's protection of parental rights in a broad sense set the stage for homeschooling to be accepted legally and how homeschooling itself grew organically in the environment of respect for parental rights already established in the United States.

II. "IN THE BEGINNING . . ."[2]

According to the Holy Scriptures of the Jewish and Christian faiths, "God supernaturally created all things, including humans, and the family was established by God, pre-dating the institution of government."[3]

In his book, *The Liberty of Parents to Direct the Upbringing of Their Children*,[4] William Wagner traces the origins of parental rights. He explains

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[1] For a comprehensive overview of U.S. Supreme Court precedent regarding parental rights broadly, including in the contexts of medical and health care decisions, the author recommends Michael P. Donnelly, *A Legal Overview and History of Parental Rights in the United States*, *in* PARENTAL RIGHTS IN PERIL 15, 15–41 (Stephen M. Krason ed. 2022).

[2] *Genesis* 1:1 (New Int'l).

[3] An abbreviated version of this discussion was previously written by the author and can be found at William A. Estrada, *Theology of Politics: Parental Rights in Education*, STANDING FOR FREEDOM CTR. (Aug. 9, 2023), https://www.standingforfreedom.com/white-paper/parental-rights-in-education/.

that a key moment in the history of parental rights was when Moses introduced the Divine Law through the Ten Commandments and posits that this was when God bestowed on parents a duty to provide their children with moral guidance.[5] The Fifth Commandment states, "[h]nor your father and your mother, as the Lord your God has commanded you, so that you may live long and that it may go well with you in the land the Lord your God is giving you."[6]

Professor Wagner demonstrates that throughout the law and the prophets in the Jewish and Christian scriptures, spiritual messages are passed from parent to child. For example, when God made His covenant with Abraham, God instructed Abraham and his offspring to keep the covenant. This is an example of a parent being commanded by God to direct the upbringing of his children: "[t]hen God said to Abraham, 'As for you, you must keep my covenant, you and your descendants after you for the generations to come.'"[7] In another passage, scripture states "[f]or I have chosen him, so that he will direct his children and his household after him to keep the way of the Lord by doing what is right and just, so that the Lord will bring about for Abraham what he has promised him.'"[8]

More key passages in Jewish and Christian scriptures are found in Deuteronomy. Moses commands the children of Israel:

> And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up.[9]

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[4] 1 WILLIAM WAGNER, THE LIBERTY OF PARENTS TO DIRECT THE UPBRINGING OF THEIR CHILDREN: DIVINE, NATURAL, AND COMMON LAW FOUNDATIONS (2023).

[5] *Id.* at 8–9.

[6] *Deuteronomy* 5:16 (New Int'l); *Exodus* 20:12.

[7] *Genesis* 17:9 (New Int'l).

[8] *Id.* 18:19 (New Int'l).

[9] *Deuteronomy* 6:6–7 (King James).

In many chapters of Jewish and Christian scriptures found in Proverbs, parents share sacred wisdom with their children. Proverbs 1:8 urges, "[l]isten, my son, to your father's instruction and do not forsake your mother's teaching."[10] Proverbs 4:1–6 implores children to learn from their parents and keep their commands.[11]

In Judaism, the Talmud has this to say about the importance of parents:

> [T]he equating of one's attitude toward his parents to his attitude toward God is a logical derivation, as the three of them are partners in his creation. As the Sages taught: There are three partners in the forming of a person: The Holy One, Blessed be He, who provides the soul, and his father and his mother. When a person honors his father and mother, the Holy One, Blessed be He, says: I ascribe credit to them as if I dwelt between them and they honor Me as well.[12]

And summing up the importance of family in the Jewish faith, Rabbi Jonathan Sacks had this to say:

> [I]f there's one element of Judaism I'd love to share with everyone it's this: If you want to survive and thrive as a people, a culture, a civilization, celebrate the family. Hold it sacred. Eat together. Tell the story of what most matters to you across the generations. Make children the most important people. Put them centre stage.
>
> Encourage them to ask questions, the more the better. That's what Moses said thirty-three centuries ago and Judaism is still here to tell the tale having survived some of

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[10] *Proverbs* 1:8 (New Int'l).

[11] *Id.* 4:1–6.

[12] Babylonian Talmud, Kiddushin 30b.

> the most brutal persecutions in human history, yet as a religious faith we[']re still young and full of energy.[13]

In the Christian faith, the importance of parents and the family is continued through the example and teachings of Jesus Christ,[14] and in the Epistles written by Saint Paul to the early Christian church.[15] Matthew Henry, the great protestant theologian whose work spanned the seventeenth and eighteenth centuries, wrote in his commentary on Ephesians, specifically Ephesians 6:1–4, that

> [t]he great duty of children is to obey their parents (v. 1), parents being the instruments of their being, God and nature having given them an authority to command, in subserviency to God; and, if children will be obedient to their pious parents, they will be in a fair way to be pious as they are.[16]

He then continued that "[i]t is the order of nature that parents command and children obey."[17] He followed this up, however, with the full counsel of the Christian Scriptures by reminding parents:

> [t]hough God has given you power, you must not abuse that power, remembering that your children are, in a particular manner, pieces of yourselves, and therefore, ought to be governed with great tenderness and love. Be not impatient with them, use no unreasonable severities and lay no rigid injunctions upon them. When you caution them, when you counsel them, when you reprove them, do

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[13] *If You Want to Survive and Thrive as a People, a Culture, a Civilisation, Celebrate the Family*, THE RABBI SACKS LEGACY (Mar. 30, 2012), https://rabbisacks.org/archive/if-you-want-to-survive-and-thrive-as-a-people-a-culture-a-civilization-celebrate-the-family.

[14] *See, e.g.*, *Luke* 2:41–52; *Matthew* 15:4–9; *Matthew* 19:19; *Mark* 7:7–13; *Mark* 10:18–19; *Luke* 18:19–20.

[15] *See, e.g.*, *Ephesians* 6:1–4; *Colossians* 3:20.

[16] MATTHEW HENRY, MATTHEW HENRY'S COMMENTARY ON THE WHOLE BIBLE 2318 (9th ed. 1991).

[17] *Id.*

> it in such a matter as not to *provoke them to wrath.* In all such cases deal prudently and wisely with them, endeavouring to convince their judgements and to work upon their reason.[18]

And then specifically as to education, Matthew Henry concluded his commentary on this particular Bible passage by stating:

> "[g]ive them a good education." It is the great duty of parents to be careful in the education of their children[,] "[n]ot only bring[ing] them up, as the brutes do, taking care to provide for them; but bring them up in the nurture and admonition, in such a manner as is suitable to their reasonable natures. Nay, not only bring them up as men, in nurture and admonition, but as Christians, in the admonition of the Lord. Let them have a religious education."[19]

The Islamic faith has a similar view of parental rights, in accord with the Jewish and Christian teachings on parental rights. Perhaps the most comprehensive view of Islamic and Qur'anic support for parental rights is found in a 2014 article published in the International Journal of Pediatrics, titled *Rights of Children and Parents in Holy Quran*:

> It is clear that after Allah parents are the persons who give us innumerable favors. They provide protection, food and clothing to the newly born. The mother sacrifices her comforts and sleep to provide comfort to her children. The father works hard to provide for their physical, educational and psychological (and spiritual) needs. It is a matter of common courtesy that if a person does you some favor you feel obliged to him. Verbally you say 'thank you' to him. You try to repay and compensate him for his gifts and favors. You feel a sense of gratitude towards him. So it is

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[18] *Id.*

[19] *Id.*

with Allah and with parents. Allah's favors cannot be counted or repaid except by thanking Him and obeying His orders. After Allah our parents deserve our thanks and obedience for the favors they had done us. That's why Quran lays stress on feeling grateful to parents, and doing good to them.

