

A CONSTITUTIONAL RIGHT TO HOME INSTRUCTION?

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Parental and scholarly dissatisfaction with the public school system is increasingly evident. In the spring of 1983, the National Commission on Educational Excellence issued *A Nation at Risk*,¹ a report demanding the restoration of core curriculum requirements and discipline in our public schools. In 1981, James Coleman, a University of Chicago sociologist, released a study demonstrating that private schools do a better job educating our young than public schools do.² These two studies, among other things, have led parents to reconsider the viability of public schools. A recent survey, for example, found that 25.5% of parents with school age children would send their children to private schools if Congress enacted President Reagan's Tuition Tax Credit proposal,³ which would allow parents a \$250 tax credit for private school expenditures.

The rapid growth of home instruction is one of the most dramatic reactions against our public schools.⁴ Approximately thirty thousand families now practice home instruction, which entails the complete removal of the child from the institutional educational environment.⁵

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1. The National Commission on Excellence in Education, *A Nation at Risk: The Imperative of Educational Reform* (1983).

2. J. COLEMAN, T. HOFFER, S. KILGORE, *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC AND PRIVATE SCHOOLS COMPARED* (1982).

3. Congressionally Mandated Study of School Finance Final Report: Vol. 2, *Private Elementary and Secondary Education*, Report to Congress from Secretary of Education, 68 (1983).

4. Similar to the home study movement in its criticism of public education is the Christian day school movement. Christian day schools, with current enrollments of approximately one million students, are the fastest growing segment of institutional private education. For a general discussion of Christian school opposition to public education, see Carper, *The Christian Day School Movement, 1960-1982*, 17 EDUC. F. 135 (1983); Devins, *State Regulation of Christian Schools*, 10 J. LEGIS. 351 (1983) [hereinafter cited as *State Regulation*]; Devins, *Fundamentalist Schools vs. the Regulators*, Wall St. J., Apr. 14, 1983, at 26, col. 3.

5. See Lines, *Private Education and State Regulation*, 12 J. L. & EDUC. 189, 197 n.8 (1983);

Although most parents who seek to educate their children at home are dedicated and sincere, several states have enacted statutes that severely restrict or even eliminate the home instruction alternative.

The parents' right to teach their children in the home is premised on the parent-child bond. The primacy of this parent-child bond is beyond dispute.⁶ In most situations, the state must demonstrate abuse or neglect before it can interfere with this relationship.⁷ Yet some individuals contend that in education, government regulations should promote a state-selected system of values.⁸ Comprehensive state regulatory schemes reflect this view for they frequently severely limit parental choice among educational alternatives.⁹

Increasingly parents are going to court to challenge restrictive state education procedures on both statutory and constitutional grounds. On constitutional grounds, parents claim that these procedures deprive them of their fundamental right, protected by the due process clause of the fourteenth amendment, to direct the upbringing of their children.¹⁰ On statutory grounds, parents argue that their home study program satisfies vague "equivalency with public schools" statutes,¹¹ or that their home should be viewed as a private school for purposes of state compulsory education laws.¹² These parents usually recognize that the state has authority to demand that its young attain minimum academic competence in a basic curriculum.¹³ Some states, however, contend that only through the total prohibition of home instruction or the development of comprehensive standards to regulate home instruction can they meet their compelling responsibility to ensure that every child in the state receives an adequate education.¹⁴

This Article attempts to define the boundaries of permissible state authority in the home schooling context. The underlying thesis of this

Ward, *What Happens When Parents Turn Teachers*, N.Y. Times Winter Survey of Education, Jan. 10, 1982, sec. 13 at 3.

6. See *infra* notes 67-81, 95-122 & 213-21 and accompanying text.

7. See generally Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1978).

8. See *infra* notes 203 & 204.

9. See *infra* notes 43 & 44 and accompanying text.

10. See *infra* notes 112-22 and accompanying text.

11. See *infra* notes 176 & 177.

12. See *infra* notes 157-61 & 170-72 and accompanying text.

13. See Ball, *Religious Liberty: New Issues and Past Decisions*, in A BLUEPRINT FOR JUDICIAL REFORM, 327-49 (P. McCuligan & R. Rader, eds. 1981).

