

HOMESCHOOLING IN THE UNITED STATES AND ITS LESSONS FOR ISRAEL

*By Arnon Gutfeld and Yoram Rabin**

I. INTRODUCTION

The rate of families homeschooling their children has been on the rise since the 1970s. In recent years, this trend has also spread to new social circles that traditionally had not taken part in this phenomenon. Throughout the years, the issue of homeschooling has spurred intense debate in courts, legislatures, and academic literature. Indeed, the issue presents complex dilemmas and questions that lend themselves to no easy answers. The long, dedicated struggle led by homeschooling advocates led to the recognition of the right of parents to homeschooling. In the United States, this was upheld in a ruling, and, subsequently, in legislation by various States. Nevertheless, dissention on the subject prevailed. With the right to homeschooling acknowledged, alongside its benefits and achievements, the focal point of the discussion shifted to the appropriate scope of this right, as well as the required extent of inspection and restrictions on its application.

A. Homeschooling and Its Justifications

Homeschooling (or home education) is a term referring to the physical location of the studying – the home – and those responsible for the teaching – the parents. The discussion regarding the right of parents to homeschool their children are comprised of two main issues: the identity of the educators, and the identity of those determining the educational content.

Advocates of homeschooling regard it as deriving from the right of parents to choose their children's education, included in the right to education, the right to acquire education, and the right to equality in education.¹ The right to choose an education has been anchored in several international treaties. In the 1984 Universal Declaration of Human Rights, it was established that parents "have a prior right to choose the kind of education that shall be given

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¹ Y. Rabin, "The Many Faces of the Right to Education," in *Exploring Social Rights – Between Theory and Practice* (D. Barak-Erez & A. Gross eds., 2007).

to their children.”² Several treaties have established the obligation of States to respect parents’ freedom to choose for their children institutions other than those founded by public authorities, and the right of individuals to establish and manage educational institutions that comply with standards stipulated by the State.³ The International Covenant on Civil and Political Rights anchored the liberty of parents to assure that their children receive a religious and moral education according to their own convictions,⁴ while other covenants also determined that the moral and religious education of children will be conducted according to their convictions, and that no person or group of people should be compelled to accept a directive that does not conform with their beliefs.⁵

Several central justifications underlie the right to choose an education. First, the right of the child to autonomy and freedom, out of which stems the right of the child to choose the best education for them. Education provides the individual with the freedom of thought and the knowledge necessary to make an informed choice between several options, and allows the individual to realize their plans and aspirations. Since minors are not capable of making decisions regarding their future, this responsibility lies with their parents; these, naturally, want the best for their children and seek to promote their interests.

Second, the right of the parents to autonomy and freedom, out of which stems their right to influence their children, to shape them in their image, and to raise them in accordance with the values in which they believe – with education serving as a central tool to this end. Furthermore, in light of the many resources that parents are required to invest in educating their children from home, and the great satisfaction that parents can derive from doing so, some see homeschooling as a life project, which may lead to a self-realization and actualization of the parents.

² UN General Assembly, *Universal Declaration of Human Rights*, 10 Dec. 1948, 217 A (III), Article 26(3).

³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 Dec. 1966, 993 U.N.T.S. 3, arts. 13(3)-13(4); UN Educational, Scientific and Cultural Organization (UNESCO), *Convention Against Discrimination in Education*, 14 Dec. 1960, Article 5(1)(b); UN General Assembly, *Convention on the Rights of the Child*, 20 Nov. 1989, 1577 U.N.T.S. 3, art. 29(2).

⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 Dec. 1966, 999 U.N.T.S. 171, art. 18(4).

⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 Dec. 1966, 993 U.N.T.S. 3, art. 13(3); UN Educational, Scientific and Cultural Organization (UNESCO), *Convention Against Discrimination in Education*, 14 Dec. 1960, Article 5(1)(b); UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 Nov. 1981, A/RES/36/55, Article 5(2).

A third justification stems from the right to culture, according to which individuals in society should be allowed to maintain their traditions and languages, and which demands that different groups, and especially minority groups, be granted the freedom to provide their children with an education that will preserve their culture and uniqueness.⁶ An additional possible justification, which is often heard in the United States, lies in the right to religion, which includes the right of the parents to instill in their children their religious values through the process of their education.⁷

To conclude, the right to homeschooling is maintained by the same justifications that rationalize recognizing the right to choose an education – it assists in actualizing parent's autonomy in decision making regarding all matters pertaining to their children's education; it serves as a means of preserving the culture of different groups; and, additionally, by instilling religious values in their children, it enables parents to realize their right to religion. Therefore, it would seem that the right to homeschooling should be recognized as part of the right to choose education. However, the right to homeschooling is challenged by conflicting interests and values, bringing to the fore the question of the scope of the right to homeschooling, as well as the extent of State imposed supervision and restrictions on its implementation.⁸

B. Homeschooling in the United States

1) Trends and Data

Since the 1970s, the United States has seen a rise in the number of parents who are not interested in sending their children to public schools; instead, seeking to grant them education from home. From the miniscule figure of 10,000-15,000 homeschooled children in the 1970s, the number of homeschooled children in the United States rose to an estimated 60,000-125,000 in 1983, and *circa* 250,000-350,000 in the early 1990s.⁹ According to reports by the American National Center for Education Statistics (NCES), by 1999, the number of homeschooled children was about 850,000,

⁶ Y. Rabin & N. Or, "On the Right to Homeschooling", 14 *L. & Bus.*, 803, 810-13 (2012) [in Hebrew]; M. P. Donnelly, *The Human Right of Home Education*, 7 - 8 (2016), available at http://www.ghc2016.org/sites/default/files/donnelly_the_human_right_of_home_education.pdf.

⁷ N. Devins, "A Constitutional Right to Home Instruction?" 62 *Wash. U. L. Q.* 435, 439 (1984).

⁸ Rabin & Or, *supra* note 6, at 814-5.

⁹ P. Lines, *Homeschoolers: Estimating Numbers and Growth* (1999), available at <http://library.stmarytx.edu/acadlib/edocs/homeschoolers.pdf>.

constituting 1.7% of all pupils in the United States; by 2003, their number had risen to about 1,096,000 – 2.2% of all pupils; in 2007, 1,520,000 children were homeschooled – 3% of all pupils; and in 2012, the number of homeschooled children had reached 1,773,000, 3.7% of all pupils.¹⁰

Findings collected by the NCES in 2007 showed that homeschooling was prevalent across the different age groups. Thus, 3% of pupils studying in the first to fifth grades were homeschooled, in comparison to 2.9% of those studying in sixth to eighth grades and 2.8% of those studying in ninth to twelfth grades. However, the finding did point to a significant difference between the percentage of homeschooled girls (3.5%) and boys (2.4%), indicating that most homeschooled children come from two-parent households (3.6%), and the minority from one-parent households (1%).¹¹

Researchers have pointed out that while the phenomenon of homeschooling started out among a specific population group – white Christian middle class families, over the years it has also proliferated to other population groups in the United States.¹² The findings collected in 2007 did, in fact, show that parents of different ethnicity, socioeconomic backgrounds, education levels, and places of residence, chose to homeschool their children; nevertheless, the preference of certain population groups for homeschooling can still be discerned. Thus, in 2007, 3.9% of white children were homeschooled, compared to 0.8% of black children, 1.5% of Hispanic children and 1.8% of Asian children. In addition, the findings showed that 1.8% of impoverished children were homeschooled, in comparison to 2.9% of non-poor children and 4.1% of near-poor children. In rural locales, 4.9% of children were homeschooled, in contrast with a mere 2% of children living in cities, 2.7% of children living in suburbs, and 3% of children living in towns. Regarding the parents' education level, 1.8% of children whose parents have only a high school diploma or General Equivalency Diploma

¹⁰ S. Grady & S. Bielick, *Trends in the Use of School Choice: 1993 to 2007*, (2010); S. Bielick, K. Chandler & S. P. Broughman, *Homeschooling in the United States: 1999*, (2001); U.S. Dept. of Ed., Nat'l Center for Ed. Stats., *Table 206.10, Number and percentage of homeschooled students ages 5 through 17 with a grade equivalent of kindergarten through 12th grade, by selected child, parent, and household characteristics: 2003, 2007, and 2012*, (hereafter, "NCES Table"), available at https://nces.ed.gov/programs/digest/d13/tables/dt13_206.10.asp?current=yes. According to the definition of the National Center for Education Statistics, homeschooled children are children whose parents reported that they receive homeschooling for at least a part of their study period, including children who enrolled in partial studies in a public or private school for no more than 25 weekly hours.

¹¹ NCES Table, *supra* note 10, at 20-22.

¹² *Id.*, at 4.

(“GED”) were homeschooled, compared to 3.9% of children of parents with a bachelor’s degree.¹³

The reasons leading parents to favor homeschooling over the education provided by schools have also changed somewhat throughout the years. Studies conducted in the 1980s and the early 1990s demonstrated that the majority of homeschooling families have chosen to do so for religious reasons.¹⁴ In a study conducted in 2007, parents were asked for the main reason behind homeschooling their children. 36% of parents answered that the main reason was their wish to provide their children with religious or moral guidance; of the remaining, 21% replied that their decision stemmed mainly from concerns regarding the school environment, 17% replied that the main motivation was their dissatisfaction with the education provided in schools, and the rest of the parents were motivated by other reasons, such as the special needs of the child or unwillingness to educate their children according to a traditional educational approach.¹⁵ In a similar study conducted in 2012, only 16% of parents responded that the main reason was a wish to provide their children with religious guidance, and 5% responded they would like to provide their children with moral guidance. 25% identified concerns with the school environment as a pivotal reason, 19% pointed to dissatisfaction with the education provided in schools, and the remaining parents reported that they were motivated by other considerations.¹⁶

Despite the increased, widespread popularity of the homeschooling phenomenon over the years, it was not rare for parents to encounter obstacles and resistance when seeking to homeschool their children. The legal and bureaucratic difficulties they faced will be discussed below, yet several concerns underlying the opposition to homeschooling can be pointed to: the main concern was a fear of harming the developmental process of homeschooled children, both academically and socially; another concern was that homeschooling would harm the academic achievements of pupils based on the fact that mothers – in most cases responsible for homeschooling the children – lacked the necessary qualifications to teach; an additional concern

¹³ *Id.*, at 20-22.

¹⁴ C. J. Klicka, *The Right To Home School: A Guide To Law On Parents' Right In Education*, 2 (3rd ed., 2002); P. Basham, J. Merrifield & C. R. Hepburn, “Home Schooling: From the Extreme to the Mainstream, 2nd edition”, 8 *Studies in Education Policy* (2007), available at <https://www.fraserinstitute.org/sites/default/files/Homeschooling2007.pdf>.

¹⁵ M. Planty, W. Hussar, T. Snyder, G. Kena, A. K. Ramani, J. Kemp, K. Bianco, R. Dinkes, *The Condition of Education 2009*, 135 (2009).

¹⁶ U.S. Dept. of Ed., Office of Non-Public Education, available at <http://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html>.

was regarding the preparation of students for life in an integrated society. This was based on the assumption that in order to develop social skills, children should study in school alongside other children their age; other concerns related to the inability to identify cases of neglect or abuse among homeschooled children, due to a lack of supervision by a school and a lack of exposure of homeschooled children to other groups, may harm pluralism in American society.¹⁷

With respect to concerns regarding academic performance, studies conducted over the years, as well as statistical data collected by educational authorities in various countries, demonstrated that homeschooled children did not fall short in their achievements compared to pupils studying in schools, and in many cases even performed significantly better.¹⁸ Studies also showed that graduates of homeschooling scored highly in university and college admission tests and performed well in their academic studies.¹⁹ Data collected by the Commission on Higher Education in Colorado on the achievements of fifty-five graduates of homeschooling who enrolled in academic studies in the years 1998-2000, showed them outperforming school graduates in the SAT, ACT, and first year of academic studies.²⁰

In a study conducted by Dr. Brian Ray of the National Home Education Research Institute (NHERI) in 2009, of 11,739 pupils from all fifty states, homeschooled pupils scored in standardized tests 34%-39% over the norm – their average ranged from the 84th percentile for language and math to the 89th percentile for reading. The study presented several interesting findings. Children of parents with teaching certificates were at no advantage over other children. On the contrary, the scores of children whose parents held no teaching certificates were slightly higher than children whose parents were certified to teach (the grade point average of the prior group being at the 88th percentile, whereas that of the latter being at the 87th percentile). These findings challenged the perception of the problematic nature of parents without teaching qualifications homeschooling their children. Additionally, no correlation was found between the degree of homeschooling regulation and pupils' achievements – the average scores of pupils across States with varying levels of regulation were nearly identical. No significant difference was found between the achievements of children of parents with different

¹⁷ M. P. Donnelly, "Creature of the State? Homeschooling, the Law, Human Rights, and Parental Autonomy," in J. W. Montgomery, *Homeschooling in America and in Europe: A Litmus Test of Democracy*, 17, 24-25 (2014).