And the Lord hath decreed that you worship none but Him and that you be kind to parents, (behave kindly with them and do not compel them to bring their needs to your attention; but fulfil their requirements before they have to tell you, even though in reality they are not in need of your assistance); if one or both of them attain old age in thy life, (and be-come angry with you) say not to them a single word of contempt, and (*if* they beat *you*) repel them not; but address them in terms of honour (and respect, i.e., say to them 'May Allah forgive you') and, out of kindness, lower to them the wing of humility (and whenever you look at them, look with gentleness and kindness; do not raise your voice upon their voices, nor your hands above their hands; nor walk before them); and say:

"My Lord! bestow on them Thy Mercy even as they cherished me in childhood". This explanation covers all three rights of parents: To cheerfully bear the hardship inflicted by parents, to talk to them gently, and not to raise your hands and voice above theirs and not to precede them in any way, all these injunctions cover the obedience by the body. To look at them with kindness and mercy and always to ask Allah's Mercy for them shows love. And to fulfil their needs before their demand concerns the rights on wealth. And thus the similarity between the rights of Almighty Lord and these metaphorical lords reaches the last point of completion.

What does a 'good turn' mean? It includes obeying and respecting them, speaking softly and kindly, avoiding harsh words or harsh tone, giving them company when they are

lonely, caring for their physical and psychological needs (especially in their old age), and praying to Allah that He may bless them and have mercy on them.

The only thing above respect to Mother, is the worship of Allah Subhanahu wa ta'ala (SWT), it is mentioned in Surah Isra, Verse No. 28-29, it says that:

"Allah has ordained for you, that you worship none but Him, and to be kind to our parents and if any one or both of them reach old age do not say a word of contempt or repel them but address them with honour, and speak to them with kindness, and lower your wing of humility and pray to Allah (SWT)-My Lord, bless them as they have cherished me in childhood".

Surah Nisa, Verse No. 1 says: "Respect the womb that bore you".

Also, Surah Nisa, Verse No. 36 says: "And worship Allah and join not any partner with Him and do good to parents . . . .["]

Surah A'nam, Verse No. 151, says: "You have to be kind to your parents".

Again in Surah Luqman, Verse No. 14; it again says the same thing that: "We have enjoined on the human beings to be kind to his parents. In travail upon travail, did their mother bore them and in years twain was their weaning".

A similar thing is repeated again in Surah Ahqaf, Verse No. 15: "We have enjoined on the human beings to be kind to his parents. In pain did their mother bore them and in pain did she give them birth".

It seems that the lordship of parents is a mirror of the Lordship of Allah. Right from birth to weaning, and from protection to upbringing, at every stage it is the parents who are the means of conveying the Grace of Allah to the

> child. Likewise, the rights of the parents are very much akin to the rights of Allah (SWT).[20]

As illustrated by the principles they promote, the three great Abrahamic world religions are in accord that parental rights were established by the Divine at the very beginning of the world and not from any act of any government instituted by man. That is, as Patrick Lee describes it, "the relationship between the parents and their children is a pre-political relationship, and the family is a pre-political community. These realities are not constructs of the state."[21] Or, as Mary Rice Hasson wrote, "parental authority is God-given and inherent in the parent-child relationship. Parental authority precedes the state; that is, the state neither grants nor delegates authority to parents over their children. Parents possess this authority simply by virtue of being parents."[22] As described by Melissa Moschella, "[P]arental authority is natural and original, primary to the state's authority over children and in no way derived from it."[23] As further explained by Melissa Moschella,

> [C]hildren are *primarily* and *directly* members of families, and only *secondarily* and *indirectly* members of the larger political community, because the intimate relationship between parent and child gives parents the most direct and immediate special obligation to care for and exercise paternalistic authority over their children. . . . [B]ecause parental authority is based on intrinsic features of the parent-child relationship, the authority of parents is

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[20] Masumeh Saeidi et al., *Rights of Children and Parents in Holy Quran*, 2 INT'L J. PEDIATRICS 103, 107–08 (2014) (endnotes omitted).

[21] Patrick Lee, *Who Has Primary Responsibility for Rearing and Educating Children?*, *in* PARENTAL RIGHTS IN PERIL 2 (Stephen M. Krason ed., 2022).

[22] Mary Rice Hasson, *Parental Rights and Decisions about Minor Children's Health Care*, *in* PARENTAL RIGHTS IN PERIL 73 (Stephen M. Krason ed., 2022).

[23] MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG? PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN'S AUTONOMY 23 (2016).

> *natural* and *original,* not *conventional* or *derivative* of the authority of the state or larger community.[24]

It is also important to note that, as the three great Abrahamic world religions teach, this right of parents is a responsibility delegated by Creator God that comes with an equally important responsibility of love and tender care owed to children. As HSLDA President James R. Mason noted in his article titled *In Defense of Homeschooling: A Response to Critics of Parents' Rights to Educate Their Children,* "the correct relationship of the state to the family is that parents have *fundamental* rights, not absolute rights. A fundamental right means that the state should only intervene for compelling reasons, and then only in a limited fashion."[25] Indeed, Jesus Christ had this to say about someone who harms a child, whether physically, emotionally, or spiritually:

> [Jesus] called a little child to him, and placed the child among them. And he said: ". . . whoever welcomes one such child in my name welcomes me. If anyone causes one of these little ones—those who believe in me—to stumble, it would be better for them to have a large millstone hung around their neck and to be drowned in the depths of the sea."[26]

This evil on the part of a parent could be summed up as parents acting in ways against nature or the natural instinct, or, as Melissa Moschella describes it, as parents acting in ways that destroy their legitimacy: "Only in situations of genuine abuse and neglect may the state step in to exercise paternalistic authority over children in a direct and immediate way, because in those cases parental authority has lost its legitimacy."[27]

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[24] *Id.* at 147.

[25] James R. Mason, *In Defense of Homeschooling: A Response to Critics of Parents' Rights to Educate Their Children*, *in* PARENTAL RIGHTS IN PERIL 165 (Stephen M. Krason ed., 2022) (footnote omitted).

[26] *Matthew* 18:2–6 (New Int'l).

[27] MOSCHELLA, *supra* note 23, at 151.

III. PARENTAL RIGHTS AS IDENTIFIED BY THE GREEK PHILOSOPHERS[28]

We have seen that parental rights were virtually undisputed in ancient times. However, some of the Greek philosophers challenged this ancient faith tradition respecting parental rights. This tension (and indeed, debate among worldviews) was aptly summarized by the U.S. Supreme Court in the landmark 1923 case *Meyer v. Nebraska*[29]:

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians.[30]

Aristotle, writing over 300 years before the birth of Christ, disagreed with his teacher Plato's views on the role of the family in society. Aristotle recognized that the family predates government:

> The friendship between man and wife seems to be inherent in us by nature. For man is by nature more inclined to live in couples than to live as a social and political being, inasmuch as the household is earlier and more indispensable than the state, and to the extent that

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[28] The author notes that the Greek Philosophers predated Islam; the Islamic perspective on parental rights is grouped with the Jewish and Christian perspectives on parental rights for internal cohesiveness.

[29] *See* discussion *infra* Section V.

[30] Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923).