14. See *infra* notes 43 & 44.

Article is that the state cannot prohibit or render meaningless the home study option. At the same time, the state has authority to insist that students taught at home learn as much as their public school counterparts. Supreme Court decisions recognize the fundamental nature of both a parent's child-rearing interest¹⁵ and religious freedom.¹⁶ Also, writings in the fields of developmental psychology¹⁷ and educational theory,¹⁸ as well as writings concerning the role of education in an open political system, recognize the parents' special interest in directing their child's education.

This Article is divided into four sections. The first section is devoted to an overview of both the reasons why parents choose to teach their children at home and the types of regulations used by the state to govern home instruction.¹⁹ The next section discusses the basis for the state's authority to intervene in family education matters and due process limitations on such intervention.²⁰ State authority over family matters is based on its collectivist interest in an educated populace and its *parens patriae* interest in the wellbeing of its youth. One limitation on the state's authority is the parents' fundamental right to direct the religious upbringing of their children. This fundamental right is not absolute, however, because the state may reasonably regulate educational alternatives.

The third section of this Article systematically describes court rulings on the home instruction issue.²¹ This section begins with a discussion of two recent lawsuits that challenge total prohibition of home instruction. These cases may provide significant insight into the scope of legitimate state authority over the home study alternative. The remainder of this section highlights the limited precedential value of other state cases on the issue whether the state can constitutionally prohibit or make meaningless the home study option. Failure on the part of states' and parents' attorneys either to raise significant issues or to introduce evidence to support their claims is a prime cause of the courts' inability to speak clearly on this issue. Additionally, many of these cases raise

15. See *infra* notes 67-81, 95-122 & 213-21 and accompanying text.

16. See *infra* notes 93 & 200.

17. See authorities cited *infra* notes 213 & 214.

18. See *infra* notes 205-10 and accompanying text.

19. See *infra* notes 23-54 and accompanying text.

20. See *infra* notes 55-129 and accompanying text.

21. See *infra* notes 130-99 and accompanying text.

narrow statutory issues, which do not lend themselves to constitutional extrapolations.

The final section of this Article is a critical analysis of arguments used by the states to justify governmental interference with the family.²² This section attempts to explain the limited reach of the state's communitarian and *parens patriae* interests. In the home study context, this limited state interest is sufficient to justify regulations governing hours of core curriculum, length of school day and school year, student reporting, and competency examinations. More expansive regulations unconstitutionally interfere with the fundamental parent-child bond.

I. THE NATURE OF THE CONTROVERSY

Parents teach their children at home for a number of reasons. Not surprisingly, the most common of these reasons is dissatisfaction with the public school system.²³ These dissenting parents share a common disenchantment with the academic and social environments of public schools.²⁴ For these parents, the state, if left to its own devices, will create a monolithic educational structure that will stamp out "the needed diversity for a truly free society."²⁵ These parents also are fear-

22. See *infra* notes 200-29 and accompanying text.

23. For an expanded discussion of parental dissatisfaction with the public school system, see Devins, *State Regulation*, *supra* note 4, at 355-59.

