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# From Blackstone's Common Law Duty of Parents to Educate Their Children to a Constitutional Right of Parents to Control the Education of Their Children

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**Abstract**

Blackstone's Commentaries stated that the common law imposed a duty on parents to provide for the maintenance, protection, and education of their children, and of these, the duty to provide an education was "of far the greatest importance."

Early on American courts cited Blackstone for the proposition of the common Iaw duty of parents educate their children. As the nineteenth century progressed, public and private schools were formed in most American states, and a number of states enacted compulsory education laws.

American states also sometimes also enacted laws that interfered with the freedom of parents to direct the education of their children. In 1919, in the wake of the anti-German hysteria of World War I, Nebraska passed a law that prohibited the teaching of German in the Lutheran sectarian schools. In 1922, Oregon passed a law prohibiting parents from enrolling their children in private and sectarian schools. The Supreme Court held that both of these laws were unconstitutional under the Fourteenth Amendment's due process clause, because they interfered with the liberty of parents to control the education of their children.

In the United States, Blackstone's common law duty of parents to provide an education for their children had evolved into a constitutional right of parents to control the education of their children.

## Introduction

American constitutional law is similar in many ways to the common law.

Like the common law, American constitutional law develops in a "line of growth" and evolves within that "line of growth." Constitutional law emerges from the decisions of the United States Supreme Court in actual cases, and those decisions are binding on the lower courts and on the Supreme Court itself under the principle of *stare decisis.*[1] Just as the decisions of the courts over a period of time establish a body of common law, so too the decisions of the United States Supreme Court over a period of time establish a body of constitutional law.[2]

In this paper, I will discuss how Blackstone's common law duty of parents to educate their children evolved in the United States into a constitutional right of parents to control the

[1] Under the Constitution, the jurisdiction of the federal courts, including the United States Supreme Court are limited to "cases and controversies." U.S.CONST. ,art. III, sec. 2, cl.1.

[2] See generally the discussion in Robert A. Sedler, The Settled Nature of American Constitutional Law, 48

education of their children. I will first discuss the common law duty of parents as set forth by Blackstone. I will then discuss the development of public education in the United States and the enactment of compulsory education laws that imposed the legally enforceable obligation upon parents to provide their children with an education. Following, I will explain how the American Constitution provides a structural basis for challenging governmental action interfering with individual rights and how the Fourteenth Amendment's due process clause has been used by the Supreme Court to create a constitutional right of parents to control the education of their children. I will conclude with some further observations about the nature of this constitutional right.

**The Common Law Duty Of Parents To Their Children**

Blackstone defined the relationship between parent and child as the "most universal relation in nature," and stated that the duties of parents to their children consisted of three particulars: their maintenance, their protection, and their education.[3] In speaking

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[3] BLACKSTONE'S COMMENTARIES 160 [BL.COMM–BOOK I. CH. XVI * 447] (Chase ed. 1877) [Hereinafter cited as "BLACKSTONE." The citation is to the page in the Chase edition, which in turn cites by way of * to the paging of the original edition].In the above passage, Blackstone was referring specifically to the duty owed to legitimate children. The common law sharply distinguished between the duties owed to legitimate children and the duties owed to illegitimate or , as we would put it today, to out-of-wedlock children. That distinction was also embodied in legislation in all American states and resulted in a great deal of discrimination against out-of-wedlock children. The United States Supreme Court has invalidated practically all the traditional forms of discrimination against out-of-wedlock children as violative of the Fourteenth Amendment's guarantee of equal protection of the laws. See *e.g*., Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Clark v. Jeter, 486 U.S. 456 (1988). Thus, in American law, the duty of the parents to provide for the maintenance, protection and education of their children extends to both in-wedlock and out-of-wedlock children. In addition, as a constitutional matter, the duty is owed in equal measure to children of both sexes. See Stanton v. Stanton, 421 U.S. 7 (1975), holding violative of the Fourteenth Amendment's guarantee of equal protection of the laws a state law imposing a duty on parents to support male children until age 21, but to support female children only until age 18. Interestingly enough for present purposes, the distinction related to the parent's duty to provide education for the children: the premise of the law was that male children would need support for a longer period of time in order to obtain further

of the duty of parents to educate their children, Blackstone stated: "The last duty of parents to their children is that of giving them an *education* suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself."[4] Blackstone lamented the fact that, "the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children."[5]

The common law duty of parents to their children as set forth by Blackstone, then was expressed in the trilogy of maintenance, protection, and education.[6] While there were relatively few reported cases involving this common law duty, there is no doubt that the duty was

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education, while female children would not have that need.

[4] BLACKSTONE at 165 [*450-451].