> procreation is a bond more universal to all living things [than living in a state].[31]

Aristotle further opined that this is rooted in love from the parents to children (parents "know better that the offspring is theirs than children know that they are their parents' offspring, and the bond which ties the begetter to the begotten is closer than that which ties the generated to its author."),[32] that "parents love their children as themselves: offspring is, as it were, another self,"[33] and that parents "love their children as soon as they are born, but children their parents only as, with the passage of time, they acquire understanding or perception. This also explains why affection felt by mothers is greater [than that of fathers]."[34]

Plutarch, the Greek and Roman philosopher and historian writing in the early years of the Christian era, stated that nature bestows in humanity "a kind love and tender affection towards his children."[35]

Plutarch mused further on the pain of childbirth[36] and the pain that fathers see "when their children fall to gaming, revelling, masking, and banqueting, to drunkenness, wanton love, whoring, and such-like misdemeanours. . . . And yet for all this, fathers cease not still to nourish and bring up children."[37]

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[31] ARISTOTLE, NICOMACHEAN ETHICS, 1162a16-19 (Martin Ostwald trans., 1986).

[32] *Id.* at 1161b20-22.

[33] *Id.* at 1161b27-28.

[34] *Id.* at 1161b24-27.

[35] PLUTARCH, OF THE NATURAL LOVE OR KINDNESS OF PARENTS TO THEIR CHILDREN, *reprinted in* PLUTARCH'S MORALIA: TWENTY ESSAYS 290, 296 (Ernhest Rhys ed., Philmon Holland trans., 1911).

[36] *Id.* at 299–300 ("[B]ut yet, for all the sorrow and dear bargain that a mother hath of it, this kind and natural love doth still so bend, incline and lead her, that notwithstanding she be in a heat still upon her travail, full of pains and afterthroes, panting, trembling, and shaking for very anguish, yet she neglecteth not her sweet babe, nor windeth or shrinketh away from it; but she turneth toward it, she maketh to it, she smileth and laugheth upon it, she taketh it into her arms, she huggleth it in her bosom, and kisseth it full kindly . . . .").

[37] *Id.* at 301.

Plutarch's conclusion was that "surely the cause of this their kindness and affection [of parents to their children] proceedeth altogether from nature[.]"[38]

IV. PARENTAL RIGHTS AS IDENTIFIED BY THE ENGLISH COMMON LAW PHILOSOPHERS[39]

The great English Common Law philosophers, whose views so influenced the Founders of the U.S. Constitution, drew on this rich and ancient history. Consider the following from John Locke's *Second Treatise of Civil Government*, first published in 1690, almost a century before the ratification of the U.S. Constitution in 1787:

> Adam was created a perfect man, his body and mind in full possession of their strength and reason, and so was capable from the first instance of his being to provide for his own support and preservation, and govern his actions according to the dictates of the law of reason which God had implanted in him. From him the world is peopled with his descendants, who are all born infants, weak and helpless, without knowledge or understanding: but to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents were, by the law of Nature, "under an obligation to preserve, nourish and educate the children" they had begotten; not as their own workmanship, but the workmanship of their own [M]aker, the Almighty, to whom they were to be accountable for them.
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> . . . .

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[38] *Id.* at 302.

[39] For a reader who also wishes to study how the writings of the Church Fathers such as Saint Augustine of Hippo, Saint Thomas Aquinas, and others also built on this ancient foundation of parental rights, the author recommends Melissa Mochella's previously cited book, *To Whom Do Children Belong? Parental Rights, Civic Education, and Children's Autonomy*, specifically pages 25–29.

> . . . This is that which puts the authority into the parents' hands to govern the minority of their children. God hath made it their business to employ this care on their offspring, and hath placed in them suitable inclinations of tenderness and concern to temper this power, to apply it, as [H]is wisdom designed it, to the children's good, as long as they should need to be under it.[40]

Locke's understanding of the right and obligation of parents to direct the upbringing of their children reflected the Common Law understanding of his day and is similar to the views of William Blackstone and others.[41] It is a view that was shared by our Founders and the first generations of our nation's leadership, which is a major reason why the U.S. Supreme Court had no opportunity to decide a parental rights case until 1923.[42]

V. PARENTAL RIGHTS AS IDENTIFIED BY THE U.S. SUPREME COURT[43]

In the early twentieth century, a rise of political and social activism sought to alter these deeply rooted (and widely held through all levels of politics and society) historical views on family and government. This

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[40] JOHN LOCKE, TWO TREATIES OF GOVERNMENT 123, 126 (Ian Shapiro, ed., Yale Univ. Press 2003) (1690).

[41] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *447; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 160 (1827) (generally discussing the proposition that natural bonds of affection result in parents loving their children, taking care of their children, and acting in the best interests of their children).

[42] For the reader who wants to do a deep dive into this rich history of parental rights—from ancient times to the Founders of our nation to the present, the author highly recommends two books: Stephen M. Krason, PARENTAL RIGHTS IN PERIL (2022), and MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG? PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN'S AUTONOMY (2016).

[43] This review of U.S. Supreme Court case law pertaining to parental rights was originally written by the author and submitted in two *amicus curiae* briefs to the First Circuit and Eleventh Circuit Court of Appeals. *See* Corrected Brief of Amicus Curiae Parental Rights Foundation in Support of Plaintiffs—Appellants & in Support of Reversal, Foote v. Ludlow Sch. Comm., No. 23-1069 (1st Cir. Mar. 21, 2023); Brief of Amicus Curiae Parental Rights Foundation in Support of Plaintiffs—Appellants & in Support of Reversal, Littlejohn v. Sch. Bd. of Leon Cnty., No. 23-10385 (11th Cir. May 30, 2023).

political and social activism directly led to *Meyer v. Nebraska,* the first time the U.S. Supreme Court ever weighed in on the issue of parental rights.

"As so many turning points in history do," *Meyer* had its roots in war.[44] "Just nine years [earlier], anarchist Gavrilo Princip assassinated Archduke Franz Ferdinand of Austria and his wife, Sophie, Duchess of Hohenberg—the first event in a chain of tragedies that [ultimately] plunged the nations [of the world] into World War I."[45]

As America mobilized for war, intense patriotism was the order of the day, leading to virulent anti-German sentiment (which was helped along by a broader anti-immigrant sentiment). William G. Ross explains:

> The advent of war, however, precipitated a paroxysm of hostility toward German ethnicity. Although there was no reason to question the loyalty of most Americans of German ancestry, the government's crusade to inspire "100 percent Americanism" and to portray the German nation as anti-democratic and barbarous inevitably inspired suspicion of German-Americans who retained distinctly Germanic customs.
>
> . . . .
>
> The widespread use of the German language was the most visible aspect of German ethnicity and it became the primary target of anti-German hysteria. . . .
>
> Twenty-three states enacted statutes that imposed restrictions upon instruction in foreign languages, especially the German language.[46]

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[44] This background was explained in an op-ed by the author. William A. Estrada, *Marking the Milestones: 100 Years of Parental Rights Protections*, WASH. EXAM'R (Feb. 23, 2023, 6:00 AM), https://www.washingtonexaminer.com/restoring-america/community-family/marking-the-milestones-100-years-of-parental-rights-protections.

[45] *Id.*

[46] William G. Ross, *Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 131–33 (1988) (footnotes omitted).

The state of Nebraska passed a law prohibiting parents from having their children taught in another language, except in extremely limited circumstances. Robert Meyer, a teacher at a small Lutheran private school, was convicted of violating the law and fined $25. He appealed his conviction, only to lose before the Nebraska Supreme Court[47] before appealing to the U.S. Supreme Court.

And on June 4, 1923, the U.S. Supreme Court overruled Robert Meyer's conviction in a 7–2 decision and struck down Nebraska's law. Not only had Robert Meyer won, but the Court's decision was also the first in a line of cases protecting parental rights as a fundamental right.