¹⁸ *Ibid.*, 25-26; see also Klicka, *supra* note 14, at 8-14.

¹⁹ *Ibid.*, 14-15.

²⁰ J. Paul & G. Gloeckner, "A Study of Home School Graduates & Traditional School Graduates," 183 *J. C. Admin.* 17 (2004).

educational approaches either. As to the education level of the parents homeschooling their children, the achievements of children whose parents held a bachelor's degree were better than those whose parents held none; nonetheless, the latter group still performed much better than the national average, being in the 83rd percentile. Furthermore, while gaps were observed between the scores of children of parents with different income levels, these amounted to a few percentage points, and across all income levels the scores of homeschooled children were far above the national average (children from families in the highest income level were in the 89th percentile, while children from families in the lowest income level were in the 85th percentile). Expenditures per child also affected their scores only slightly. Another interesting finding was that achievements of homeschooled girls and boys were nearly identical, in contrast with the gender gaps that have long existed in the national education system.²¹

Another study, comprised of 235 participants from a homeschooling group in Southern California, demonstrated that there was no statistical correlation between the achievements of homeschooled pupils, their gender and ethnic background, the amount of time dedicated to teaching, the family's income level, and the parents' teaching experience. These findings demonstrated that class and race did not affect the achievements of homeschooled pupils. This in contrast with public schools, in which substantial gaps between different classes and races were found.²²

In addition, the social skills of homeschooled children seemed unimpaired by the children studying at home rather than in school. Homeschooling parents dealt with this difficulty by incorporating their children in community activities, youth movements, academic contests, etc. Additionally, alongside national organizations that support homeschooling, in many communities, local support groups were founded, organizing periodic activities for homeschooled children. Studies that examined the social skills of homeschooled children indicated that these enjoy high self-esteem, a mature personality and a social skills set similar to, or more developed than that of their school-attending peers. A study conducted in 1992 examining two groups of children aged 8-10 revealed that homeschooled children demonstrated less behavioral problems than children who attended public or private schools. Another study, conducted by Dr. Brian Ray in 2003, surveyed almost 5,000 graduates of homeschooling, and

²¹ B. D. Ray, *Homeschool Progress Report 2009: Academic Achievement and Demographics* (2009), available at http://www.hslda.org/docs/study/ray2009/2009_ray_studyfinal.pdf.

²² E. Collom, "The Ins and Outs of Homeschooling: The Determinants of Parental Motivations and Student Achievement," *37 Ed. & Urban Soc.* 307 (2005).

found that homeschooled children were more active in their communities, participating in more extracurricular activities. The study also revealed that graduates of homeschooling turned to academic studies, integrated in the workforce and were engaged in the community and in politics at rates similar to, or higher than, those of their school-graduate peers.²³

These studies all led to the conclusion that homeschooled children did not grow in social isolation, and that their social skills did not fall short of those of school pupils. Furthermore, homeschooled children were not exposed to peer pressure, nor to negative social activities such as violent behavior or drug consumption. Another advantage to homeschooling emanates from the fact that private tutoring by the parents (or by another person) is faster and more efficient than instruction in a classroom. These shortened teaching times allowed the child to experience a breadth of projects and practical experiences. Educationally, private tutoring enabled flexibility and adaptation to the needs of every child, and devoting time to assisting children with difficulties or developing the talents of gifted children.²⁴

In light of these data, it has been argued that the fear of homeschooling was not in the least justified, and that objections to homeschooling in fact stemmed from conceptions and interests of biased parties. According to this argument, officials and teachers in the education system had a strong financial interest in diminishing the scope of homeschooling, in light of the large sums payed through tax money for every child studying in a public school. Moreover, education system officials possessed an educational worldview that portrayed them as the “guardians of the children,” and thus the ones who should be controlling the nature of their education. It has been argued that it is this educational approach, alongside their vested financial interest that motivate teachers’ organizations and education system officials to mount difficulties for parents who sought to homeschool their children, object to legislation supportive of homeschooling, and to act to increase restrictions and regulations imposed on homeschooling parents.²⁵

2) *Historical Background*

In the beginning of the settlement period in America, parents bore the responsibility for their children’s education. Albeit in the seventeenth and eighteenth centuries some white parents had sent their children to study in a school for short periods of time, most of their education took place within the family unit. The schools, mostly established by the local community or

²³ Klicka, *supra* note 14, at 8 - 15; Donnelly, *supra* note 6, at 27.

²⁴ Klicka, *supra* note 14, at 8 - 15; Donnelly, *supra* note 6, at 9 -18.

²⁵ Klicka, *supra* note 14, at 7 -21.

the church, operated in an unsystematic, unregulated and non-continuous manner, their role perceived to complement parental education, rather than substitute it. The landscape of educational institutions was characterized by a wide array of schools, and the distinction between public and private education was extremely ambiguous. Nearing the end of the colonial period, the status of the family as an economic and social unit began to deteriorate, and the roles of the family – including the education of the children – gradually shifted to non-familial institutions. By 1820, schools became accessible to white Americans across most inhabited areas, excluding the South. Nevertheless, the colonial pluralistic approach to education was also prevalent in the nineteenth century; correspondingly, the State recognized the existence of variety and diversity in education, even encouraging it.²⁶

In the mid-nineteenth century, shifts in educational conceptions and practices lead to the replacement of the pluralistic educational approach with a modern concept of public schools. After the Civil War, the majority of States in the United States passed laws regulating free education for all, and by the onset of the twentieth century, public schools had already been established in all States. Leaders of the reform, many of whom were motivated by Protestant and anti-Catholic ideas, believed that public schools would create a moral, disciplined and unified society, ready to participate in the political and social life of the United States. Some even regarded public schools as a substitute for the family unit, while perceiving private schools as non-democratic, divisive and at odds with the public interest.²⁷

During that time, schools were still perceived as a service provided to families, and parents were permitted to prevent their children from learning content that was inconsistent with their beliefs or opinions. In addition, some children worked to assist their families, and therefore did not study. By 1890, about 86% of children aged 5-14 attended school; however, most schools were very small, and were attended by children from no more than four or five families. As such, they were perceived by parents as a place of learning that implemented the educational and religious preferences of the family and the community, rather than as a branch of the State. With the passing of compulsory education laws – a process completed in all States by 1918 – the burden of responsibility for children's education shifted from the family to public, State-run schools.²⁸ The education laws that mandated

²⁶ J. C. Carper, "Pluralism to Establishment to Dissent: The Religious and Educational Context of Home Schooling," *75 Peabody J. Ed.* 8-12 (2002).

²⁷ *Ibid.*, at 12-15; C. Degani, *Home Schooling: Rebellion Against Society or Elitism in Education*, (1996).

²⁸ Degani, *supra* note 27; *see also* Carper, *supra* note 26, at 12-5.

attendance in public or private schools lacked any reference to the possibility of homeschooling.²⁹

In the twentieth century, a gradual secularization process of the public education system took place, reflecting the conceptual changes that occurred in American society. This process was met with harsh criticism by Protestant conservatives, who until that point were ardent supporters of the foundation and establishment of a public education system. On this backdrop, parents who sought to instill their values and Christian worldview in their children, began to look for alternative arrangements. While some attempted to bring about a change in the curricula of public schools, others withdrew entirely from institutional education and turned to homeschooling.³⁰ The phenomenon of homeschooling that reemerged in the mid-1960s, gave birth to the awakening of the homeschooling movement, which, through its public, legal and regulatory struggle, aimed to gain recognition in the right of parents to homeschooling. This movement was divided in two: a religious right-wing faction led by religious leader Dr. Raymond Moore that demanded recognition in the right to homeschooling for religious reasons; and a libertarian left-wing faction originated in the counterculture movement that drew inspiration from author and educator John Holt.³¹

3) *The Constitutional Grounding of the Right to Homeschooling*

The Constitution of the United States does not grant any rights to education, including the right of parents to homeschool their children.³² However, some claim that this right is in fact grounded in the Fourteenth Amendment, which prohibits the State from depriving individuals of their liberty without due process. This argument has been reinforced by the consistent ruling of the Supreme Court of the United States that protection of liberties granted by the Fourteenth Amendment include the liberties of parents with respect to their children.³³ In the 1925 ruling on *Pierce v. Society of Sisters*, the Supreme Court determined that parents held the fundamental right to direct the upbringing and education of their children, and that this right was protected by the Fourteenth Amendment; based on

²⁹ Klicka, *supra* note 14, at 83.

³⁰ Carper, *supra* note 26, at 1-17.

³¹ Basham, Merrifield & Hepburn, *supra* note 14, at 7-8; *see also* I. Lyman, "Homeschooling: Back to the Future?," *Cato Institute Policy Analysis No. 294* (1998), available at <http://www.cato.org/pubs/pas/pa-294.html>.

³² The right to homeschooling is explicitly anchored in more recent constitutions. *See, e.g.*, Art. 42(2) of the Constitution of Ireland, from 1990, which explicitly establishes the right to home education: "Parents shall be free to provide this education in their homes or in private schools recognized by the State."

³³ Klicka, *supra* note 14, at 32.

this, the Court struck down an Oregon statute that required all children to attend public schools. The Oregon statute would have prevented parents from sending their children to other schools outside the public school system. The state was prohibited to compel children to receive their education solely in public schools.³⁴

Another anchor on which homeschooling advocates based the right to homeschooling was the First Amendment, which protected the freedom of religion and prohibited legislation that impeded it. Since many homeschooling parents do so for religious reasons, as mentioned above, it may be argued that laws restricting the ability of parents to homeschool their children according to their religious values and worldview contradicted the First Amendment.³⁵

4) The Legal Battle for Recognition of the Right to Homeschooling

The right to homeschooling was discussed in an American court ruling as early as 1904. In a case presented to the Indiana Supreme Court, the court defined “school” as “a place where instruction is imparted to the young”; based on this definition, the court recognized a family home in which children were studying as a private school. The court determined that the number of children studying in a certain location was not vital to its definition as a “school,” and therefore a school could exist with only one pupil.³⁶ In 1950, the Supreme Court of Illinois handed a similar ruling, in which it recognized a school existing in the home as a private school. The court justified its decision by arguing that compulsory education laws were meant to force parents to fulfil their obligation to provide their children with an education; as such, their goal was that all children will be educated, but not necessarily in a certain manner or at a certain place.³⁷ In 1963, the Kansas Supreme Court found that a home school was not functioning properly, and therefore did not recognize it as a private school. Nevertheless, the court’s decision was based on the fact that the home school did not meet the requirements of the State for a private school, and it acknowledged that a private school may exist in a private home as long as it complied with these requirements.³⁸

Despite homeschooling being the subject of various legal discussions and rulings, the homeschooling movement that became more prominent in the

³⁴ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

³⁵ Klicka, *supra* note 14, at 49.

³⁶ *State v. Peterman*, 70 N.E. 550 (1904).

³⁷ *People v. Levisen*, 90 N.E.2d 213 (1950).

³⁸ *State v. Lowry*, 191 Kan. 701 (1963); *see also* Klicka, *supra* note 14, at 103.