[5] *Id*. Blackstone went on to say that, "Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him.

[6] Blackstone's Commentaries was recognized as an authoritative statement of the common law by many American courts. As one judge stated: "I have cited Blackstone's Commentaries because that work was contemporaneous with our Constitution, and brought the law of England down to that day, and then, as now, was the authoritative text-book on its subject, familiar not only to the profession, but to all men of the general education of the founders of the Constitution. . . . That book, therefore, thus belongs to the precise time to which our question relates, and is especially authoritative on its subject, and therefore I shall continue to cite it. Loring, J., in Knote v. United States, 10 Ct.Cl. 397 (1874). In Gulley v. Gulley, 111 Tex. 233, 231 S.W. 97 (1921), the Texas Supreme Court quoted Blackstone's Commentaries on the common law duty of parents to support their children: "It [the common law] declares that he the father shall support his children, because every man is under obligation to provide for those descended from his loins," cited in Milburn v. Milburn, 254 S.W. 121 (Tex.App.1923). And as a New York Family Court more recently observed: "As Justice Sir William Blackstone so elegantly set forth in his commentaries: 'The duty of parents to provide for the *maintenance* of their children is a principle of natural law * * *By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect *right* of receiving maintenance from their parents * * * The municipal laws of all well-regulated states have taken care to enforce this duty.' (1 Blackstone's Commentaries, at 466 [Sharswood ed 1891]; emphasis in original)." In the Matter of Commissioner of Social Services on Behalf of Taisha Lachs v. Grifter, 150 Misc.2d 209, 575

recognized by the common law of all of the American states.[7] The duty of the parents to provide financial support for their minor children is now imposed by statute in all of the American states. The statutes codify the common law duty of support and make provision for the issuance of support orders in connection with divorce.[8]

**The Movement Toward Public Schools And Compulsory Education**

In the early days of the American Republic, providing for a child's education was considered the responsibility of the parents in accordance with their common law duty, as set forth by Blackstone. For the most part, affluent families educated their children by the use of tutors or in sectarian schools, and in most places, there was no provision for the education of less affluent children. Some towns, particularly in New England, did provide public schools, and by the middle of the nineteenth century some public educational systems had been established, again primarily in New England and in the North.[9] As more and more states did establish

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N.Y.S.2d 259 (Family Court of New York 1991).

[7] Among the few reported cases, see Stanton v. Wilson, 3 Day 37 (Conn.1808); Steele v. People, 88 Ill.App. 186 (1899); Shields v. O'Reily, 68 Conn. 256 (1896).

[8] For illustrative cases involving the operation of modern parental support statutes, see *e.g*., Knill v. Knill, 306 Md. 527, 510 A.2d 546 (1986); In the Matter of Commissioner of Social Services, *supra*, note 6. See also N.E. v. Hedges, 391 F.3d 832 (6th Cir. 2004), where the biological father of a child asserted a constitutional right to avoid paying child support on the ground that he did not want to parent a child, the child's mother told him that she was using contraception, and that the mother married another man, with whom she and the child were living. Not surprisingly, his constitutional claim was given short shrift by the Court. The Court cited Blackstone's discussion of the *parens patriae* doctrine, 3 BLACKSTONE COMMENTARIES [*836), and noted that it was the basis of the state's power to determine paternity and impose a duty of support on fathers of out-of-wedlock children. 391 F.3d at 835. The Court went on to say that: "For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring - even if unwanted and unacknowledged - remains constitutionally sufficient to support paternity tests and child support requirements." *Id*.

[9] In Brown v. Board of Education, 347 U.S. 483, 489-90 (1954), the United States Supreme Court discussed the limited nature of public education in the United States at the time of the adoption of the Fourteenth Amendment in 1868. The Court did so in the context of concluding that there was insufficient historical evidence to demonstrate that the Framers of the Fourteenth Amendment considered that this Amendment would prohibit or authorize racially segregated public schools. The Court stated:

systems of public education, they also enacted statutes making education compulsory and imposing the duty on parents to enroll their children in the public or private schools. These statutes varied widely from state to state in terms of the number of years that children were required to attend school.[10] But they all required that parents enroll their children in school and imposed sanctions on parents who failed to comply with the statute's requirements.[11] By the early part of the 20th century, compulsory education was widespread throughout the United States.[12]

We see then that in the United States the common law duty of parents to provide for the

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> In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of Negroes was almost nonexistent, and practically all of the race was illiterate. In fact, any education of Negroes was forbidden by law in some states. . . . It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even, in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory education was virtually unknown.
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> (emphasis added).