The Court held in its decision that "it is the natural duty of the parent to give his children education suitable to their station in life."[48] This reasoning hearkened back to the Declaration of Independence, in which our Founders recognized two crucial ideas: 1) our rights come not from government, but from "the Laws of Nature and of Nature's God," and 2) that "all men are created equal [and] that they are endowed by their Creator with certain unalienable Rights[.]"[49]

In *Meyer* the Court explained that "the individual has certain fundamental rights which must be respected. . . . [The individual] cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means."[50]

The Court then did something logically and historically spectacular: it returned to the family as the building block of society. As classically trained people, the justices on the Court rejected the Greek philosopher Plato's musing that "children are to be common"[51] as contrary to our own nation's founding:

> Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from

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47 Meyer v. State, 187 N.W. 100, 104 (Neb. 1922), *rev'd*, 262 U.S. 390 (1923).

48 Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

49 THE DECLARATION OF INDEPENDENCE, para. 1–2 (U.S. 1776).

50 *Meyer*, 262 U.S. at 401.

51 *See* discussion *infra* Section III.

> those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[52]

Importantly, the Court found that parental rights are a substantive due process right within the Fourteenth Amendment.[53]

Two years later, parental rights were again at the forefront, this time in *Pierce v. Society of The Sisters of The Holy Names of Jesus And Mary*,[54] a case challenging an Oregon law standardizing education of children in public schools and centralizing it within state power. Notably, this law had been championed by the Klu Klux Klan.[55]

In a unanimous opinion, the Court again found that parental rights are a substantive due process right within the Fourteenth Amendment, building upon the foundation laid in *Meyer*: "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."[56]

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[52] *Meyer*, 262 U.S. at 402.

[53] *Id.* at 399–400.

[54] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[55] *See, e.g.*, Ben Bruce, *The Rise and Fall of the Ku Klux Klan in Oregon During the 1920s*, 11 VOCES NOVAE, 2019 at 5 (fourth alteration in original) (footnotes omitted) ("In retaliation against papal influence, the Klan fully endorsed the 'Oregon School Bill,' a measure that sought to outlaw all private schools in the state, including Catholic schools, and require all students to attend public school. . . . Although the Klan did not contribute to the bill's creation, it was heavily involved in its promotion. The Klan printed and distributed pamphlets that contained messages like, 'The Klan believes free public school . . . is the most essential of all American institutions . . . and the Catholic hierarchy opposes this.' A newspaper advertisement for the bill featured similar language: 'Ignorance of American ideals and institutions and language is the greatest menace to our children].' The ad was paid for by the Scottish Rite of Freemasonry, a fraternal organization closely allied to the Klan. A front-page article in the Klan's statewide newspaper praised the bill as 'the greatest piece of constructive legislation enacted in any state in fifty years.'").

[56] *Pierce*, 268 U.S. at 535.

Less than twenty years later, the U.S. Supreme Court again recognized parental rights.[57] The guardian of a nine-year-old girl was convicted of allowing her child to sell Jehovah's Witness publications in violation of a state law protecting children from labor violations.[58] While upholding the conviction, the Court affirmed a key concept of parental rights:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . [I]t is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.[59]

Four Justices dissented from the Court's decision and would have overturned the woman's conviction. Indeed, Justice Murphy wrote in his dissent, foreshadowing the Court's ruling twenty-eight years later in *Wisconsin v. Yoder,* the following: "Nor can parents or guardians be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child. The evils must be grave, immediate, substantial."[60]

Then came 1972, and perhaps the most well-known U.S. Supreme Court decision affirming parental rights, *Wisconsin v. Yoder*.[61] In this case, the Court overturned the convictions of members of the Old Order Amish religion and the Conservative Amish Mennonite Church who were convicted of violating Wisconsin's compulsory attendance statute by not sending their children to public school after the eighth grade.[62] The Court said,

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[57] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[58] *See id.* at 159–62.

[59] *Id.* at 166 (citation omitted).

[60] *Id.* at 175 (Murphy, J., dissenting).

[61] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[62] Moschella writes that this almost didn't become a case:

> It is interesting to note that the decision to prosecute in this case did not seem to be motivated either by a concern that the education the Amish

> [T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.
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> . . . .
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> . . . Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[63]

Two years after *Yoder* came *Cleveland Board of Education v. LaFleur*.[64] Although this case dealt with school board policies requiring pregnant teachers to take involuntary maternity leave, the Court once again reaffirmed that "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[65]

In 1977, in a case dealing with which individuals constitute a family in the context of a local housing ordinance, the Court again reiterated that

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> were providing for their children would insufficiently prepare them to be law-abiding and productive citizens, or that it unduly limited the children's future life options. Rather, Superintendent Kenneth Glewen would have been happy to let the Amish do as they wished on the condition that they send their children to the public high school for the first couple weeks, which would be sufficient for the children to be counted among the school's pupils for the purpose of funding allocation. When the Amish refused to comply with such an unprincipled scheme, Glewen retaliated by filing a complaint with the district attorney.

MOSCHELLA, *supra* note 23, at 155.

63 *Yoder*, 406 U.S. at 213–14, 232.

64 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

65 *Id.* at 639–40.

"the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[66]

In the same year, 1977, in a case dealing with New York State and New York City's policies regarding the removal of foster children from foster homes, the Court reaffirmed the family as the essential building block of society that predates the government of the United States:

> But there are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. The individual's freedom to marry and reproduce is "older than the Bill of Rights." Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment, the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in "this Nation's history and tradition."[67]

In the 1978 case of *Quilloin v. Walcott*, a family law case dealing with a natural father's challenge to the adoption of his child by the child's stepfather, the Court stated,

> We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. . . .
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> We have little doubt that the Due Process Clause would be offended "[if] a State were to attempt to force the

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[66] Moore v. East Cleveland, 431 U.S. 494, 503–04 (1977) (footnote omitted).

[67] Smith v. Org. of Foster Fams., 431 U.S. 816, 845 (1977) (citations omitted).

> breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[68]

In the same year, the Court decided another family law case, *Stanley v. Illinois*, concerning a dependency proceeding.[69] The Court held for the unwed father and once again reaffirmed the importance of parental rights:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "rights far more precious than property rights[.]" "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.[70]

One year later came *Parham v. J. R.* in which the Court made this ringing pronouncement:

> 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

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[68] Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (alteration in original).

[69] Stanley v. Illinois, 405 U.S. 645 (1978).

[70] *Id.* at 651 (citations omitted).

> additional obligations." . . . 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.
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> . . . The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.
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> . . . .
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> . . . Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments. . . . We cannot assume that the result in *Meyer v. Nebraska* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child. . . . Neither state officials nor federal courts are equipped to review such parental decisions.[71]

Three years later, in 1982, in a child neglect case arising out of New York, the Court again reaffirmed the importance of parental rights, saying,

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[71] Parham v. J.R., 442 U.S. 584, 602–04 (1979) (citations omitted).

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. . . .
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> . . . .
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> . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.[72]

Eleven years later, the Court decided a case dealing with non-resident immigrant juveniles who were detained by the federal government, *Reno v. Flores.*[73] A particular line of the case is exceedingly helpful in reminding policy makers and the courts that parental rights must be respected as a constitutional limit on the exercise of state power, even if nonparents believe they would do a better job making decisions for a child than the child's parents:

> "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child

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[72] Santosky v. Kramer, 455 U.S. 745, 753, 760 (1982).

[73] Reno v. Flores, 507 U.S. 292 (1993).

> *adequately*. Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.[74]

In the 1997 case of *Washington v. Glucksberg*, the Court upheld Washington State's law banning assisted suicide.[75] The Court reaffirmed that parental rights are fundamental rights, and that strict scrutiny should be utilized in reviewing governmental actions infringing upon parental rights:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children. . . . The Fourteenth Amendment forbids the government to infringe "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.[76]

And most recently, in the grandparent visitation case of *Troxel v. Granville*, the Court summed up almost a century's worth of precedents, stating

> [t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. . . . In light of this extensive precedent, it cannot now be doubted that the Due Process

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[74] *Id.* at 303–04 (citations omitted).