1970s and 1980s faced a complex, at times ambiguous, legal predicament, propelled by the compulsory education laws of the various States. In fourteen States, legislation disregarded homeschooling altogether, *albeit* in most cases the laws permitted education in private schools. In fifteen additional States, the law explicitly addressed homeschooling; while in the remaining twenty-one States, the terminology used could imply recognition of homeschooling, such as “equivalent education elsewhere than a school” or “education given by a private tutor”. However, the thirty-six States that explicitly or implicitly addressed homeschooling differed substantially from one another in how detailed the laws regulating non-public education were, as well as who bore jurisdiction over it. Moreover, several laws were ambiguous: some authorized local public school staff to make decisions on such matters, some set rigid requirements for homeschooling, and in six States, the laws required that whoever teaches children – wherever the teaching may take place – must hold the certification required for teaching in a public school.³⁹

The homeschooling movement strove to clarify these laws, in many cases succeeding in changing them. To achieve this goal, the movement adopted two strategies. First, some homeschooling parents attempted to argue that the constitutional right to homeschooling should be recognized based on the First or Fourteenth Amendment; these arguments were mostly rejected in ruling. Second, and exceedingly more successful strategy, was the move to bring the courts to interpret State laws in a manner favorable to those seeking to homeschool their children, or, alternatively, to strive and alter state laws to clearly and explicitly permit homeschooling. Whereas in some States the courts recognized a homeschooling home as a private school, in others the courts determined that the State law was unconstitutionally ambiguous, thereby forcing the legislature to regulate the issue of homeschooling in law. In States where the law set exceedingly harsh requirements for allowing homeschooling, significant public pressure was exercised in order to change it. In this manner, by 1993, the homeschooling movement succeeded in bringing all States to recognize the legality of homeschooling – also for parents without teaching diplomas. Currently, differences still exist between various States in the degree of regulation and supervision that they impose on homeschooling parents.⁴⁰

In 1972, a groundbreaking ruling that promoted the constitutional grounding of the right to homeschooling was decided in *Wisconsin v.*

³⁹ M. Gaither, “Homeschooling in the USA Past, Present and Future,” 7 *Theory and Research in Education* 331, 339-340 (2009).

⁴⁰ *Ibid.*

Yoder.⁴¹ The ruling addressed the right of members of the Amish community, who conducted a special religious lifestyle, to not send their children to public schools (or recognized private ones), and to homeschool them instead. The defendants, members of the Amish community who resided in the State of Wisconsin, were found guilty of violating the State's compulsory education law, which required school attendance until the age of sixteen, since they refused to send their children to a private or public school after they finished the eighth grade. Their refusal was based on the claim that a high school education was unnecessary for the lifestyle of the Amish community, and would expose their children to the dangers posed by the secular society. According to the ruling, the defendants demonstrated a sincere belief that a high-school education contradicted the religion and lifestyle of the Amish community, and that sending their children to high-schools would endanger their own and their children's religious redemption; as such, the court accepted the defendants' claim that enforcing the compulsory education law with respect to their children would violate their rights anchored in the First and Fourteenth Amendments.⁴²

Parents seeking to homeschool their children for religious reasons have cited the *Yoder* ruling in claiming that their right to homeschool was anchored in the First Amendment. This argument was upheld by the Michigan Supreme Court's ruling in 1993 that it was unconstitutional to enforce laws that required that homeschooling be conducted by certified teachers in the case of families whose religious beliefs prohibit it. The court explicated that enforcement of this law violated the right to religious freedom anchored in the First Amendment, and therefore those families were exempt from the requirements for a teaching diploma.⁴³ However, in most cases arguments based on the First Amendment were rejected.⁴⁴

Indeed, it is difficult to draw from the *Yoder* ruling a wider, universal right to homeschooling, derived from the freedom of religion. In the *Yoder* ruling, the court emphasized the unique characteristics of the Amish as a distinct religious community with historical roots that isolated and self-sufficient, and whose religious beliefs are seminal to its member's way of life and are essential in its survival. The court also highlighted the importance of the informal professional education given to children in the Amish community after the eighth grade, which provides them with the tools necessary for living in the Amish community. On these grounds, the court ruled that the State did not demonstrate that its interest in the children's education was

⁴¹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁴² *Ibid.*

⁴³ *People v. DeJonge*, 442 Mich. 266 (1993).

⁴⁴ Degani, *supra* note 27, at 7.

paramount to the right of the Amish to follow their unique way of life without intervention.⁴⁵ In doing so, the court restricted the application of the ruling to a community with highly unique characteristics, limiting its use for other cases. The court also determined that in order for the right to homeschooling to be recognized as part of the right to freedom of religion, it must overpower the interest of the State in the children's education.

Nonetheless, the ruling of *Yoder* paved the way for recognition in the right to homeschooling both in law and in ruling.⁴⁶ The North Carolina Supreme Court opined that the principles expressed in *Yoder*, as well as those reflected in the United States Supreme Court's decision in *Pierce*, raised considerable doubts as to the constitutionality of laws prohibiting homeschooling.⁴⁷ Another ruling stated that according to the *Yoder* and *Pierce* decisions, a law addressing homeschooling was subject to harsher judicial review due to the constitutional rights of parents to decide on the manner of their children's upbringing and instill in them educational and religious values.⁴⁸ As such, it would appear that the ruling on *Yoder* granted, in practice, a quasi-constitutional status to the right to homeschooling that was not based on any explicit constitutional text.⁴⁹

In order to determine whether a law violated the right of parents to homeschooling as part of their right to freedom of religion, the *Yoder* ruling introduced the "compelling interest test." The test, later developed through further rulings, was composed of four stages. In the first and second stages, the burden was on the parents to prove that they held an honest religious belief, and that that belief was infringed by the application of the law. In the third and fourth stages, the burden was shifted to the State to demonstrate that the application of the law was necessary in order to achieve a paramount educational interest with the least inflicted harm. In instances that the State succeeded in doing so, the right to freedom of religion was trumped by the compelling educational interest. According to the Supreme Court ruling, the educational interest can include the interest of the State that children acquired reading and writing skills in order for them to be able to vote and participate in the democratic process – or from the economic interest that children are able to support themselves in the future, and not become a burden on welfare services.⁵⁰ Frequently rejecting arguments by parents that the First Amendment protected their right to homeschooling, courts have

⁴⁵ *Yoder*, *supra* note 41, at 212-29, 234-6.

⁴⁶ Rabin & Or, *supra* note 6, 817-818.

⁴⁷ *Delconte v. State*, 329 S.E.2d 636, 647 (N.C. 1985).

⁴⁸ *Ellis v. O'Hara*, 612 F. Supp. 379, 381 (E.D. Mo. 1985).

⁴⁹ Rabin & Or, *supra* note 6, at 817-8.

⁵⁰ Klicka, *supra* note 14, at 49-51.

been criticized in the literature for failing to properly implement the “compelling interest test;” instead, implementing in many cases a probability test which favored the State.⁵¹

As previously discussed, courts were more susceptible to arguments in favor of homeschooling that did not evoke the Constitutional argument. Such an example can be found in relation to homeschooling parents arguing that they should be recognized as a private school. Until the 1980s, the compulsory education laws of most States required that children studied in a public or private school, or, alternatively – in some States – be taught by a certified teacher. As such, the only possibilities facing homeschooling parents were to be recognized as a private school or to acquire the required qualifications for being certified as teachers. Due to the difficulties in obtaining a teaching certificate, the only viable option for many families was to operate as a private school. Indeed, in many cases, their defense in court was that they were operating as a private school, an argument supported by many precedents in ruling.⁵²

It is in this context that the question of the definition of the term “private school” arose. As previously mentioned, already in 1904, in the *Peterman* ruling, a school was defined as “a place where education was imparted on the young,” regardless of the number of pupils studying in it. However, in two rulings from the 1980s, the term “school” was interpreted as an institution where a group of pupils studied. In both cases, the defendants, who faced criminal prosecution for not sending their children to school, argued that the compulsory education law of the State in which they resided suffered from ambiguity due to the term “school” not being clearly defined. The first ruling, handed in 1984 by the Supreme Court of Arkansas, included a discussion of the interpretation of the State law requiring the guardian of children aged 7-15 to send them to a public, private or parochial school. The court determined that the term “school” was commonly interpreted as an institution to which a child was sent; as such, the court ruled that the homeschooling provided to their daughter by the defendants – who were not certified as teachers – did not fall under this definition.⁵³ Another ruling, handed by a Florida District Court of Appeal in 1985, deliberated on the compulsory education law in place in the State of Florida at the time that defined attendance in a school as attendance in any school, or, alternatively, being taught at home by a private tutor who met all the law requirements. The court defined the term “school” as “an organization of pupils for instructional purposes,” accordingly ruling that a home could not be a

⁵¹ *Ibid.*, at 73-81.

⁵² *Ibid.*, at 99-100.

⁵³ *Burrow v. State*, 282 Ark. 479 (Ark. Sup. Ct. 1984).

“private school.” Thus, when the education takes place at home, the teaching should be carried out by a certified tutor.⁵⁴ Nevertheless, in 1985, after the aforementioned rulings were rendered, laws granting protection to homeschooling parents were passed in both Florida and Arkansas, making the aforementioned decisions null and void.⁵⁵

In a long series of cases in which homeschooling parents were criminally charged, the courts of the various States recognized homeschooling as private schools this to avoid prosecutions.⁵⁶ Thus, in 1984, a court in Kansas ruled that parents teaching their children from home were operating legally as “non-accredited private schools,” and determined that the law did not authorize local public school officials or enforcement agencies to conduct an independent evaluation of the competency of a prima facie private school in the dearth of clear evidence of educational neglect.⁵⁷ In 1988, the Colorado Court of Appeals declared that children enrolled in private schools could be homeschooled, as long as the private school deemed the arrangement to be satisfactory. This decision was based on the State law exempting children from obligatory studies in a public school contingent on being enrolled in a private or parochial school, without requiring their attendance records.⁵⁸ In a ruling by the North Carolina Supreme Court, the court stated that the legislature did not attach much importance to the definition of the term “school,” and that the appropriate approach for examining whether homeschooling coincided with compulsory education laws, should focus on the question whether the homeschooling complied with the standards set by the law for non-public schools, rather than its definition of a school.⁵⁹

In 1994, the Texas Supreme Court upheld the rulings of the district court and the Court of Appeals in the *Leeper* case. In this case, eighty homeschooling families were prosecuted following a directive issued by the Texas Education Agency declaring it illegal for homeschooling parents to operate as private schools.⁶⁰ The ruling of the trial court, confirmed on higher appeals, determined that the interpretation of the law by the Texas Education Agency was erroneous, and that education conducted by the parents at home should be considered, according to the law, as studies in a private or parochial school, provided that the parents act in good faith and follow a written curriculum designed to meet basic educational goals in five

⁵⁴ *State v. Buckner*, 472 So.2d 1228 - 1230 (Fl. Dist. Ct, App. 1985).

⁵⁵ Klicka, *supra* note 14, at 110-111.

⁵⁶ *Ibid.*, at 101-9.

⁵⁷ *In re Ahlman*, Case No. 83-JC-1366 (Harvey County Dist. Ct. of Kan. 1984).

⁵⁸ *People in interest of D.B.*, 767 P.2d 801 (1988).

⁵⁹ Delconte, *supra* note 47.

⁶⁰ Klicka, *supra* note 14, at 107-8.

core subjects.⁶¹ In 1991, the Court of Appeals confirmed the ruling of the trial court, and declared that the prohibition of homeschooling had impinged on the right of the educators to equality, in discriminating between them and other private schools on the basis of the place of study alone – a criteria that posed no relevant difference with regard to the purpose of educating all school-aged children.⁶² This ruling was confirmed by the Supreme Court of Texas that accepted the ruling of the lower courts that homeschooling held a legal status similar to that enjoyed by private schools.⁶³

In 1992, the North Dakota Supreme Court was presented with the question whether homeschooling parents could operate as a private school. This followed an amendment passed in 1989 that explicitly addressed the subject of homeschooling, and established that homeschooling – similar to studies in a private school – can provide an exemption from compulsory studies in a public school. The court ruled that homeschooling families may choose between two possibilities for exemption from public school attendance – operating as a private school, or operating in accordance with the new law that regulates homeschooling. The court based its conclusion on the argument that the two articles that granted exceptions neither conflicted with, nor referred to, each other, and therefore, the new law that addressed homeschooling did not establish a negative arrangement.⁶⁴ From the ruling, one may conclude that in States that passed laws that regulated homeschooling, it did not necessarily mean that families that engaged in homeschooling could be prevented from doing so because of other legal provisions. On the contrary, most laws dealing with homeschooling avoided negative limitations. Laws dealing with private schools were passed in a manner that would prevent these laws from hindering homeschooling families.⁶⁵

As discussed, in order to handle the legal situation in which compulsory education laws lacked any explicit regulation of homeschooling, the courts of various States determined that homeschooling families could operate as private schools. Some of the States' courts have chosen a different path, and made use of the doctrine of ambiguity in order to determine that compulsory education laws were void on the grounds of unconstitutionality. Decisions of this nature were divided in two groups: in some cases, it was decided that the term “private school” was vague in an unconstitutional way, whereas in

⁶¹ *Leeper v. Arlington Indep. School Dist.*, Case No. 17-88761-85 [Tarrant County, 17th Judicial Ct. (Texas)] (1987)

⁶² *Texas Education Agency, et al. v. Leeper, et al.*, 843 S.W.2d 41 (1991).