The Court in *Brown* also cited a number of works discussing the development of public education prior to 1868. Referring to these works, the Court noted that: "Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all states." 347 U.S. at 490 n. 4.

[10] In 1877, George Chase, the editor of the 1877 edition of Blackstone's COMMENTARIES, stated: "In the United States, very ample facilities are afforded in nearly all the States for the education of children by public schools. In some of the States, education has been made compulsory by statute. He uses as an example a recently-enacted New York statute requiring that children between the ages of 8 and 14 be sent to a public or private school for at least 14 weeks in each year, or be instructed at home for that period, in spelling, reading, writing, English grammar, geography and arithmetic." BLACKSTONE at 165, n. 5. I think that Mr. Chase was overstating the availability of public education outside of New England and the Northern states at that time, but there is no doubt that by the latter part of the 19th century, public education was taking hold in the United States.

[11] For illustrative early 20th century cases involving enforcement of compulsory education requirements against non-compliant parents, see State of Indiana v. O'Dell, 187 Ind. 84, 118 N.E. 529 (1918); Jackson v. Mason, 145 Mich. 338, 108 N.W. 697 (1906); Covell v.The State, 143 Tenn. 571, 227 S.W. 41 (1920).

[12] See the discussion of this point by the United States Supreme Court in Brown v. Board of Education, *supra*, note 9, 347 U.S. at 490, n.4

In the United States, it is the responsibility of each state to provide for the education of its children. In every state, this responsibility is carried out by local school boards established pursuant to state law. Education, the

education of their children - a duty of imperfect obligation, since it was not legally enforceable against the parents - had been transformed in the United States into a statutory requirement that imposed on parents the duty to "bestow a proper education on their children," as Blackstone had advocated.

**The Constitution And Individual Rights**

From the very beginning of the Nation's constitutional history, it was recognized that the power of the government must be limited in order to protect individual rights. The Framers of the Constitution were very familiar with the violation of individual rights that had occurred during the colonial era and were seriously concerned about the abuse of governmental power, even by a government that had been democratically elected. Moreover, they believed that certain important individual rights should be protected from governmental action, and that there were certain things that no government, no matter how democratically elected, should be able to do to those whom it governed.[13] The original Constitution contained a few "individual rights" provisions imposed against the newly-formed federal government and against the states.[14] But it was in the Bill of Rights adopted in 1791 that the historical concern for the protection of individual rights achieved full realization. In the Bill of Rights, the Framers imposed numerous, and sometimes in sweeping terms, limitations on governmental power designed to protect individual rights, such as

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United States Supreme Court observed in *Brown*, "is perhaps the most important function of state and local governments." Brown v. Board of Education, *supra*, 347 U.S. at 493.

[13] See generally the discussion in Robert A. Sedler, "The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective, 44 OHIO STATE L.J. 93, 123-126 (1983).

[14] In the American constitutional system, the sovereignty formerly exercised by the British Crown over domestic matters devolved upon the states at the time of Independence. In this sense, state sovereignty is a "given" in the American constitutional system, and the states do not depend on the Constitution for the source of their

freedom of speech, freedom of religion, and protection against unreasonable searches and seizures. One of those limitations, contained in the Fifth Amendment, was that, "no person shall be deprived of life, liberty or property without due process of law."

The Bill of Rights, however, only ran against the federal government and did not impose any limitations on state governmental power. The American Civil War and the defeat of the southern states seeking to secede from the Union changed all this. In the "Reconstruction Period" following the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments were adopted. The Fourteenth Amendment, adopted in 1868, contained broad provisions designed to protect individual rights against state governmental action, and has become the primary textual basis of constitutional protection of individual rights.[15] The Fourteenth Amendment carried over the due process clause of the Fifth Amendment, and provided that, "no state shall deprive any person of life, liberty or property without due process of law." The Fourteenth Amendment's due process clause has also been held to incorporate the principal guarantees of the Bill of Rights, so as to make them binding on the states as well as the federal government.[16]

In the late 19th and early 20th century, the Supreme Court held that the due process clause, despite its historical origin as consecrating modes of fair procedure, also had a substantive component, and so provided a textual basis for challenging laws and governmental actions that

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power. The Constitution established a new federal government with enumerated powers and provided for federal supremacy in the event of a conflict between the exercise of federal and state power.

[15] The Thirteenth Amendment, adopted in 1865, prohibited slavery or involuntary servitude, and the Fifteenth Amendment, adopted in 1870, prohibited racial discrimination in voting.