[75] Washington v. Glucksberg, 521 U.S. 702 (1997).

[76] *Id.* at 702, 720–21 (citations omitted).

> Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. . . . [T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made.[77]

These cases are powerful reminders of the history of parental rights jurisprudence in the United States. But how does homeschooling in particular fit into this? After all, none of these cases could be construed as homeschooling cases. Before providing an answer to this question, it is important to touch on one critical point: that the courts should use strict scrutiny as the standard of review for any cases involving parental rights.

VI. STRICT SCRUTINY IS THE CORRECT STANDARD OF REVIEW FOR PARENTAL RIGHTS CASES

As demonstrated by their wide recognition throughout history, parental rights are fundamental.[78] And as a fundamental right, the correct standard of review is strict scrutiny. According to the U.S. Supreme Court: "[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' [] include[s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[79] Four years later, the Court built upon this foundation, explaining that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . [.]"[80] The Court then reiterated what it had said in *Flores:* "[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process

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77 Troxel v. Granville, 530 U.S. 57, 65–66, 72–73 (2000).

78 *See supra* Sections I–V.

79 Reno v. Flores, 507 U.S. 292, 301–02 (1993).

80 *Glucksberg*, 521 U.S. at 720–21 (1997) (internal citation omitted).

is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'"[81]

Using different terminology for strict scrutiny, the Court explained this in *Wisconsin v. Yoder*:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.[82]

In *Troxel*, as previously discussed, the Court reaffirmed the fundamental nature of parental rights and, in the context of nonparental visitation cases decided under state law,[83] the Court held for the parent and found Washington's nonparental visitation statute unconstitutional without needing to reach a strict scrutiny determination: "[Washington's nonparental visitation statute] unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad."[84] And the Supreme Court made it clear prior to its declaration that parental rights are a fundamental right, and that "[t]he [Fourteenth Amendment's Due Process] Clause also includes a substantive

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[81] *Id.* at 721 (quoting Reno v. Flores 507 U.S. 292, 302 (1993)).

[82] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[83] Troxel v. Granville, 530 U.S. 57, 73 (2000) ("Because we rest our decision on the sweeping breadth of [Washington's nonparent visitation statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context.").

[84] *Id.* at 67.

component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'"[85]

Parental rights are fundamental rights. As such, when matters relating to parental rights versus the government come before the courts, the courts must apply a strict scrutiny analysis.

With this issue addressed, let us proceed to a discussion of parental rights in the context of homeschooling.

VII. THE RISE OF HOMESCHOOLING[86]

The preceding sections describe how one particular aspect of parental rights, the right of parents to send their children to a private school of their choosing, was under attack. Indeed, private schools as an institution were under existential attack. History could have turned out very differently if state laws prohibiting the ability of parents to choose to enroll their children in a private school of their choice had been upheld by the U.S. Supreme Court as a valid exercise of state power. That did not happen, however, and today, private schools are thriving, popular, and generally considered to be one of the best ways to educate a child—if the parents can afford private school tuition and there is a private school available.

This victory for private schools and for a parent's right to enroll a child in a private education program laid the foundation for homeschooling to prevail legally in the United States. We must remember, however, that today's success of homeschooling was not a foregone conclusion even a generation ago. Melissa Moschella reminds us that "[h]omeschooling is now legal throughout the United States, but for most of the twentieth

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[85] *Id.* at 65 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

[86] This Article does not attempt to demonstrate *why* homeschooling is beneficial. For the reader who wishes to understand the deep benefits that home education can provide to children, to families, and to society, the author recommends HOMESCHOOL FREEDOM: HOW IT WORKS & WHY WE MUST PROTECT IT (J. Michael Smith & James R. Mason eds., 2020). For the reader who wishes to examine the academic outcomes of homeschool students and graduates, the author recommends LINDSEY M. BURKE, BRINGING ACHIEVEMENT HOME: A REVIEW OF THE ACADEMIC OUTCOMES OF HOMESCHOOLING STUDENTS IN THE UNITED STATES (2019); and Angela R. Watson, *Homeschool Hub*, JOHNS HOPKINS INST. FOR EDUC. POL'Y (2023), https://education.jhu.edu/edpolicy/policy-research-initiatives/homeschool-hub/.

century homeschooling was considered to be a violation of compulsory education laws."[87] HSLDA President James R. Mason summed up this past possibility of a dystopian future for homeschooling in his article titled *In Defense of Homeschooling: A Response to Critics of Parents' Rights to Educate Their Children*:

> Looking back at the birth of the modern homeschooling movement, it is easy to forget that what may seem inevitable in hindsight was far from certain back then.
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> In the 1980s, prosecutors in Iowa, Michigan, North Dakota, Texas, and other states charged parents with crimes for homeschooling without a state teaching license. And across the country, parents faced considerable peril when they navigated the kind of bureaucratic "regime" that Professor Bartholet [a Harvard Law Professor who wrote a law review article[88] calling for the government to ban homeschooling] would have us return to.
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> The peril was real. The outcome was uncertain. Yet early homeschoolers endured.
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> HSLDA participated in state supreme court cases in each of the states mentioned above. And we have worked hard with state and local allies across the country to help parents roll back the old anti-homeschooling regime. The fact that homeschooling today is unquestionably legal, mainstream, and widely accessible was never a foregone conclusion.
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> . . . .
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> Homeschooling's progress from a perceived fringe to a mainstream option has been one of the most dramatic "wins" of my lifetime. HSLDA founder Mike Farris calls it a

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[87] MELISSA MOSCHELLA, *TO WHOM DO CHILDREN BELONG? PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN'S AUTONOMY* 3 (Cambridge University Press, 2016).

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

> "generational win." Getting from there to here was never a foregone conclusion. Parents in the 1960s, '70s, and '80s risked legal peril and social stigma to do what homeschoolers take for granted today.
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> Yet homeschooling steadily grew, as more moms and dads just like you and me took the plunge. And as the movement removed more and more legal, social, and practical barriers, together we created a dizzying array of networks, co-ops, and state and local organizations—the rich mosaic we know as homeschooling today.[89]

Indeed, while homeschooling has flourished in the United States due, in large part, to our nation's rich history and tradition of protecting parental rights, the same has not occurred overseas.[90] Such was not the fate in the United States, however, despite some early losses in the courts.

It is important to note that homeschooling is not new in the United States: "George Washington, Patrick Henry, and John Quincy Adams were home schooled for all or a significant part of their education."[91] Christopher Klicka stated that "[h]ome schooling is an age-old educational method that has experienced a resurgence, beginning in the 1970s in the United States."[92] In her doctoral dissertation, Dixie Dillon Lane tracked the modern growth of homeschooling in Los Angeles County, California, starting as far back as 1950.[93] James R. Mason, discussing the growth of the modern homeschool movement, wrote that, beginning in the 1950s "a small but growing number of parents all over the country began leaving the public

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[89] Mason, *supra* note 25, at 169–71.

[90] *See, e.g.*, Konrad v. Germany, App No. 35504/03 (Sept. 11, 2006), https://hslda.org/docs/librariesprovider2/public/international/konrad_decision.pdf?sfvrsn=1db3fed1_3; Wunderlich v. Germany, App. No. 18925/15 (June 24, 2019), https://hudoc.echr.coe.int/?i=001-188994.

[91] MICHAEL FARRIS, THE FUTURE OF HOME SCHOOLING: A NEW DIRECTION FOR CHRISTIAN HOME EDUCATION 4 (1997).