⁶³ *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 443-4 (1994).

⁶⁴ *Birst v. Sanstead*, 493 N.W.2d 690, 695 (1992).

⁶⁵ Klicka, *supra* note 14, at 108-9.

others, the courts ruled that other aspects of the law, such as “equivalent instruction” or “properly qualified,” were vague.⁶⁶

The formulation of State compulsory education laws in a broad and undetailed manner proved problematic. As a result, those responsible for the implementation of the laws were granted an extensive discretion that could cause arbitrary repudiation of the right to homeschooling. Granting wide-ranging discretion to inspectors has bred dozens of different definitions for the qualifications required of homeschooling parents, as well as a variety of diverse inspection procedures and testing and evaluation methods for homeschooled pupils. In many cases, this has transferred the authority to decide whether families could exercise their right to homeschooling to education system officials. In cases that inspectors found homeschooling parents to be non-compliant with the demands that they themselves levied, their decision exposed the parents to criminal prosecution for violating compulsory education laws.⁶⁷

In 1985, the Minnesota Supreme Court discussed the State’s compulsory education law dictating that students must be taught by teachers with a qualification equivalent to the those required of public school teachers. The court ruled that the term used in the required qualifications – “essentially equivalent” – was too vague to trigger a criminal conviction.⁶⁸ In another case, a district court in Missouri discussed a law that established that homeschooled children should receive an education “substantially equivalent” to that provided in local schools. The court ruled that since it did not interpret the term “substantially equivalent,” in effect, the law subjected a basic right to an undefined standard. The court added that the law did not notify the parents of their obligations, and had set no guidelines for its enforcement, thereby granting officials too broad a discretion. As such, the court declared the law to be unconstitutionally vague, and in violation of the right to due process.⁶⁹ In the case of *Jeffery*, the court ruled that a Pennsylvania law authorizing inspectors to decide whether a homeschooling parent was “properly qualified” and the curriculum she taught was “satisfactory” was unconstitutionally vague, as it did not establish any criteria for deciding on the questions of what constituted a qualified tutor and a satisfying curriculum.⁷⁰

⁶⁶ *Ibid.*, at 83.

⁶⁷ *Ibid.*, at 86-8.

⁶⁸ *State v. Newstrom*, 371 N.W. 2d 525, 532-3 (1985).

⁶⁹ *Ellis v. O'Hara*, 612 F. Supp. 379, 381 (E.D. Mo. 1985).

⁷⁰ *Jeffrey v. O'Donnell*, 702 F. Supp. 516, 521 (M.D. Pa. 1988).

In the *Popanz* case it was argued that homeschooling parents could not be regarded as operating private schools. The Wisconsin Supreme Court declared the compulsory education law void for vagueness, since it did not contain a definition of a “private school.” The court ruled that by not setting guidelines for the definition of a “private school,” the law did not provide fair warning to those seeking to comply with it, nor did it include directives that would enable its proper enforcement.⁷¹ On *Roemhild*, the Georgia Supreme Court passed a similar ruling that annulled a State law for violating the right to due process in granting those in charge of its enforcement the authority to determine what constituted a “private school.” The court further noted that granting officials the discretion to decide whether a person’s conduct violated the law on an ad hoc basis created the danger of arbitrary and discriminatory enforcement.⁷²

The rulings on the aforementioned cases moved the legislatures in Missouri, Minnesota, Georgia, Wisconsin and Pennsylvania to pass laws aimed at simplifying matters for homeschooling parents, thereby assuaging the dispute between homeschooling parents and the state.

5) Oversight and Restrictions Imposed on Exercising the Right to Homeschooling

a) Regulation, Supervision and Inspection

As described above, through a lengthy process that took place in the United States since the 1970s, the right to homeschooling has been recognized as a right with a Constitutional origin. However, as seen in the *Yoder* ruling, the right to homeschooling was juxtaposed with conflicting values and interests. This raised the questions of the scope of the right, and the appropriate degree of supervision and restrictions imposed by the State.

The State holds an interest in the education of children. This interest emanated from the need to provide them with tools that would enable them to function independently, to become contributing citizens in the political, civil and economic life of the State, and to cultivate in them the values on which a democratic and pluralistic society was grounded. Apart from this interest, other considerations also justified supervision of homeschooling, such as the fear of parents exploiting homeschooling in order to conceal cases of neglect or abuse from the authorities, or choosing homeschooling

⁷¹ *State v. Popanz*, 112 Wis. 2d 166, 176-7 (1983).

⁷² *Roemhild v. State*, 251 Ga. 569, 573-4 (1983).

for inappropriate reasons, such as the will of the parents to prevent their children from experiencing “racial mixing” in public schools.⁷³

Another end that justified intervention and inspection by the State was the child’s autonomy and rights, the realization of which required them to be exposed to worldviews and value systems other than those of their parents.⁷⁴ In addition, in the literature the argument has been made that a lack of regulation and supervision of homeschooling violated the State’s Constitutional obligation to ensure equal access to education for all children.⁷⁵

Throughout the years, the courts have repeatedly emphasized that recognition of the parents’ right to direct their children’s education, as expressed in the *Yoder* and *Pierce* rulings, did not grant parents an absolute right to educate their children from home as they pleased: in order to guarantee the interest of the State in the children’s education, the State could pass reasonable laws that regulated the supervision and limitations imposed on homeschooling.

In the 2008 *Combs* ruling, the United States Court of Appeals for the Third Circuit discussed the case of six homeschooling families in Pennsylvania, who sought to forgo the requirements of the law regarding reporting on, and reviewing, the educational progress of their children. The parents argued that subjecting their children to the supervision and discretion of education system officials would stand in contradiction to their religious beliefs, according to which God designated the role of teaching religious subjects exclusively to the family. Therefore, the parents claimed that forcing them to carry out the directives of the law, regarding review and supervision of homeschooling, would violate their right to freedom of religion. By rejecting these arguments, the Court declared that the parents held no Constitutional right to provide their children with private education that was not reasonably regulated by the State. The court cited the *Pierce* ruling that determined that *albeit* the State must allow parents the choice of forms of education other than the public school, the State held an interest in the manner in which the alternative educational frameworks operated. The court emphasized that although the Supreme Court of the United States has yet to clearly define the

⁷³ C. J. Ross, “Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling,” 18 *Wm. & Mary Bill Rts. J.* 991, 1002-10 (2010).

⁷⁴ *Ibid.*; see also R. Reich, “Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling,” in *Political and Moral Education*, 275 (S. Mecado & Y. Tamir eds., 2002).

⁷⁵ T. B. Waddell, “Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Re-regulation of Homeschooling,” 63 *Vand. L. Rev.* 541, 555 (2010).

boundaries of parental right to direct their child's upbringing and education, it was clear that this was no absolute right. The court also differentiated between actions by the State that impinged on the core of the parental right to make decisions on crucial matters related to the upbringing and education of the child, and actions that had no constitutional bearing.⁷⁶

As one may have presumed, after the right to homeschooling had been recognized in law and in ruling, the focus of the dispute shifted to the regulation and supervision imposed on homeschooling. While various States differed significantly in the regulations, supervision and limitations imposed on homeschooling, since the 1990s a general trend of deregulation could be discerned.⁷⁷ This trend may be largely attributed to actions by the Home School Legal Defense Association (HSLDA) that had devoted significant efforts to thwarting new legislation regulating homeschooling and striving to change existing laws. The organization advocated, with substantial efforts, the cancellation of the requirements for homeschooling curricula established by State laws, as well as those regarding the certification of homeschooling parents as teachers, the testing of homeschooled pupils, and home inspections intended to review the education given by the parents. As a result, the State laws regulating homeschooling have become more considerate toward homeschooling parents. In Alaska, one of the most favorable States for homeschooling, pupils that received any kind of home education were exempt from compulsory attendance at a school, and did not face requirements of any kind in terms of curricula or tests they must pass. Similar to Alaska, several other States have also little to no supervision of homeschooling. Even in States with legislation regulating the subject of homeschooling, in many cases authorities chose not to enforce the directives of the law, and in practice there was barely any supervision of homeschooling parents.⁷⁸

According to the HSLDA's charting of the degrees of regulation across the fifty States, in eleven, the law did not even require parents to notify authorities of their intention to homeschool their children; in fifteen other States, the low degree of regulation required only such notification; and in nineteen States, in addition to notification, test scores and/or professional evaluation of the pupil's progress were required. The five remaining States maintained a high degree of regulation, which included additional requirements, such as approval of the curriculum by the state, the parents' qualification as teachers, and an evaluation of the pupil, through test scores

⁷⁶ *Combs v. Homer Ctr. Sch. Dist.*, 540 F.3d 231, 243, 247-9 (2008).

⁷⁷ *Waddell*, *supra* note 75, at 547-8.

⁷⁸ *Reich*, *supra* note 74, at 8-9; K. A. Yuracko, "Education off the Grid: Constitutional Constraints on Homeschooling," 96 *Cal. L. Rev.* 123, 128-30 (2008).

or otherwise.⁷⁹ In a 2015 report by the HSLDA, it was mentioned that in the last decade, twenty States have passed laws improving the conditions of homeschoolers, whereas only in Montana their legal status has slightly worsened. Thus, for example, following an amendment passed in 2014, the law in Pennsylvania no longer required parents to file a portfolio to an inspector on behalf of the local public school for an evaluation of the pupil; instead, the current law dictates that the inspector must accept the approval of an evaluator chosen by the parents, who confirms that they provide their child with a proper education. In North Dakota, parents are no longer required to obtain approval by the school district for their request to exempt their homeschooled child from compulsory school attendance, and in Missouri and West Virginia laws banning the State authorities from discriminating against homeschooled pupils were passed.⁸⁰

One important question raised through the discussion of the supervision of homeschooling concerned the identity of the supervisor. In many States, compulsory education laws granted public school officials the discretion to decide whether parents will be allowed to homeschool their children. Until 1982, most States granted officials in the local public school unlimited discretion to allow or prohibit homeschooling. Since then, at least thirty States have changed their laws in a manner that either limited that discretion or revoked their authority altogether. However, in some of these States, discretion on certain questions remained at the hands of the officials, such as whether the pupil's evaluation or test scores indicated satisfactory progress, or whether the appeal by parents homeschooling a child of high school age to relinquish the requirement for a bachelor's degree should be accepted.⁸¹ Leaving this discretion at the hands of public school officials could be problematic, as they are neither neutral nor impartial on this matter. First, their discretion could be biased in light of the financial interest of public school systems to reject homeschooling, due to the large sums paid by tax money for each pupil studying in a public school. Second, as previously mentioned, it seems that many public school officials regard themselves as the "guardians of the children," who know better than anyone where the child's best interests lie, and are therefore prejudiced against homeschooling.⁸²

⁷⁹ "Homeschool Laws in Your State", HSLDA, available at <https://www.hslda.org/laws/default.asp>.

⁸⁰ "A Report Card on The Last Ten Years of Homeschool Freedom", HSLDA, available at <http://www.nxtbook.com/nxtbooks/hslda/2015q1/#/8>.

⁸¹ Klicka, *supra* note 14, at 11-12.

⁸² *Ibid.*, at 113-115.