[16] See the discussion of the structure of constitutional protection of individual rights in Robert A. Sedler, Constitutional Law - United States, in CONSTITUTIONAL LAW: INTERNATIONAL ENCYCLOPAEDIA OF LAW SERIES 135-137 (Kluwer Law International 2005).

substantively interfere with liberty and property interests.[17] During that time, the Court used the due process clause to sustain challenges to governmental economic regulation and to restrict significantly the power of the government to regulate the market economy. The Court retreated from this position during the "Great Depression" of the 1930's, and today the due process clause does not operate at all to limit the power of the government to enact economic regulation.[18] But the concept of substantive due process had been firmly established in American constitutional law, and in the 1920's and continuing to the present time, the due process clause has furnished a textual basis for challenging laws interfering with liberty and property interests.

In its application of substantive due process doctrine, the Court has drawn a distinction between "fundamental" and "non-fundamental" liberty interests. This distinction relates to the standard of review that the Court applies to determine the constitutionality of laws and governmental actions interfering with those interests. Where the asserted liberty interest has been denominated as "non-fundamental," the Court applies a somewhat deferential "rational basis" standard, which only requires that the law be reasonably related to advancing a legitimate governmental interest. Where the asserted liberty interest has been denominated as "fundamental," the Court applies a much more restrictive "compelling governmental interest" standard, which requires that the asserted governmental interest be "compelling," and that the challenged law be the "least drastic means" of advancing that interest. In light of the differing

[17] As the Supreme Court stated in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992): "Constitutional protection of the woman's decision to terminate her pregnancy comes from the Due Process Clause of the Fourteenth Amendment . . . The controlling word in the case before us is 'liberty.' Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years [the] Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'"

standards of review, it is more likely that a law interfering with a "non-fundamental" liberty interest will be upheld while a law interfering with a "fundamental" liberty interest will be invalidated.[19]

The Supreme Court has stated that, "Perhaps oldest of the fundamental liberty interests recognized by the Supreme Court is the interest of parents in the care, custody and control of their children."[20] This interest was first recognized in two cases, going back to the 1920's, which involved the right of parents to control the education of their children. The first of these cases was Meyer v. Nebraska,[21] decided in 1923, In the wake of World War I, there was strong anti-German feeling in a number of midwestern states, where the German-American population was concentrated, and this took the form of hostility toward the teaching of the German language in Lutheran parochial schools. The Nebraska law, which came before the Supreme Court in Meyer, prohibited the teaching of any subject in any language other than English and prohibited the teaching of any foreign language to children who had not completed the eighth grade. In a prosecution against a teacher in Lutheran parochial school for teaching reading to a child in German, the Supreme Court held that the law violated due process. The Court pointed out that the liberty protected by the due process clause included the liberty of parents to bring up their children, and that it was the "natural duty of the parent to give his children education suitable to their station.[22] " This liberty included the right of the parents to engage the teacher to instruct their children, so that the law interfered with the liberty of the teacher to teach, of the pupils to

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[18] See the discussion of this point in Sedler, Constitutional Law - United States, *supra*, note 16 at 224-225.
[19] See the discussion of this point in Sedler, Constitutional Law - United States, *supra*, note 12 at 138-139.
[20] Troxel v. Granville, 530 U.S. 57, 65 (2000).
[21] 262 U.S. 390 (1923).
[22] 262 U.S. at 399.

acquire knowledge and "with the power of parents to control the education of their own."[23] The Court concluded that the law was "arbitrary and without reasonable relation to any end within the competency of the state and so was unconstitutional."[24]

Two years later, in Pierce v. Society of Sisters,[25] the Court again held violative of due process an Oregon law that prohibited parents from sending their children to private schools. Here the Court even more strongly than in Meyer affirmed the right of parents to control the education of their children. Citing its decision in Meyer, the Court stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[26]

It was "entirely plan," said the Court, that the Oregon law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing ane education under their control,"[27] and therefore, was unconstitutional.[28]

The constitutional right of parents to control the education of their children was now firmly established in American constitutional law.

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[23] *Id.* at 401.
[24] *Id*. at 402.
[25] 268 U.S. 510 (1925)
[26] 268 U.S. at 535.
[27] *Id.* at 534-535,
[28] See the discussion of these cases and the development of the constitutional right to parent in Robert A. Sedler, "The Constitution and Personal Autonomy: The Lawyering Perspective," 11 THOMAS M. COOLEY

**The Constitutional Right Of Parents To Control The Education Of Their Children: Some Further Observations**

In the United States, we have seen the considerable progression of the common law duty of parents to provide for the education of their children. Blackstone saw this duty as part of the common law trilogy of the duty of parents to provide for the maintenance, protection and education of their children. This duty was not enforceable at common law, but it became a legally enforceable obligation in the United States as a result of compulsory education laws enacted in all the American states.. This legally enforceable obligation in turn gave rise to a constitutional right on the part of parents to control the education of their children. It will be recalled that Blackstone said that the duty of parents to give their children an "education suitable to their station in life" was "of far the greatest importance of any, " for without an education, the parent "suffers the child to lead a life useless to others and shameful to himself."[29] The United States Supreme Court in Meyer used identical language when it referred to the "natural duty of the parent to give his children education suitable to their station, "[30] and it may be queried whether Justice McReynolds, writing for the Court, somehow "borrowed" this language from Blackstone although without attribution.[31] In the final analysis, what was a "duty of imperfect obligation" at common law had become a constitutional right in the United States.