[92] CHRISTOPHER J. KLICKA, THE RIGHT CHOICE: HOME SCHOOLING 11 (1992).

[93] Dixie Dillon Lane, Skipping School: Homeschooling in Los Angeles County, 1950–2010 (Apr. 2015) (Ph.D. dissertation, University of Notre Dame) (on file with author).

schools to teach their own children. Some did it for religious reasons. Others did it for educational reasons. Some were evangelical Christians, and some were hippies. And a few were both!"[94] Mason continued, "[t]his growing movement was ignited in 1979, when James Dobson interviewed the late Dr. Raymond Moore on his *Focus on the Family* radio broadcast. Dr. Dobson later said, 'I consider Dr. Raymond Moore to be the father of the modern homeschool movement.'"[95]

Before the 1970s, and even the 1950s, however, some far-sighted courts of the late nineteenth century recognized homeschooling. The Massachusetts Supreme Judicial Court, in setting aside a verdict against a father for failing to send his eleven-year-old daughter to a public school, stated in 1893:

> But if the person having a child under his control, instead of sending him to a public school or to a private day school approved by the school committee, prefers to have him instructed otherwise, it will be incumbent on him to show that the child has been instructed for the specified period in the required branches of learning, unless the child has already acquired them. This permits instruction in those branches in schools or academies situated in the same city or town, or elsewhere, or instruction by a private tutor or governess, *or by the parents themselves*, provided it is given in good faith and is sufficient in extent.[96]

Milton Gaither in his seminal book, *Homeschool: An American History*, wrote that the history of homeschooling in the United States is not an easy task to recount:

> One of the greatest achievements of the homeschooling movement was the legalization of homeschooling in the 1980s and early 1990s in every state in the country. Yet this

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[94] James R. Mason, *A Look Back at the Great California Homeschool Case of 2008*, *in* HOMESCHOOL FREEDOM (J. Michael Smith & James R. Mason eds., 2020).

[95] *Id.*

[96] Commonwealth v. Roberts, 34 N.E. 402, 403 (Mass. 1893) (emphasis added).

> very important story has seldom been told outside the annals of homeschoolers' own publications. It is a difficult story to tell, for two reasons. First, since U.S. education law is predominantly a state affair and not a federal one, there are actually fifty stories to tell. These fifty stories interface in complicated ways as well: court cases in one state are cited in others, legislative trends become contagious, and national organizations often exert significant influence on local politics.[97]

Fortunately, while the *why* and other questions may be disputed, the legal landscape is clear. It may surprise many of today's readers to find that, unlike in the court battles defending the right of parents to choose a private school,[98] the homeschool parents of the early- to mid-twentieth century did not usually prevail in the courts. Los Angeles homeschool parents lost in court in 1953[99] and 1961.[100] A deeply religious homeschool family lost before the Virginia Supreme Court in 1948.[101] Washington parents lost throughout the twentieth century, including a parent who was an experienced teacher in 1912,[102] and another parent providing quality

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[97] MILTON GAITHER, HOMESCHOOL: AN AMERICAN HISTORY 175 (2008).

[98] *See, e.g.*, *supra* discussion Section V.

[99] People v. Turner, 263 P.2d 685 (Cal. App. Dep't Super. Ct. 1953), *appeal dismissed*, 347 U.S. 972 (1954).

[100] *In re* Shinn, 16 Cal. Rptr. 165 (Cal. Ct. App. 1961).

[101] Rice v. Commonwealth, 49 S.E.2d 342 (Va. 1948).

[102] State v. Counort, 124 P. 910, 911–12 (Wash. 1912) ("The theory of appellant in this connection is that it would be a defense to this charge to show that he is experienced as a teacher and qualified to teach all branches required to be taught in the public schools of this state, and that he maintains a private school at his home for the instruction of his own children. We have no doubt many parents are capable of instructing their own children, but to permit such parents to withdraw their children from the public schools without permission from the superintendent of schools, and to instruct them at home, would be to disrupt our common school system and destroy its value to the state. This statute recognizes that adequate private schools may be maintained in any district to which parents may send their children without any violation of the law, and it would be a good defense to show attendance at such private school for the required time. We do not think that the giving of instruction by a parent to a child, conceding the competency of the parent to fully instruct

instruction in 1959.[103] Several homeschool families lost before the New Hampshire Supreme Court in 1929.[104] A highly dedicated New York mother lost in 1976,[105] when the court determined that she was not providing her children with an adequate education.[106]

New Jersey was unique in that parents educating their children at home lost in 1937[107] and again in 1950,[108] but a contrary result occurred in 1967. The 1967 case started similarly to the two previous New Jersey ones when Frank and Barbara Massa were charged and convicted in Municipal Court for educating their daughter at home (two older children were enrolled in public high school), and fined $2,490.[109] On appeal to the County Court for Morris County, New Jersey, however, they prevailed (while representing

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the child in all that is taught in the public schools, is within the meaning of the law 'to attend a private school.' Such a requirement means more than home instruction; it means the same character of school as the public school, a regular, organized and existing institution making a business of instructing children of school age in the required studies and for the full time required by the laws of this state. The only difference between the two schools is the nature of the institution. One is a public institution, organized and maintained as one of the institutions of the state. The other is a private institution, organized and maintained by private individuals or corporations. There may be a difference in institution and government, but the purpose and end of both public and private schools must be the same—the education of children of school age. The parent who teaches his children at home, whatever be his reason for desiring to do so, does not maintain such a school.").

[103] State *ex rel.* Shoreline Sch. Dist. v. Superior Ct. for King Cnty., 346 P.2d 999 (Wash. 1959) (en banc), *cert. denied*, 363 U.S. 814 (1960).

[104] State v. Hoyt, 146 A. 170 (N.H. 1929).

[105] *In re* Franz, 378 N.Y.S.2d 317 (N.Y. Fam. Ct. 1976), *aff'd*, 390 N.Y.S.2d 940 (N.Y. App. Div. 1977).

[106] *In re* Franz, 390 N.Y.S.2d 940, 942 (N.Y. App. Div. 1977) ("The trial court found—and we do not question—that the mother made sincere efforts to furnish the child with all of the educational requirements. The record indicates, however, that she was better versed in some of the common branches than she was in others, and in some she was not qualified at all. The indication was, also, that if John showed interest in a particular subject, undue emphasis was placed on that item to the consequent neglect of others. Also, she set aside only one and one-half hours per school day for his instruction as against the school's period for instruction, which covered five hours daily.").

[107] Stephens v. Bongart, 189 A. 131 (Essex County Ct. 1937).

[108] Knox v. O'Brien, 72 A.2d 389 (Cape May County Ct. 1950).

[109] State v. Massa, 231 A.2d 252, 253–54 (Morris County Ct. 1967).

themselves pro se), with the court finding "that the State has not shown beyond a reasonable doubt that defendants failed to provide their daughter with an equivalent education."[110] Indeed, the court noted that "[t]he Massa family, all of whom were present at each of the hearings, appeared to be a normal, well-adjusted family. The behavior of the four Massa children in the courtroom evidenced an exemplary upbringing."[111]

Parents during this time frame also occasionally prevailed when they could show that they were (or had retained) licensed teachers with teaching experience.[112] But even these limited wins were not universal.[113]

One standout case from this time, however, was *People v. Levisen*.[114] In this decision—which is still the definitive case on home education in Illinois—the Illinois Supreme Court decided for the home educating parents. The Illinois Supreme Court determined that the parents were deeply religious Seventh Day Adventists, highly educated, and providing an exceptional education for their seven-year-old daughter.[115] The court then reversed the parents' convictions for violating the Illinois compulsory attendance statute, finding that they were operating a valid one-student private school in their home. Notably, there was a sharp dissent. Justice Simpson observed the following, sounding not unlike present-day critics of homeschooling:

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110 *Id.* at 253, 257.