The *Anderson* case presented the Supreme Court of North Dakota with the question of the authority of public school officials in relation to homeschooling. In that case, parents were charged with violating the State's compulsory education law for homeschooling their children despite not being, as required, certified teachers. The parents argued that the law authorized a party with financial interest – the local school council – to decide whether a pupil should be exempted from compulsory studies in a public school, thereby violating the right to due process. The court accepted the argument that according to the right to due process, a person whose matter was discussed by the authorities was entitled to litigation before an impartial, neutral and disinterested tribunal. Nevertheless, the court ruled that in the case under consideration, the law authorized the school council to carry out an executive action, and not to practice discretion, thereby presenting no violation of the right to due process.⁸³ From this ruling, one can conclude that in instances where the law set a concrete requirement, such as that a homeschooling parent held a teaching certificate or a bachelor's degree, the official was carrying out an executive action when deciding whether the requirement was being met. However, when the requirements of the law are formulated with terms open to broad interpretation, such as "qualified", in order to avoid the violation of the right to due process, the official must enact his discretion in defining the term, and in implementing the definition he established under the circumstances of the case.⁸⁴

b) Home Inspections

In several States, the supervisory authorities decided that home inspections should be conducted in order to supervise homeschooling, even when State laws established no such requirement. In many cases, parents' refusal to conduct home inspections led to a decision not to allow them to homeschool, and at times even to their prosecution.

Homeschooling advocates argued that home inspections violated the Fourth Amendment, which anchored the right to privacy and to protection from arbitrary search or seizure by the authorities. As such, home inspections were constitutional only when the family agreed to them of its own free will, or when they were conducted by power of a court order that was based on reasonable grounds.⁸⁵ Another argument that has been accepted in two cases discussed before courts in New York in 1988, was that home inspections violated the right to due process anchored in the Fifth Amendment. In one of these cases, the court stated that the insistence of

⁸³ *State v. Anderson*, 427 N.W. 2d 316, 317-20 (1988).

⁸⁴ Klicka, *supra* note 14, at 119- 121.

⁸⁵ *Ibid.*, at 124- 126.

local education authorities to conduct home inspections was arbitrary, unreasonable and not based on an order, and determined that their conduct violated the right of the parents to due process, as well as their privilege against self-incrimination. Following the ruling on the matter, the New York State Education Department issued regulations governing the subject of homeschooling. According to these regulations, public school officials were not authorized to conduct home inspections except in the case of a homeschooling family being on probation.⁸⁶

In 1998, the Massachusetts Supreme Court ruled in *Brunelle* that barring parental consent public school officials cannot demand or conduct home inspections as a condition for the approval of a homeschooling program. The court discussed two cases in which school officials approved appeals by parents to homeschool, but conditioned them on the parents' consent for periodical home inspections by a supervisor to evaluate educational progress and confirm that the curriculum was being implemented as approved. The parents appealed to the court, requesting that it declare the policy unconstitutional. The court accepted their arguments, declaring that provided the curriculum complied with the requirements of the law, the officials must approve it. The court noted that the approval of a homeschooling curriculum may not be conditioned on requirements superfluous to the interest of the State in all children receiving an education. The court declared that home inspections were unnecessary for protecting the interest of the State, and therefore should not pose as a condition for the approval of a study plan. Additionally, the court found that there were less harmful measures for protecting the interest of the State and confirm that the study plan was indeed being followed, such as implementing tests or requiring parents to file periodical reports. Furthermore, the court emphasized the importance of protecting the privacy of the family vis-à-vis the parents' right to direct their children's upbringing. In any case, in its ruling, the Court emphasized that it did not determine whether home inspections should be required in cases the homeschooled child's progress was unsatisfactory, or under other circumstances making this requirement necessary.⁸⁷

c) Parent Qualifications

As a prerequisite for homeschooling, the laws of many States required the homeschooling parent to possess a teaching certification or certain level of education. However, currently, the trend has been to abolish such requirements, and instead to focus on monitoring the performance of the

⁸⁶ *Ibid.*, at 129-130.

⁸⁷ *Brunelle v. Lynn Public Schools*, 702 N.E. 2d 1182 (1998).

pupil through yearly tests or the evaluation of pupil portfolios.⁸⁸ In some States, the requirements of parent qualifications have been either alleviated or removed altogether. In New York State, supervisors clarified that the ambiguous term “competent teacher,” that appeared in the law was to be interpreted as a homeschooling parent who complied with the requirements of the law on notification and reporting to the authorities; while the law of Hawaii explicitly stated that homeschooling parents were considered competent teachers.⁸⁹ This trend may be justified by different studies conducted in the United States that revealed that there was no correlation between the education level of the parents and the educational achievements of their pupils.⁹⁰

In a 1976 ruling, the Hawaii Supreme Court abrogated a compulsory education law that included requirements for all educators to possess a teaching certificate.⁹¹ In a series of cases, the courts determined that the legislator did not intend ambiguous terms referring to the qualifications required of parents, such as “competent teacher,” “equivalent instruction,” “instruction equivalent to that given in public schools,” and “instructed in a manner approved in advance by the superintendent,” to be synonymous with teaching certificates.⁹²

In States where requirements concerning parent qualifications were still in place – North Carolina, Ohio, Pennsylvania, Georgia, South Carolina, Tennessee, West Virginia, New Mexico and North Dakota – in most cases, the required level of education was no more than a high school diploma or GED. In some instances, the law cited alternatives, such as test results from parents indicating an education level equivalent to that of a high school graduate, or the parent teaching under the supervision of a certified teacher.⁹³ Michigan was the only State in which the law still required a teaching certificate from the parent. However, in the 1993 decision on *DeJonge*, the Michigan Supreme Court ruled that the requirement for a teaching certificate violated the right to freedom of religion, anchored in the First Amendment, in relation to a family whose religious beliefs prohibited the use of certified teachers, thereby excluding such families from the requirements. The court explicated its ruling by stating that requiring a teaching certificate was neither necessary nor the least harmful means of achieving the interest of the

⁸⁸ Klicka, *supra* note 14, at 141.

⁸⁹ *Ibid.*, at 141-146.

⁹⁰ *Ibid.*, at 136-141.

⁹¹ *State v. Whisner*, 47 Ohio St. 2d 181 (1976).

⁹² Klicka, *supra* note 14, at 142- 146.

⁹³ *Ibid.*, 141.

State in children's education.⁹⁴ In the case of other parents, the Michigan Department of Education followed a lenient policy that parents with a bachelor's degree and parents with a teaching permit were also considered as having a teaching certificate. Furthermore, the requirement for a teaching certificate was only found in a Michigan law regulating nonpublic schools, allowing homeschooling parents to operate as a private school, thus providing parents another option – homeschooling their children according to the Michigan law regulating homeschooling that established no such requirement.⁹⁵

The trend of easing supervision and restrictions on homeschooling parents, and the lack of enforcement of existing requirements, has been met with criticism in some of the relevant literature. The criticism did not stem from a concern for the educational achievements of homeschooled pupils, but rather from two other concerns: that parents use homeschooling to conceal cases of neglect or abuse; and that families of fundamentalist religious beliefs, or other extremist convictions, would educate their children in a doctrinaire manner that zealously adhered to one worldview – which they perceived as the ultimate truth. In such instances, families might instill in their children values inconsistent with the democratic values of tolerance and pluralism, and prevent their children from being exposed to other value systems and ways of life - a necessity in the development of critical thinking and minimal autonomy. In light of this concern, critics believed that the scope and boundaries of the right to homeschooling must be defined, and that the supervision and limitations that should be imposed on its implementation must be regulated. This should be performed in a manner that would balance the parental right to direct the child's education with the interests of the State and the child, and, foremost, with their common interest in an education that would allow children to develop and realize their autonomy.⁹⁶

The *Riddle* case was an example of the aforementioned concern. In that case, the Virginia Supreme Court ruled on the matter of parents who believed that according to the bible, they must educate their children themselves, protect them from outside influences and the fear of heresy, and oppose government intervention that might endanger their eternal redemption. The parents instructed their children on the subjects taught in school, and added religious lessons based on their Christian belief. The court stated that the parents chose to isolate themselves and their children during

⁹⁴ *People v. DeJonge*, 501 N.W. 2d 127 (1993).

⁹⁵ Klicka, *supra* note 14, at 141.

⁹⁶ Reich, *supra* note 74; Ross, *supra* note 74; Waddell, *supra* note 75; Yuracko, *supra* note 78; J. G. McMullen, "Behind Closed Doors: Should States Regulate Homeschooling?" 54 *S. Cal. L. Rev.* 75 (2002).

their formative years from outside society and its values. The court opined that the children were expected “to be released upon the world only after their opportunities to acquire basic skills have been foreclosed and their capacity to cope with modern society has been so undermined as to prohibit useful, happy or productive lives.” The court declared that if the parents were allowed to homeschool their children without any State supervision, those would be raised in an environment of indoctrination, and in a social isolation so profound that they will become “mindless automatons incapable of coping with life outside of their own families.”⁹⁷

One possible solution presented in the literature for balancing the parental right with the interests of the State and the child was setting the boundary for the right of the parents at the point where its realization would harm the child’s developmental process and their transition to an independently functioning adult, or otherwise limit or harm the development of their minimal autonomy. In cases of neglect or abuse, the need for State intervention was undisputed. The controversy arose when the parents in question attempted to prevent the development of the child’s autonomy – *i.e.*, instill in them a blind belief in their worldview or complete obedience to their authority or another. In such cases, the child was not allowed to develop minimal autonomy because awareness of alternative ways of living would have required exposure to the existence of beliefs and value systems different from their parents.⁹⁸

In light of these considerations, some researchers have proposed to adopt regulations that compel homeschooling parents to incorporate content concerning tolerance to other opinions and beliefs in their curricula, thereby allowing the child to be exposed to different worldviews. Several means for ensuring this kind of exposure were suggested, such as requiring parents to hand in curricula for approval by education system officials, presenting them with a choice of study materials from a list preapproved by the state, and conducting periodical evaluations that measure the ability of the child to deal with worldviews other than their own.⁹⁹ These proposals coincided with an additional suggestion that while the courts should rule that completely depriving parents of the right to choose a curriculum violated their right to homeschooling, setting requirements that the parents must comply with – without barring them from teaching other subjects – would not. According to the proposed solution, in extreme cases, where the parents refused to comply

⁹⁷ *State v. Riddle*, 285 S.E.2d 359 (1981).

⁹⁸ Reich, *supra* note 74, at 27-32.

⁹⁹ *Ibid.*, 35; *see also* Ross, *supra* note 73, at 1008.

with these demands in a manner clearly harmful to the public interest, the State could intervene in the education they provide.¹⁰⁰

Other suggestions have been made in the literature regarding the necessary means for supervising homeschooling. Based on the instructive ruling on *Yoder*, as well as other rulings, it has been noted that any legislation regarding the means of supervision and the restrictions imposed on homeschooling should promote the interest of the State in children's education and safety while utilizing the least harmful measures of doing so.¹⁰¹

Thus, for example, one proposal has been to require parents to notify authorities of their intent to homeschool their child (today, as previously mentioned, some States do not even have such a requirement). This would allow for simpler communication between the school and the parents, and would enable monitoring the progress of the pupil, collecting information on homeschooling in the State, and discerning more easily between cases of homeschooling and cases of neglect. It has also been proposed that the burden of demonstrating that the interest in the child's education was being fulfilled would be placed on the parents, requiring them to prove to education system officials that their curriculum complied with the required educational standards. Thus, the problem of non-enforcement will be solved, since it largely stemmed from the strain on school officials and the difficulty in overseeing the numerous, scattered homeschooling families; it would also spare the need to utilize invasive and harmful means such as home inspections. In addition, it has been argued that homeschooled pupils should be required to take yearly or periodical tests, which would measure their educational progress. If the pupil repeatedly failed to demonstrate educational progress, the state would be required to intervene and compel them to attend school, or, according to another proposal, to carry out other measures such as assistance through tutoring.¹⁰²

Elsewhere, it has been proposed to utilize home inspections in order for the authorities to ensure that parents were not homeschooling as a cover for hiding abuse, and to confirm that the pupils were not studying in conditions of complete isolation, and that they come in some contact with the environment outside their homes.¹⁰³ Regarding the identity of the supervisor, it has been suggested to make use of independent third parties in place of education officials, due to their monetary interest in deciding whether a child

¹⁰⁰ Waddell, *supra* note 78, at 589.

¹⁰¹ McMullen, *supra* note 96, at 108-9.

¹⁰² Reich, *supra* note 74, 34-9; McMullen, *supra* note 74, at 107-8.