24. See S. ARONS, *COMPELLING BELIEF* 75-134 (1983); Carper, *supra* note 4, at 281-282.

25. J. WHITEHEAD, *THE NEW TYRANNY* 3 (1982). According to Stephen Arons, the public school inculcates in its students a set of state-selected values:

[t]he values in which public school students must confess belief include the following:

1. Authority in society should be organized hierarchically, and it is appropriate for those of less authority to cultivate attributes of obedience and passivity.
 2. Truth is prescribed and established by authority and learning means understanding and accepting the official version of reality.
 3. Material acquisition, rather than spiritual condition, is the most significant measure of personal success and social progress; and measurement, rather than intuition, defines knowledge.
 4. Competition is more important than cooperation.
 5. The ability to follow directions is more important than creativity, and dissent is either the result of poor communication, willful misanthropy, or emotional instability.
- No single family articulates the values underlying public schooling in just this language; and all the families offended by beliefs they see enshrined in public schools do not agree on which values constitute public orthodoxy. The list of offensive school beliefs grows, however, with each conversation one has with "unschoolers."
6. Poverty, malnutrition, disease, oppression, and violence are not created by anyone who lives according to society's rules, and people in general should perform whatever acts are required by their "roles" without ethical discomfort.
 7. Compulsion and coercion are acceptable means of creating proper behavior, including learning.
 8. There are specific character attributes associated with race, gender, class, and age

ful of the "moral breakdown" in our public schools, which they associate with lack of discipline, social permissiveness, and drug and alcohol abuse.²⁶

Parents also seek to teach their children at home for religious reasons. Some Christian educators and parents, for example, believe that public schools have become too "secularized," with the result that religious values no longer have a place in public education.²⁷ This lack of religion in public education can partially be attributed to Supreme Court decisions that prohibited organized prayer,²⁸ Bible reading,²⁹ and the posting of the Ten Commandments in public schools.³⁰ The inclusion of sex education and evolution courses in the public school curriculum, which some Christian educators find morally objectionable, exacerbates this problem.³¹

In addition to their religion-based criticisms of the public schools, Christian educators also seek to advance a particular set of religious values through home education. These educators believe that education should be inherently religious and thus oppose state efforts to license their home study programs.³² In court, Christian educators and parents argue that state efforts to limit or prohibit home instruction deprive them "of their liberty to freely carry out their religious mission in the form of Christian education. . . ." ³³ Parents who wish to teach their children at home may base their actions on two constitutionally

that cannot be changed and upon which may be based the distribution of power, wealth, and dignity.

9. Institutional schooling contributes to the progress of the individual and society, upgrades general morality, reduces prejudice, and protects each rising generation from the mistakes of the previous generation.

10. Manual labor can never attain the dignity or power of intellectual labor; and art, music and mysticism are nonessential.

S. ARONS, *supra* note 24, at 100-01.

26. See D. Ham, *Reasons Why Parents Enroll Their Children in Fundamentalist Christian Schools* (unpublished Ph.D. dissertation, University of Missouri at Columbia, 1982). Along with a general "moral breakdown" in the schools, parents also claim they are concerned with the deprecation of schools, asbestos, and other dangers.

27. See Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U. L. REV. 847; Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implication*, 10 TEX. TECH. L. REV. 1 (1978).

28. *Engel v. Vitale*, 370 U.S. 421 (1962).

29. *Abington School Dist. v. Schemp*, 374 U.S. 203 (1963).

30. *Stone v. Graham*, 449 U.S. 39 (1980).

31. See Rice, *supra* note 27.

32. See Devins, *Fundamentalist Schools and the Law*, *Chris. Sci. Mon.*, Sept. 22, at 23 col. 4.

33. *Bangor Baptist Church v. State*, 549 F. Supp. 1208, 1216 (D. Me. 1982) (citing plaintiff's petition). See also *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983); *State v. Moorehead*, 308

protected rights. First, the parents' right to direct the upbringing of their child is protected by the due process clause of the fourteenth amendment.³⁴ Second, the parents' right to protect the religious upbringing of their child is protected by the free exercise clause of the first amendment.³⁵