111 *Id.* at 257.

112 *See, e.g.*, Wright v. State, 209 P. 179 (Okla. Crim. App. 1922); State v. Peterman, 70 N.E. 550 (Ind. Ct. App. 1904).

113 *See, e.g.*, State v. Counort, 124 P. 910 (Wash. 1912).

114 People v. Levisen, 90 N.E.2d 213 (Ill. 1950).

115 *Id.* at 214 ("The father is a college graduate and a minister in his religion. The mother has had two years of college and some training in pedagogy and educational psychology. The evidence consists solely of a stipulation providing, *inter alia*, that the child would be in the third grade if she went to the public school; that under the direction of a Seventh Day Adventist institution the mother has been teaching her third-grade work at home for five hours per day and in addition teaches her vocal music; that the child has regular hours for study and recitation; and that she shows proficiency comparable with average third-grade students. The subjects thus being taught and the textbooks from which the instruction is given are set forth in detail.").

> If the compulsory attendance school law is not enforced, may not parents withdraw their children from school at any time desired, even in the middle of a term or semester so as to teach them at home? Thereafter, should they change their minds, could they not again, under the law, return their children to the same school? Schools may thereby be disrupted and certainly will lose the power, prestige and jurisdiction which is now theirs. In my opinion the appellants were properly found guilty, even though it be conceded that they are qualified instructors.[116]

As greater numbers of parents chose to educate their children at home in the 1980s, the pace of litigation picked up. This was recounted by Michael Farris and Bradley P. Jacob in their 1998 law review article, *American Public Education: From One Room Schoolhouse To Global Classroom: Public Schools' Pyrrhic Victories Over Parental Rights*.[117]

First, came the losses in state courts in Virginia,[118] New Mexico,[119] North Dakota,[120] Arkansas,[121] Ohio,[122] Tennessee,[123] Maine,[124] Kansas,[125] and Florida.[126] All ruled against homeschoolers in the 1980s and early 1990s.

Federal courts likewise ruled against homeschoolers in the 1980s in New York[127] and North Carolina.[128]

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116 *Id.* at 216 (Simpson, J., dissenting).

117 Michael Farris & Bradley P. Jacob, *Public Schools' Pyrrhic Victories Over Parental Rights*, 3 RICH. PUB. INT. L. REV. 123, 123 (1998).

118 Grigg v. Commonwealth, 297 S.E.2d 799 (Va. 1982).

119 State v. Edgington, 663 P.2d 374 (N.M. Ct. App. 1983).

120 Birst v. Sanstead, 493 N.W.2d 690 (N.D. 1992); Van Inwagen v. Sanstead, 440 N.W.2d 513 (N.D. 1989); State v. Toman, 436 N.W.2d 10 (N.D. 1989); State v. Dagley, 430 N.W.2d 63 (N.D. 1988); State v. Melin, 428 N.W.2d 227 (N.D. 1988); State v. Anderson, 427 N.W.2d 316 (N.D. 1988); State v. Lund, 424 N.W.2d 645 (N.D. 1988).

121 Burrow v. State, 669 S.W.2d 441 (Ark. 1984).

122 State v. Schmidt, 505 N.E.2d 627 (Ohio 1987).

123 Crites v. Smith, 826 S.W.2d 459 (Tenn. Ct. App. 1991).

124 Blount v. Dept. of Educ. and Cultural Servs., 551 A.2d 1377 (Me. 1988).

125 In Interest of Sawyer, 672 P.2d 1093 (Kan. 1983).

126 State v. Buckner, 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985).

These losses were not universal, however, as homeschool parents prevailed (often in extremely narrow decisions on due process grounds) in state courts in Iowa,[129] Wisconsin,[130] Georgia,[131] Minnesota,[132] Massachusetts,[133] North Carolina,[134] and South Carolina,[135] and in federal courts in Missouri[136] and Pennsylvania.[137] This is one major difference between the home educators of the early to mid-twentieth century, and the homeschool families of the late 1970s and early 1980s: those early parents almost universally lost. In the 1980s, homeschoolers began to prevail in the courts. It may not have been in a majority of the cases, but it was enough.

Michigan was in a class of its own. As Michael Farris and Bradley P. Jacob describe in their law review article,

> Michigan was notorious for prosecuting and convicting home schoolers, and lower courts had ruled in every case against the DeJonge family, but the Michigan Supreme Court finally recognized a religious liberty right to home school in *People v. DeJonge*, 442 Mich. 266, 501 N.W.2d 127 (1993). On the same day, however, the Court denied such a liberty to non-religious home schoolers. *People v. Bennett*, 442 Mich. 316, 501 N.W.2d 106 (1993). The Michigan legislature corrected this inconsistency by extending the right to all home educators in 1996.[138]

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127 Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988).

128 Duro v. Dist. Att'y, 712 F.2d 96 (4th Cir. 1983).

129 State v. Trucke, 410 N.W.2d 242 (Iowa 1987).

130 State v. Popanz, 332 N.W.2d 750 (Wis. 1983).

131 Roemhild v. State, 308 S.E.2d 154 (Ga. 1983).

132 State v. Newstrom, 371 N.W.2d 525 (Minn. 1985).

133 Care & Prot. of Charles, 504 N.E.2d 592 (Mass. 1987).

134 Delconte v. State, 329 S.E.2d 636 (N.C. 1985).

135 Lawrence v. State Bd. of Educ., 412 S.E.2d 394 (S.C. 1991).

136 Ellis v. O'Hara, 612 F. Supp. 379 (E.D. Mo. 1985).

137 Jeffery v. O'Donnell, 702 F. Supp. 516 (M.D. Pa. 1988).

138 FARRIS & JACOB, *supra* note 117, at 141.

Regardless of whether homeschool families won or lost in the courts, however, the homeschooling resurgence of the 1980s and early 1990s was also unique in that these families and their supporters had universal success in the legislatures. In the states where courts ruled against homeschoolers, the legislatures reacted by swiftly passing legislation to allow homeschooling to proceed. Even in the states where individual homeschool families prevailed in the courts, legislatures still acted to enshrine homeschooling as a valid option to satisfy state compulsory education laws. Writing about this phenomenon from his vantage point in 2008, Grover Norquist stated,

> Today homeschoolers are 1 or 2 percent of the population. They punch above their weight class, as they have been toughened up by defeating the teachers unions' efforts to criminalize homeschooling. Now an organized force, homeschoolers do not ask for anything from the government. . . . They simply wish to be left alone.[139]

Farris and Jacob describe the victory of homeschoolers in the legislatures, even after losses in court:

> [T]he obvious equity and common sense of permitting parents to teach their own children with minimal government interference is sufficiently powerful that, even in those cases where the courts have ruled against home schoolers' rights, legislative changes to protect those rights have consistently occurred shortly thereafter. Thus, there has been a steady march of court or legislative victories for home schoolers.[140]

And this has come full circle with the courts now embracing homeschooling. In the most recent major court decision to wrestle with the legality of homeschooling, a state appellate court in California initially

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[139] GROVER G. NORQUIST, LEAVE US ALONE: GETTING THE GOVERNMENT'S HANDS OFF OUR MONEY, OUR GUNS, OUR LIVES 11 (2008).