¹⁰³ Waddell, *supra* note 75, at 593-4.

will be educated at home or in a public school. The inspectors would conduct an evaluation of the educational state of the pupils through test scores and interviews with them and their parents, and, on the basis of this evaluation, could recommend the appropriate means for addressing unsatisfactory achievements.¹⁰⁴ Utilizing independent inspectors could have further advantages – enhancing the cooperation with parents with anti-establishment beliefs, and even solve the difficulty in cases of parents refusing to allow any inspection by State officials due to their objection to subjecting homeschooling to state authority, for religious reasons or otherwise.

d) The Right to Partial Use of Public School Resources

Another question discussed in the literature is whether homeschooled pupils should be allowed to make use of resources offered by public schools, such as libraries, computer labs, sport teams and various school activities.

In 1998, the 10th Circuit Court of Appeals ruled on this issue in the *Swanson* case. There, it was argued that refusing to allow a female pupil, homeschooled for religious reasons, to enroll in a public school on a part-time attendance basis violated both her and her parents' constitutional right to freedom of religion. The court determined that the constitutional right of the pupil's parents to direct her upbringing was not absolute. It further declared that as parents of children studying in public schools held no right to prevent their children from being exposed to certain content in the curricula, neither did the appellants' right to direct their daughter's education include the right to dictate to what portions in the school curriculum she should be exposed. As such, the court ruled that the appellants failed to present a reasonable argument for a violation of their Constitutional right to direct their daughter's education, and that, in this case, it was unjustified to implement the stricter test requiring the State to prove the existence of a compelling interest.¹⁰⁵

The subject discussed in *Swanson* raised interesting questions and brought to light contradicting considerations. On the one hand, opening the resources of public schools to homeschooling families might bring them closer to the system and assist in the child's exposure to an environment other than their home. Additionally, it might contribute to the creation of equality between better-off families and families of lower socioeconomic classes, who are unable to carry the expenses of purchasing a computer, accessing educational resources and participating in social activities such as

¹⁰⁴ McMullen, *supra* note 96, at 108-9.

¹⁰⁵ *Swanson v. Guthrie Ind. Sch. Dist. No. I-L*, 135 F. 3d 694, 699-700 (1998).

extracurricular classes and trips. In addition, it can also assist in improving the quality of the education that the homeschooled child received at home, and even lead to an improvement in the quality of education given at the school. On the other hand, making public school resources available to homeschooling families could lead to more pupils leaving the public system, and divert resources and time of the already overwhelmed school staff. Furthermore, as discussed in *Swanson* and in other rulings, a transformation of the school into a service provider that offered a selection of resources that parents can pick and choose from, could prove problematic.¹⁰⁶

In most States, the existing law made it difficult for parents to obtain partial access to school resources. The assumption was that homeschooled pupils have left the public system, thereby relinquishing the resources that it offered. However, some school districts have already adopted a more conciliatory approach, and established offices that provided homeschooling families with study and pedagogical materials, and contact them regarding school activities. In one district, a “virtual charter school” was established that offered homeschooling families instruction by public school teachers, as well as standard tests, carrier consultation and real-time consultation with teachers and pupils.¹⁰⁷ In addition, some districts established offshoots offering enrichment courses for homeschooled pupils, some schools began to offer programs that allowed part-time student enrollment, and homeschooled pupils increasingly took part in extracurricular school activities.¹⁰⁸ On the other hand, homeschooling educators have independently created common frameworks resembling schools, which have sports teams, bands, clubs, resource pools, meeting places and more.¹⁰⁹

Thus, the emerging trend was the formation of an educational policy that adapted itself to the demographic, technological and economic changes in American society, and the creation of hybrid frameworks that blurred the dichotomous distinction between schools and homeschooling. It is possible that this trend will lead in the future to a broad reform also in the public education system.¹¹⁰

¹⁰⁶ Reich, *supra* note 74, at 38-9.

¹⁰⁷ *Ibid.*

¹⁰⁸ P. T. Hill, “Home Schooling and the Future of Public Education,” 75 *Peabody J. Ed.* 20, 23 (2000); Gaither, *supra* note 39, at 343.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, at 343-344.

e) The Right of the Child to Oppose Homeschooling

Another issue discussed in the literature was whether, and to what extent, the will of the child should be taken into consideration. The best interest of the child has been an important, if not a decisive, consideration; however, the will of children does not always match their best interest, and, as such, children are not necessarily in a position allowing them to make the best decisions for themselves.¹¹¹

Nevertheless, when the children in question are of an age and level of maturity allowing them prudent and reasonable decision making, their will should be accordingly taken into account. When a homeschooled child is interested in studying in a public school, it is especially important to heed their educational preferences and take them into consideration, in order to protect their interests in the face of those of their parents. Therefore, it has been proposed in the literature that the state provided a forum where children can voice their preferences.¹¹² It has also been suggested that the State created a mechanism for deciding in cases of conflict between the child and parents; thus, if it will emerge that homeschooling was standing in the way of the child to realize their educational goals, when deemed necessary for the realization of the child's aspirations, the State could order that additional education be provided, or even that the child be incorporated in additional out-of-home educational frameworks.

6) The Significance and Implications of the Homeschooling Phenomenon in the United States

The phenomenon of homeschooling did not emerge in a vacuum; it has its roots in a specific social, cultural and political context, and its expansion to a growing number of circles in the United States, as within these circles, was the product of long-term processes taking place in American society. At the same time, this phenomenon changed the face of the country's educational landscape, and it appeared that in the long term it may hold substantial consequences in terms of society, culture, economy and politics.

In her research, Degani discussed whether homeschooling reflected social protest, and an expression of disappointment with the values of American society, or whether it was rather a phenomenon of well-off parents who wanted (and were in a position to do so) to invest their entire energy in the

¹¹¹ J. W. Montgomery, "The Justification of Homeschooling Vis-A-Vis the European Human Rights System," in *Homeschooling in America and in Europe: A Litmus Test of Democracy*, 67, 70 (J. W. Montgomery ed., 2014).

¹¹² Reich, *supra* note 74, at 32-34.

education and development of their children, thereby creating a narrow, elitist stratum of children who enjoyed the best education, support and sympathy. After reviewing the development of the homeschooling movement and the various subgroups composing it, Degani concluded that this movement emerged following the value crisis of the 1960s. According to her research, the movement's growth reflected protest over the "loss of path" of American society, and over the State expropriating itself from the citizens and placed itself and its needs ahead of the preferences of the individual. According to Degani, the wide variety of groups that advocated homeschooling, and the differences between them, supported the conclusion that the phenomenon of homeschooling comprised an expression of protest, and not of elitism in education.¹¹³

Degani was of the opinion that the phenomenon of homeschooling reflected the shattering of the "great American spirit," and the return of American society to factions and groups that sought to emphasize their uniqueness, and were unwilling to forgo it in favor of the values represented by the State. As the democratic American society disintegrated and lost its unifying power, the power of the ethnic groups grew, and, within it, the family that served as a space for individuals to define their identity and essence. In this state of affairs, where society was in a state of disintegration, holding no single, clear, unifying voice, the education system lost its authority and ability to instill in the young the values on which it was founded – and each group sought to choose for itself the values by which it wished to educate its young. In the early days of the nation, relinquishing the uniqueness of the various groups that lived within it was necessary to create cohesion and unity. Today, the arguments that justified a uniform public education system, as well as a "melting pot" policy, are no longer valid, especially in a country that exalts pluralism.¹¹⁴

In a 2009 study, Gaither identified a new trend. According to him, most homeschooling parents still did so as an expression of protest for religious, anti-establishment or other reasons; nonetheless, a growing number of families chose this path due to practical, non-ideological considerations. To these families, homeschooling was better suited for their condition and personal circumstances. Thus, for example, families whose children were involved with time-costly activities, such as music, dance, sports or play, turned to homeschooling due to the flexible schedule it enabled. Additionally, families of children with an array of special needs, as well as families that relocated often, found homeschooling to be more convenient and suitable. According to Gaither, the growing number of families choosing

¹¹³ Degani, *supra* note 27, at 80-85.

¹¹⁴ *Ibid.*

homeschooling either as a temporary measure, as a supplement to school education, or due to necessity stemming from their life circumstances, erodes the traditional dichotomous distinctions between private and public, between home and school, and between formal and non-formal education.¹¹⁵

The phenomenon of homeschooling was presented in the literature also as part of a broader process, under which individuals and groups learn to supply themselves independently with services once provided almost exclusively by the State.¹¹⁶ As part of the described trend, non-governmental organizations provided the public with services of welfare, professional training, education, medicine, assistance to former inmates and more. These organizations learned how to provide efficient services, retain consumers, manage budgets, build up stable organizations, and train their staff – assisted by entities such as chambers of commerce and unions of former executives.¹¹⁷ Homeschooling also required the creation of qualified personnel, with the capacity to teach, motivate and evaluate students, in addition to the ability to locate resources and effectively utilize time and money. Indeed, parents invested substantial efforts in the project of homeschooling their children, and, in particular, in finding materials from different sources that were accessible to home educators on numerous internet websites. Critics of homeschooling argued that these efforts were mostly in vain, as, at best, they would lead to a duplication of what already existed in public and private schools. On the other hand, it has been argued that home educators, who were driven and motivated teachers, infused new blood and innovative ideas into the field of education, previously controlled almost exclusively by risk-averse bureaucrats who were bound by regulations.¹¹⁸

Regarding the future of homeschooling and its influence, some expected this phenomenon to continue to expand, leading to the development of study methods and materials intended for this purpose, and reinforce the political power and legal status of homeschooling; these, in turn, would contribute to the phenomenon's continued propagation. In light of the academic, social and civic success of homeschooled pupils, this trend would lead the United States toward growth and improvement.¹¹⁹ On the other hand, more skeptic

¹¹⁵ Gaither, *supra* note 39, at 342-4.

¹¹⁶ Hill, *supra* note 108, at 21-23; Donnelly, *The Human Right of Home Education*, *supra* note 6, at 3; B. S. Cooper & J. Sureau, "The Politics of Homeschooling: New Developments, New challenges," 21 *Ed. Pol'y* 110, 112 (2007); C. Lubienski, "Whither the Common Good? A Critique of Home Schooling," 75 *Peabody J. Ed.* 207 (2000).

¹¹⁷ Hill, *supra* note 108, at 21-23; Donnelly, *supra* note 6, at 3.

¹¹⁸ See Klicka, *supra* note 14 and Donnelly, *supra* note 6.

¹¹⁹ M. P. Farris & S. A. Woodruff, "The Future of Home Schooling," 75 *Peabody J. Ed.* 233, 253-4 (2000).

opinions were also found in the literature, pointing out the problematic aspects bound to the phenomenon, as well as the potential risks posed by its expansion. At the same time, critical attitudes were also expressed, perceiving homeschooling and its implications for American society and its public education system as a complex and multi-faceted.

In this context, an important issue relates to the principle of equality, and the potential implications of the phenomenon of homeschooling on the social gaps in the United States' population. On this subject, a question that must be addressed is whether the right to choose an education is, indeed, a Constitutional right granted to all, or whether, in practice, it was a privilege reserved to financially well-off families, who are able to withstand the expenses of realizing this right. Since paying for educational resources, as well as the time the parent must invest, may present a substantial financial burden on homeschooling families, it may be presumed that only families of a certain socioeconomic background are able to withstand the necessary costs. Indeed, as demonstrated by an NCES report, it appeared that the phenomenon of homeschooling was common mostly among the middle class. The report that presented statistical data regarding homeschooling pupils for the years 2003, 2007 and 2012, included data on the familial income level of these pupils, divided into five income levels. The data demonstrated that in the middle three income levels, the percentage of homeschooled pupils was the highest, whereas in the lowest and highest income levels (income below US\$20,000 or over US\$100,000, respectively), the percentage of homeschooled pupils was the lowest. As such, and in light of research findings suggesting that homeschooled pupils perform substantially better than those studying in schools, the concern arises that the growing phenomenon of homeschooling will lead to an increase in socioeconomic gaps.¹²⁰

In light of this situation, one could argue that in order to equitably enable the realization of the right to homeschooling, the State is obligated to assist in financing the costs associated with it, one such was tax breaks for homeschooling families. However, tax breaks are expected to benefit higher income families to a greater extent, thus increasing, rather than diminishing the gaps. Another way of enabling the realization of the right to homeschooling, mentioned in the previous chapter, was making public school resources accessible to homeschooling families, so that families from lower socioeconomic strata would also enjoy access to educational resources and social activities that otherwise entail substantial financial expenses.