The significance of this constitutional right in American constitutional law is illustrated by a recent case where a public school superintendent told a substitute teacher that he could

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L.REV. 774, 776-780.

[29] BLACKSTONE at 165. [*450-451]

[30] 262 U.S. at 399.

[31] It is more likely than not that Justice McReynolds, like many judges and lawyers of this era, was familiar with Blackstone's Commentaries.

obtain a position as a full-time teacher only if he agreed to enroll his child in the public schools rather than in a private school. The superintendent said that the school board wanted teachers to enroll their children in the public schools, because it "looked good" to the parents whose children attended the public schools. When the parent sued the superintendent in a federal court, the Court held that the actions of the superintendent in conditioning the parent's employment as a teacher on the parent's willingness to enroll his child in the public schools violated the parent's constitutional right to control the education of his child. That right, said the Court, going back to Meyer and Pierce, included the right to enroll his child in a private school, and it was unconstitutional for a public school system to refuse to employ him as a teacher because he exercised that constitutional right.[32]

However, the constitutional right of parents to control the education of their children, like other constitutional rights, is not absolute. It is subject to reasonable regulation by the state in order to advance the state's compelling interest in ensuring that the child receives a fully adequate education. This issue has arisen in recent years in the context of a parent's refusal to send the child either to a public school or to a state- accredited private school. Rather the parent insists on the right to educate the child at home. Some states permit "home schooling," with only minimal state regulation, while other states allow "home schooling" only by parents or tutors who hold valid teaching certificates. The courts have uniformly held that state regulation of "home schooling" does not violate the constitutional right of parents to control the education of their children, and that parents who wish to "home school" their children can only do so in

[32] Barrett v. Steubenville City Schools, 388 F.3d 967 (6th Cir.), *cert.den* 126 S.Ct. 334 (2005).

accordance with the requirements of state law.[33]

## Conclusion

In the United States, Blackstone's common law duty of parents to educate their children has evolved into a constitutional right of parents to control the education of their children. This is perhaps typical of developments in the United States where there is a trend toward constitutionalization of rights against the government. This constitutionalization is a part of the American culture, and in this paper I have tried to demonstrate how a common law duty has evolved into a constitutional right.

## References

Robert A. Sedler, "The Constitution and Personal Autonomy: The Lawyering Perspective," 11 THOMAS M. COOLEY L.REV. 774, 776-780.
Brown v. Board of Education, 347 U.S. 483 (1954).
Meyer v. Nebraska, 262 U.S. 390 (1923).
Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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[33] For illustrative cases, see Jernigan v. State, 412 So.2d 1242 (Ala.Crim.App.1982); Shinn v. The People, 195 Cal.App.2d 683, 16 Cal.Rptr. 165 (1961); Blount v. Department of Educational and Cultural Services, 551 A.2d 1377 (Me.1988); City of Akron v. Lane, 65 Ohio App.2d 90, 416 N.E.2d 642 (1979).

Some parents have also challenged restrictions on home schooling on the ground that these restrictions violated the parents' freedom of religion protected by the First Amendment's Free Exercise Clause. The courts have generally rejected these challenges on the ground that the state has a compelling governmental interest in ensuring that all children receive an adequate education. However, in People v. DeJonge, 442 Mich. 266, 501 N.W.2d 127 (1993), t he Michigan Supreme Court held that the state violated the religious freedom rights of homeschooling parents by imposing a strict requirement that only parents who were state-certified teachers could homeschool their children. The court found that the state could ensure that the children were receiving an adequate education by individualized standardized achievement testing, as the parents had proposed. In Wisconsin v. Yoder, 406 U.S. 205 (1972), a decision that seems limited to its particularfacts,the United States Supreme Court held that a state could not constitutionally apply its compulsory school attendance law to require secondary school attendance by the children of a traditional religious community whose religion forbade education beyond the secondary school level. The Court found that compliance with the requirement would seriously interfere with the community's religiously-based way of life, and that education beyond the primary level was not necessary to enable the children to function within that way of life.