[140] FARRIS & JACOB, supra note 117, at 138.

issued an opinion against homeschooling, in line with California precedents from the 1950s and 1960s.[141] So great was the outcry, however, that the appellate court took the unusual step of granting a rehearing.[142] Upon rehearing, the appellate court found homeschooling to be so commonplace and established in government policy, legislative acts, and in actual practice, that it ultimately reversed California judicial precedents from decades past that had ruled against homeschool parents.[143] In its subsequent decision, the California Appellate Court had this to say:

> We therefore conclude that home schools may constitute private schools. . . . It is estimated that there are 166,000 children being home schooled in California. It is a growing practice across the nation. The Legislature is aware that home schooling parents file affidavits as private schools, and has passed laws based on that awareness. The Department of Education has not challenged the practice, and the LAUSD has not asserted that the children of such parents are truant. In short, the rule of *Turner* and *Shinn* has been discounted as a doctrinal anachronism, and clinging to such precedent would undermine a practice that has been, if not actively encouraged, at least acknowledged and accepted by officials and the public for many years.[144]

VIII. CONCLUSION

Every child needs loving guidance. That is the beating heart behind arguments supporting parental rights.

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[141] *In re* Rachel L., 73 Cal. Rptr. 3d 77 (Cal. Ct. App. 2008), *as modified* 2008 Cal. App. LEXIS 345 (Cal. Ct. App. 2008), *rehearing granted sub nom.* Jonathan L. & Mary Grace L v. S.C.L.A. L.A. Cnty. Dept. of Child. & Fam. Serv., 2008 Cal. App. LEXIS 548 (Cal. Ct. App. 2008), *and opinion vacated sub nom.* Jonathan L. v. Super. Ct., 165 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008).

[142] For the definitive story and background of this case, the author recommends Mason, *supra* note 94, at 7–25.

[143] Jonathan L. v. Superior Ct., 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008).

[144] *Id.* at 590–91 (citations omitted).

> [Children] are not yet mature enough to handle the decisions, pressures, and cares of life. They will only receive this guidance from one of two places: loving parents, either biological or adoptive; or from the state, through the actions of government employees.
>
> This author believes that loving parents, not the state, should be the ones to raise, educate, nurture, and guide the upbringing, education, and care of their children. [The author] will likely disagree with other parents about *how* they raise their children, sometimes strongly, but in a pluralistic, free country[,] like the United States of America, [the author will] respect the decisions made by a loving parent, even if [the author disagrees] with those decisions. For the alternative is far worse: the state taking actions using the force of government to break the sacred parent–child bond. That should be rejected by every single parent, and instead, we should affirm, once and for all, that loving parents know better than the government how to raise a minor child. [145]

That is why it is so important to start at the very beginning, with a history of parental rights. That rich history and tradition, particularly the Judeo-Christian and English Common Law history, so impacted our Founders, and then eventually the U.S. Supreme Court when the Court wrestled with concepts related to government power and parental rights. That is what made the difference, and it is why homeschooling has taken off in the United States when parents in other countries around the world have not had that same level of success in making homeschooling commonplace, whether socially, judicially, or legislatively. The judicial victories of *Meyer*,

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[145] William A. Estrada, *Theology of Politics: Parental Rights in Education*, STANDING FOR FREEDOM CTR. (Aug. 9, 2023), https://www.standingforfreedom.com/white-paper/parental-rights-in-education.

Pierce, *Wisconsin v. Yoder*, and others—starting a century ago—paved the way for homeschooling freedom today.[146]

While homeschooling's place as a legal and mainstream educational institution is now secured, history has shown us that "the only thing necessary for evil to triumph is for good men to do nothing."[147] Therefore, it is incumbent on those who love freedom and who respect the history and tradition (as well as the pure beneficence to children, families, and society) of parental rights, to continue to press forward to advance the freedom and liberty of parents. It has been exciting to see the steady march of language protecting parental rights in state legislatures, as twenty-six states have now enacted some form of statutory protection of parental rights in their state codes.[148]

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[146] As a follower of Jesus Christ, the author recognizes that, ultimately, were it not for God's favor and mercies, homeschooling would not have been legalized in the United States. Truly, as the Jewish prophet Jeremiah wrote in Lamentations 3:22–23, "It is of the Lord's mercies that we are not consumed, because His compassions fail not. They are new every morning: great is Thy faithfulness." Lamentations 3:22–23 (King James).

[147] While this quote is often attributed to Edmund Burke, better sourcing is a modified version from John Stuart Mill. *See*, JOHN STUART MILL, INAUGURAL ADDRESS DELIVERED TO THE UNIVERSITY OF ST. ANDREWS 74 (1867) ("Let not any one pacify his conscience by the delusion that he can do no harm if he takes no part, and forms no opinion. Bad men need nothing more to compass their ends, than that good men should look on and do nothing. He is not a good man who, without a protest, allows wrong to be committed in his name, and with the means which he helps to supply, because he will not trouble himself to use his mind on the subject.").

[148] West Virginia: W. VA. CODE § 44-10-7 (2023); *see also* In re Willis, 207 S.E.2d 129 (W. Va. 1973); W. VA. CODE § 49-1-105(a) (2015). Kansas: KAN. STAT. ANN. § 38-141(b) (1996); *see also* KAN. STAT. ANN. § 60-5305(a)(1) (2013). Michigan: MICH. COMP. LAWS § 380.10 (1996). Texas: TEX. FAM. CODE ANN. § 151.003 (West 2001). Utah: UTAH CODE ANN. § 80-2a-201 (West 2023); *see also* UTAH CODE ANN. § 30-5a-103 (West 2022). Colorado: COLO. REV. STAT. § 13-22-107(1)(a)(III) (2021). Arizona: ARIZ. REV. STAT. ANN. § 1601 (2010). Nevada: NEV. REV. STAT. § 126.036 (2013). Virginia: VA. CODE ANN. § 1-240.1 (2013). Oklahoma: OKLA. STAT. tit. 25, § 2001–05 (2014, 2019). Idaho: IDAHO CODE § 32-1012–13 (2015). Wyoming: WYO. STAT. ANN. § 14-2-206 (2017). Florida: FLA. STAT. § 1014.03 (2021). Montana: MONT. CODE ANN. § 40-6-701 (2023). Georgia: GA. CODE ANN. § 20-2-786 (2022). Alabama: ALA. CODE § 26-1-6 (2023). Iowa: Iowa Code § 601.1(2) (2023). North Dakota: N.D. CENT. CODE § 14-09-32.1 (2023). Kentucky: KY. REV. STAT. ANN. § 158.191(4) (West 2023). North Carolina: N.C. GEN. STAT. § 114A-10 (2023). Indiana: IND. CODE § 31-14-13-4

Today, we take for granted the freedoms that we enjoy. Homeschooling has become mainstream, and indeed, as HSLDA President James R. Mason recently said, "homeschooling is here to stay. . . . [W]e're an enduring institution . . . ."[149]

The fact that individual parents may choose to educate their children at home is good for children, good for families, good for society, and good for freedom. Homeschooling freedom works. Long may it so remain.

(2009). South Carolina: S.C. CODE ANN. § 63-7-10(A)(1) (2023). Louisiana: LA. CHILD. CODE ANN. art. 101 (2015). Pennsylvania: 24 PA. CONS. STAT. ANN. § 13-1327(b)(2) (West 2019). Hawaii: HAW. REV. STAT. § 577-7(a) (1955). Oregon: OR. REV. STAT. § 419B.090(4) (2022). The author previously wrote about the critical importance of laws like these. William A. Estrada, *Enshrining Fundamental Parental Rights in State Statutes*, AM. ENTER. INST. (Mar. 14, 2023), https://www.aei.org/research-products/report/enshrining-fundamental-parental-rights-in-state-statutes/.

[149] Jillian Schneider, *The Homeschool Movement is Here to Stay, Says HSLDA President Jim Mason*, THE LION (Dec. 19, 2023), https://readlion.com/the-homeschool-movement-is-here-to-stay-says-hslda-president-jim-mason/.