¹²⁰ NCES Table, *supra* note 10.

In any case, research findings demonstrate that socioeconomic background is not necessarily a seminal factor in homeschooling. Studies presented above demonstrated that homeschooled pupils from families of all income levels performed significantly better than the national average, and that there were no substantial gaps between the achievements of homeschooled children from families of different income levels. Findings further revealed that the scale of the financial expenditure on homeschooling has only a minor influence on the achievements of the pupils. The findings showed that socioeconomic background, as well as ethnicity, have either a minor influence or none at all on the achievements of homeschooled pupils, whereas in public schools, there are significant gaps between members of different social strata and racial backgrounds. Therefore, rather than being a cause for the increase in social gaps, homeschooling may even assist in closing them.

Notwithstanding the above, it has been argued in the literature that the privatization process that transformed education, once a service provided by the State, into a service provided by the family, was harmful to both non-homeschooled pupils and in society's greater good. Lubienski, one of the most prominent critics of homeschooling, believed that the phenomenon of homeschooling was indeed a response to the deterioration of the education system, but simultaneously also one of its causes. According to Lubienski, homeschooling harmed the greater good in two manners: first, by depriving public schools of social capital, and second, by harming the capacity of the public education system to improve and react to changes. Lubienski argued that education – in addition to being a private good – was also a public good, as it embodied the principle of equality, and served to promote civic values and social goals. Therefore, society can be regarded as the “consumer” of education, since it enjoys the benefits offered by an educated population. Public education being funded by the tax payers – *i.e.*, by those who are not its direct consumers – is justified by it being a public good that everyone enjoys. When parents ignore the public aspects of education, for example by favoring homeschooling, society suffers negative consequences, such as children who receive poor education, and harm to social tolerance and cohesion. Lubienski further argued that since education was a public good, the public holds an interest in the manner in which this good was provided, similar to how the public holds an interest in the manner in which medical services are provided, *i.e.*, prevention the spreading of diseases, and maintaining the health of the citizens. In his opinion, homeschooling parents focusing on the best interests of their children presents an extreme case of the privatization of a public good. This is because homeschooling expropriated the control, the means and the object of education from the public but it do not consider the ethnic and community constraints and leaves the educations to the decision to the family unit. Lubienski claimed that

homeschooling impaired the ability of the public education system to serve the greater good; even if it did provide some pupils with better education, it harmed the rest.¹²¹

While this criticism is important, it does not portray the full complexity of the matter, nor does it bring into account all factors that may influence the greater good. In another study, it has been claimed that homeschooling has harmed the public education system, causing a decrease in taxpayer money paid to public schools, and leading to a decrease in the number of parents expected to act on the civic and political levels to improve the education given in schools. However, it has also been mentioned that homeschooling has reduced the burden imposed on public schools, and, in contrast to charter schools, did not require funds being transferred to a competing organization. In addition, the researcher noted that the value of pluralism – which was also essential for the greater good in a democratic society – required that educational conflicts will not be forcefully resolved by use of authority.¹²²

Additional papers presented the skills acquired by homeschooled pupils to become into educated, moral adults, with developed academic, familial and social skills, and as an additional contribution to the greater good, a tendency to civic engagement and involvement in the community.¹²³ Furthermore, research findings presented above pointed to graduates of homeschooling being active in the community and in politics in rates similar to, or higher than, those of school graduates. These also instructed that many homeschooling parents were not only focused on the benefit of their children, and were not indifferent to the greater good (as claimed, for example, by Lubienski). Lubienski's argument that homeschooling narrowed the benefits offered by education to the level of the family unit was challenged by the extensive ties and common frameworks created by homeschooling families. In addition, as mentioned above, it is possible that the growing phenomenon of homeschooling, alongside the trend of increased cooperation between home educators and public schools, will motivate the public education system to conduct adaptations and changes, and to lead a broad reform that will improve the level of public education.

¹²¹ Lubienski, *supra* note 116.

¹²² Hill, *supra* note 108, at 29.

¹²³ B. D. Ray, "Home Schooling for Individuals' Gain and Society's Common Good," 75 *Peabody J. Ed.*, 272 (2000); Farris & Woodruff, *supra* note 119, 248-54.

*C. Homeschooling in Israel**1) Trends and Data*

According to data provided by the Ministry of Education to the Knesset Research and Information Center in 2014, in the last decade, the number of pupils who were approved for homeschooling by the Ministry has risen: in the 2004/2005 school year, the Ministry of Education permitted 140 pupils to be homeschooled; in 2007/2008, 198 pupils received such permission; in 2009/2010, 208 pupils; in 2012/2013, 350 pupils; and in 2013/2014, 448 pupils were permitted to be homeschooled.¹²⁴ Despite these data presenting a rise of 220% in about ten years, the number of homeschooled pupils today is still minute in comparison to the total number of pupils in the education system. In light of these data, it may well be argued that homeschooling in Israel is still largely a marginal phenomenon.

According to the data provided by the Ministry of Education, most homeschooled pupils were of elementary school age, and few of kindergarten age. In the secondary education age group, the number of homeschooled pupils was significantly smaller, since in that age group teenagers are usually interested in integrating into schools due to their social needs. The data also indicated that every year, several dozen homeschooling applications were rejected, the main concern being that such a permission would harm the child.

In that Ministry of Education's response, it was noted that recently, in light of an increased demand for homeschooling, it began to employ preliminary measures to manage a central registry of children who were allowed homeschooling.¹²⁵

Further data requested by the Knesset Research and Information Center – such as the exact number of rejected homeschooling applications, or the exact number of permits handed divided by grade level or population sector – was not provided, with the explanation that they did not exist in the system.

¹²⁴ A. Winiger, *Home Schooling in Israel* (2014) [in Hebrew]. The cited source of the data is Hagit Meir, Head of the Department for Implementation of Law and Policy and Supervisor of Homeschooling in the Ministry of Education, *Response for Appeal by the Knesset Research and Information Center* (February 9, 2014) [in Hebrew].

¹²⁵ *Ibid.*, at 7-8.

2) *The Right to Homeschooling*

The rights to education in general, and the freedom of education (hereafter “the right to choose an education”) in particular, are not explicitly anchored in Israel’s Basic Laws.¹²⁶ However, in the instructional ruling of the Supreme Court on *Roe*, handed in 1995, President Shamgar determined that the right of the parents to choose an education and influence its content had a constitutional status.¹²⁷ The case revolved around a conflict touching on the roots of parent-children relations that erupted between spouses regarding the education of their joint children. The couple fought over what form of religious education should their children receive – whether they will be educated in the tradition of the Jewish religion, to which they belonged since birth, and to which both parents belonged at the time of their marriage, or whether they should also be exposed to the teachings of Jehovah’s Witnesses, which the mother joined after the marriage. The District Court ruled that the children will continue to receive a Jewish education, and that their mother will refrain from exposing them to the teachings of Jehovah’s Witnesses. The mother appealed to the Supreme Court. In the Supreme Court’s ruling, President Shamgar explained that the decision on the appeal required balancing of interests between three parties – the child, the parents and the State. Subsequently, while rejecting the mother’s appeal on the grounds of protecting the children’s best interests and rights, President Shamgar declared as follow:

The right of the parents to raise and educate their children as they see fit is a basic constitutional right, a natural right integral to, and emanating from, the bond between parents and their offspring. The family structure does not reside alongside the constitutional system, but is rather an integral part of it. Under the framework of the family unit, parents are granted rights recognized by constitutional law and protected by it. **The right of parents** to retain custody of their children and to raise them, with all that this entails, **is a natural and primary constitutional right**, an expression of the

¹²⁶ Israel has no constitution in the conventional sense, but does have some “Basic Laws”. In the instructional ruling in *Bank Hamizrahi v. Migdal Cooperative Village*, CA 6821/93, *Isr. L. Rpts.* 1, 220-221 (1995), it was established that these Basic Laws are of a status superior to that of regular Knesset legislation, and they empower the courts to conduct judicial review of legislation. For more on the situation in Israel in this context, see A. Gutfeld & Y. Rabin, *The Judicial Review Controversy: Marbury v. Madison and Its Manifestations in the Israeli Constitutional Revolution*, 45 *Isr. Y. B. Hum. Rts.* 191 (2015).

¹²⁷ *Roe v. Doe*, CA 2266/93, 49(1) P.D. 221 (1995).

natural bond between parents and their children.... This right is reflected in the privacy and autonomy of the family: the parents are autonomous in their decision making on all matters concerning their children – education, way of life, place of residence and so forth, and the intervention of society and the state in these decisions is an exception that need be justified. [Emphasis added.]¹²⁸

Although the statement regarding the right to choose an education in this case referred to a state of conflict within the family, it appears that the ruling on *Roe* established apt grounds for recognizing the constitutional status of the right of parents to choose education in relation to State authorities.

An allusion to the constitutional status of the right to choose an education can also be found in Justice Proaccia's remarks in *Poriya Illit*:¹²⁹

Alongside the official state education, the right of a person to a private education, whose financing is not a burden that the state is obligated to carry, is protected. This right derives from the liberty of individuals and entities to establish and manage educational institutions, conditioned on their compliance with basic conditions set by the State.

This outlook regarding the status of the right to choose an education has also found its way to the ruling of the district courts, both on *Peleg*¹³⁰ and on *Elkaslassi*.¹³¹

¹²⁸ *Ibid.*, at 235.

¹²⁹ *Poriya Illit Council v. Minister of Education*, HCJ 4363/00, 56(4) P.D. 203, 214 (2002).

¹³⁰ Administrative Petition (Jerusalem) in *Peleg v. Director General of the Ministry of Education*, Case No. 324/05, 5764(1) PM 229, 236 (2005): "The right to education includes the freedom to choose the kind of education that matches the worldview and reflects the culture and uniqueness of the individual. This right is not absolute, and is subject to an array of considerations, balances, examination and inspection by the Ministry of Education.... There is a constant tension between the wish to realize the aspirations and wills of the consumers of education (the pupils and their parents), who seek to adapt to themselves an educational framework which suits them, and the need to create a regime of management and supervision of education, the need to establish curricula and the will to achieve defined educational goals and instill predetermined basic knowledge in all pupils. This tension finds its solution (which is never perfect) through the creation of frameworks and study programs that fit all pupils and allow their parents to take part in molding their education." [Translated from Hebrew].

¹³¹ Administrative Petition (Jerusalem District Court) in *Elkaslassi v. Municipality of Beitar Illit*, Case no. 1320/03, 641 PM para. 10 (2004): "The existence of private schools

In our opinion, the right to choose an education includes the right of the parents to homeschooling. In other words, the right to homeschooling falls under the right to choose an education. Indeed, the right to homeschooling is an integral part of the right to choose an education.

To conclude this point, albeit there was no ruling that explicitly addressed the constitutional status of the right to homeschooling, one may carefully determine that the State of Israel belongs to the group of States that recognized the right to choose an education – which, in our interpretation, included also the right to homeschooling – by means of constitutional interpretation. Moreover, we believe that the existence of a constitutional right as mentioned above, obligates the Israeli legislature to update legislation on education in a manner conforming with the constitutional right to homeschooling. With this insight in mind, we now turn to a review of the regulations in Israel that govern homeschooling.

3) The Ministry of Education Director General Circular Regarding Homeschooling

Education laws in Israel do not explicitly address the right of parents to homeschool their children.¹³² However, this possibility does exist in Israel by power of Ministry of Education policy that is based on the Education

alongside official schools is one of the trademarks of a participatory democracy. This regime encourages community organization and allows the community to manage its life as it sees fit, among other things through the operation of educational institutions. Private schools answer the need to maintain a unique framework in a multicultural society, and thus also promote the personal autonomy of the individual, which is reflected in his ability to control the ways of his education. An attempt to prescribe study content and educational ways may cause objections due to its grave harming of this autonomy. The enforcement of a uniform educational regime may fail the unique needs of different communities, and harm the will to maintain a culture or a self-identity. One could say that a complete rejection of private school may harm human dignity, and may even harm, under certain circumstances, the fabric of democratic life. Additionally, such a rejection harms the rights of a minority to organize as a community, where such rights are recognized.” [Translated from Hebrew].

¹³² It is interesting to note that in 2011, a private law proposal was filed seeking to revise Article 5 of the Compulsory Education Law, 1949, and empower the Minister of Education to issue regulations on the subject of homeschooling. *See* Compulsory Education Law Proposal (Amendment – Homeschooling), 2011. In the explanation for the proposal it was written that the “proposal seeks to anchor in legislation the means for approving and supervising homeschooling, which, as of today, are set by Ministry of Education CEO notice. The proposed law seeks to answer the lack of legislation on the subject of homeschooling, which more and more families choose to educate their children by, a fact which requires the Knesset to act to regulate it by power of law.” [Translated from Hebrew]. The proposal was ultimately not passed into law.

Minister's authority to grant individual exemptions from compulsory studies.¹³³

In Israel, every child aged 3-18 is required to attend an educational institution recognized by the State.¹³⁴ Alongside this requirement, the Education Minister was given the authority to exempt parents from sending their children to school when there are special reasons, under the condition that the parents were able to provide their children with systematic learning found satisfactory by the Minister.¹³⁵

On the basis of this authority, since the 1980s, the Ministry of Education has formed a policy of granting individual exemptions from compulsory studies for parents who sought to homeschool their children. The policy was anchored in Ministry of Education Director General circular (hereinafter: the "DG circular"), the last of which was issued in 2009.¹³⁶ The DG circular described the position of the Education Ministry regarding homeschooling as such:

[t]he position of the education system in Israel was that children in the ages of compulsory education belonged in the educational institutions that operated according to the Compulsory Education Law, 1949, the State Education Law, 1953, and the Supervision of Schools Law, 1969. In accordance with Amendment 29 to the Compulsory Education Law, compulsory studies in a recognized educational institution applied until the end of the 12th grade. Therefore, the Ministry of Education and the local educational authority must act toward the education of every pupil in an educational institution. However, applications for homeschooling will be approved in cases [where] the parents demonstrated a fully-formed worldview that rejected studies in a school, or in cases

¹³³ It could be argued that there are some similarities between homeschooling and the Ultra-Orthodox education system in Israel. However, the Ultra-Orthodox education in Israel – which is organized in education chains corresponding to political affiliation, and not as a private initiative of some parents – is different than the regular pattern of homeschooling, and causes unique problems that fall outside the scope of this article.

¹³⁴ Article 1 of The Compulsory Education Law, 1949, SH 26: "Compulsory education' means – teaching intended for children and youth and given in fifteen years of learning, of which three are in kindergarten in ages 3-5 and 12 years of studies, grades 1-12, for children and adolescents." [Translated from Hebrew].

¹³⁵ Article 5 of The Compulsory Education Law, 1949.

¹³⁶ Ministry of Education Director General Circular, 5769/8(A), arts. 3.1-37 "Homeschooling – Procedures" (1 Apr. 2009).

with extraordinary circumstances, special and exceptional, that will result in the Ministry granting an exemption from the Compulsory Education Law to parents requesting that their child did not learn in a recognized educational institution, under the condition that the child was found to receive a satisfactory methodic education at home. In any case, the education in question will be that of one child, or the children of one family, and not a gathering for educational purposes of the children of several families. Disagreements or conflicts between the parents and the school will be insufficient grounds for the approval of homeschooling.

The DG circular listed the rules for filing an application for exemption from compulsory studies and the approval of homeschooling. In the application, parents were required to detail why their educational approach required that their children be educated under the framework of homeschooling. In addition, parents were required to attach to their application a detailed study plan that complied with the following requirements:

- The child will be exposed to different fields of knowledge amounting to at least 55% of fields of knowledge in the core curriculum of the education system according to the clusters structure, as long as they learned language skills in their mother tongue (Hebrew or Arabic), mathematics and social skills. In addition, the parents and the child will be allowed to choose any field of knowledge in which the child expressed interest.
- The plan will offer the child a suitable opportunity to aptly interact with their age group and others and to cooperate with them.
- The plan will enable the child to develop values relating to life in society.
- The plan will enable the child to develop skills of problem solving, analysis, synthesis, communication, knowledge gathering, investigation, reflection and use of a range of computer-based technologies.
- The plan will detail the means of evaluation and/or detailing of the expected products that would attest that the learning indeed took place within the defined timeframe.

According to the DG circular, when parents chose homeschooling, they accepted the responsibility for planning, implementing and evaluating their children's studies, and were expected to demonstrate the capacity to plan and provide for the children's educational needs, and to prove that their learning environment allowed access to study centers such as libraries, museums, and use of technologies including computer-based technologies.

The DG circular also detailed the manners of approving an application. The circular established that in order for the parent's application to be approved, the district supervisor will appoint a committee that will visit the parent's house and confirm that the child will receive a proper education. After the visit, the committee will formulate its recommendation for whether homeschooling should be approved. The approved period will not exceed two years, and parents requesting to extend the approval are required to reapply to the county committee and file an additional application.

4) *Court Rulings*

The Israeli Supreme Court has yet to explore the depth of the problems raised by homeschooling – including recognition of the right to homeschooling, the scope of this right, its legal regulation and restrictions in exercising it. In 2007, an appeal was filed to the Supreme Court on the subject of homeschooling, in which the Education Ministry was criticized for not approving applications for homeschooling – but the appeal was withdrawn. In the short ruling, it was explained that the appellants retracted their appeal in light of the DG circular regarding homeschooling that was revised in the same year and enabled the obtaining of homeschooling permits according to the considerations and conditions specified in it.¹³⁷

In the lower courts (the magistrate and district courts), the subject of homeschooling was discussed only on three occasions. The first two rulings addressed homeschooling by way of a conflict between spouses over the custody of the child. The first ruling discussed the appeal of a custodial mother to transfer their joint son (aged 12) from a State school to homeschooling, despite the court-appointed expert's recommendation to the contrary.¹³⁸ The father opposed the mother's appeal, arguing that transferring the minor to a homeschooling framework would be harmful, even detrimental, to his contact with him, the importance of which was undisputed. This would result from severing the father's communication channel with school officials, through which he received information regarding the child, thereby making him totally dependent on the mother for

¹³⁷ *Zinigrad v. Ministry of Education* HCJ 6672/07 (2009).

¹³⁸ *R.K. v. A.K.*, [Family Court (Hadera, Israel)], case no. 12-03-25800, (2013).

obtaining information regarding the state of the minor, his progress in his studies, his social condition and his physical and mental health.¹³⁹ Furthermore, the minor himself expressed satisfaction with his current studies, as well as his wish to pursue them.¹⁴⁰ Eventually, the court accepted the father's arguments, respected the wish of the minor, and rejected the appeal of the mother for homeschooling.

The second ruling addressed a conflict between parents on the visitation arrangements of a minor and the nature of her education.¹⁴¹ At the core of the proceeding was the request of the mother that the minor be homeschooled; the father opposed this request, wishing that the minor attended the regular education system. The family court, after considering, among others, arguments regarding the implications of this decision for the mother's way of life, and a psychological report, reached the decision that the best interests of the minor would be to study in a regular institution that would allow her to expand her educational and social horizons. The court noted the concern that otherwise the child would be somewhat isolated, and that a regular educational institution may guarantee diversity and openness both educationally and socially.¹⁴²

The third ruling discussed the appeal of a minor's biological parents to expunge an indictment (on the grounds of abuse of process) according to which the parents violated Articles 4(A) and 4(B) of the Compulsory Education Law-1949, for not arranging for the minor to study regularly in a recognized educational institution.¹⁴³ According to the defendants, during the school year, the child suffered severe abuse by her classmates. They argued that they could not refrain from acting against the harsh cruelty to which their daughter was subjected, but that no solution was found within the framework of the school. In their distress, the defendants, who have long been familiar with the method of homeschooling, decided to try to homeschool the child. Therefore, due to the difficult situation in which she found herself, they removed her from the school in the middle of the school year. While doing so, the defendants filed an application for the child to be homeschooled. The defendants conceded that they were aware that the law required them to wait for their application to be approved; however, since

¹³⁹ *Ibid.*, at para. 35.

¹⁴⁰ *Ibid.*, at para. 36. The court noted that in light of the minor's age (12) and his mental capacity his views should be given actual weight.

¹⁴¹ The details of the matter that were presented before the district court were noted in the request to appeal to the Supreme Court *Roe v. Doe*, [Family Court] appeal no. 3028/13 (2013).

¹⁴² *Ibid.*, at para. C of Justice Rubinstein's decision.

¹⁴³ *Ramat Negev Regional Council v. Segal*, (Magistrate Court, Dimona, Israel) case no. 1174/05 (2007).

the law offered no appropriate response for this difficult situation, they were forced to act in her defense and remove her immediately from that surrounding. According to the defendants, the authorities expressed insensitivity to the child's condition; they further claimed that one of the reasons their application was rejected was vengeance taken upon the defendants for having already removed the child from the school, before receiving the appropriate permission. The appeal of the parents to erase the indictment on the grounds of abuse of process was ultimately rejected.¹⁴⁴

II. CONCLUSION: LOOKING FORWARD

The parental right for homeschooling is not anchored in Israel in primary or secondary legislation, but only in the DG circular. In our opinion, the time has come for Israel, based on the American experience in the various States, and with the degree of caution required by principle regulations at their onset, to anchor the right of parents to homeschooling in an Act to be passed by the Knesset. Based on the analysis of legislation and ruling in the various States reviewed above, as well as on the moderate Israeli experience on the subject, accumulated in the Ministry of Education and in court rulings, we propose to include the following principles in the law:¹⁴⁵

1. The right of the parents to conduct homeschooling will be defined. It shall be established that this right does not pose an exemption from compulsory education, but rather a different means of realizing it. Under this right, it may also be considered to recognize the right of parents to partially realize the right to homeschooling, and leave the children in school for the study of certain subjects.
2. The law will condition the approval of homeschooling on the filing of an orderly application to the education authorities. Authorized parties will visit the house of the parents in order to ensure that the child would receive a proper education.
3. While approving the application, the education authorities would, to the extent possible, also consider the wish of the child to be homeschooled or otherwise.¹⁴⁶

¹⁴⁴ The proceeding addressed only the preliminary argument for erasing the indictment, and the verdict was not published.

¹⁴⁵ See proposed law, *supra* note 132. The proposal is an amendment of Article 5 of the Compulsory Education Law, 1949, *ibid.* and empowers the Minister of Education to establish regulations for homeschooling on a range of subjects.

¹⁴⁶ See discussion on the subject in United States law in the text corresponding to notes 112-114, *supra*.

4. Homeschooling parents will be required to teach certain core subjects, in order to protect the right of the child to receive a proper education, and to protect the interest of the state in realizing the goals of the education.

5. Homeschooling will be conditioned on supervision by the Ministry of Education. The education authorities will be authorized to withdraw the parents' permission for homeschooling when the latter did not comply with the requirements set in the law regarding the quality, level and scope of the studies.¹⁴⁷

In addition, it should be recalled that the right to homeschooling has a constitutional aspect. The right to homeschooling is protected by the constitutional right of parents to choose an education – the freedom of education – and, as such, laws that disproportionately impinge on the right to homeschooling can be abrogated for unconstitutionality¹⁴⁸ and, in the Israeli case, for violating the Basic Law: Human Dignity and Liberty.¹⁴⁹

Lastly, if, in the future, the right to homeschooling will be explicitly anchored in Israel in a Basic Law (or in a constitution,)¹⁵⁰ the constitutional text should explicitly establish that the right of the parents to choose an education included the possibility to favor homeschooling, alongside the possibilities to choose an education provided by public or private schools.¹⁵¹

¹⁴⁷ *Atid School v. Ministry of Education*, [Administrative Petition (Tel Aviv)], case no. 1294/01 (2001). The district court determined (art. 21 of the decision) that the State's intervention in the parents' decision regarding their children's education is justified when the harm to the child is grave and substantial. On the other hand, if the existing or expected harm is not grave, the decision of the parents should be overweighed.

¹⁴⁸ Such as the American ruling reviewed above, see text corresponding to notes 46-51, *supra*.

¹⁴⁹ See text corresponding to notes 132-6, *supra*.

¹⁵⁰ See Y. Rabin, *The Right to Education*, ch. 19 (2002).

¹⁵¹ Such a determination in the constitution is rare but not impossible, *see, e.g.*, art. 42(2) of the Constitution of Ireland: "Parents shall be free to provide this education in their homes or in private schools or in schools recognized or established by the State." [Translated from Hebrew].