Parental desires to direct their children's education often conflict with state laws and regulations governing home instruction. Because education is not a fundamental right protected by the due process clause of the fourteenth amendment,³⁶ courts afford the state great leeway in developing the contours of its educational system. The authority of the state to promulgate reasonable regulations to govern all forms of schooling is beyond doubt. In *Runyon v. McCrary*,³⁷ the Supreme Court noted that the constitutional prohibition against government regulation of child-rearing decisions does not similarly restrict the government from regulating parental decisions concerning their child's education.³⁸ In addition, the *Runyon* Court indicated that a constitutional right to send children to private schools does not mean that private schools could not be subjected to reasonable government regulation.³⁹ In a similar vein, the Court noted in *Gillette v. United States*,⁴⁰ that "neutral prohibitory or regulatory laws having secular aims may impose certain 'incidental burdens' on free exercise when 'the burden on First Amendment values is . . . justifiable in the terms of the Government's valid aims.'"⁴¹ The determination of whether a regulation is reasonable ultimately rests with the judiciary. The judiciary has afforded states a great deal of discretion in determining what sorts of regulations ought to govern education.⁴²

N.W.2d 60 (Iowa 1981); *State v. Staver*, 294 N.W.2d 883 (N.D. 1980); *State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981).

34. See *infra* notes 112-29 and accompanying text.

35. See *infra* notes 82-99 and accompanying text.

36. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); see also Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504 (1972). But see *Serrano v. Priest II*, 18 Cal. 3d 728, 557 P.2d 1929, 135 Cal. Rptr. 345, cert. denied, 432 U.S. 907 (1977); Clune, Coons, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Finance Structures*, 57 CALIF. L. REV. 305 (1969).

37. 427 U.S. 160 (1976).

38. *Id.* at 178. See also authorities cited in Note, *The State and Sectarian Education: Regulation to Deregulation*, 1980 DUKE L.J. 801, 811-12 n.59.

39. 427 U.S. at 178.

40. 401 U.S. 437 (1971).

41. *Id.* at 462.

42. For a discussion of regulations governing home study programs, see Lines, *Private Educa-*

States that seek to limit the home instruction alternative claim that the regulation (or even prohibition) of home instruction is necessary to ensure adequate education of their young. The Virginia State Board of Education, for example, sought to justify a "state approval of home tutor" requirement by suggesting that the home study environment was educationally deficient. The Board felt it was reasonable for the General Assembly to conclude that the more structured and controlled environment of an educational institution was superior to the more relaxed and private surrounding of a home education program.⁴³ Similarly, North Carolina prohibits home instruction because the state claims that it cannot rely on the parents to provide the necessary motivation to the child to assure that the child has access to a quality education. Unlike operators of nonpublic schools, the State believes that it cannot rely on the existence of collective market forces in the form of parental demands and concerns to assure that children have access to an education and that the education provided will be of some minimal quality.⁴⁴ North Carolina's absolutist approach is unusual, however.

tion Alternatives and State Regulation, 12 J. LAW & ED. 189, 194-97 (1983); Tobak & Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. DAYTON L. REV. 1, 51-2 (1982). For a comparable discussion of private school regulation, see Devins, *State Regulation*, *supra* note 4, at 361-63; P. Kinder, *The Regulation and Accreditation of Nonpublic Schools in the United States* (unpublished Ph.D. dissertation, University of Missouri at Columbia, 1982).

43. [T]he home environment usually is marked by relaxation, privacy, and close relationships formed by bonded lifetimes. It is reasonable for the General Assembly to conclude that education is provided to a greater extent in an environment where discipline and control is more objective, where the program and progress of study are verifiable, where the teacher has a singular role as teacher, where the student has a singular role as student and where the exclusive focus and reason for meeting is the educational program.

Virginia Supreme Court Bars Parents' "Private School," Educ. Daily, Dec. 9, 1982, at 7. See also *People v. Turner*, 121 Cal. App. 2d Supp. 861, 263 P.2d 685 (1953), *appeal dismissed*, 347 U.S. 972 (1954) (parents teaching at home needed teaching certificate while teachers in private schools did not need a certificate). For the *Turner* court:

The most obvious reason for such difference in treatment is . . . the difficulty in supervising without unreasonable expense a host of individuals, widely scattered, who might undertake to instruct individual children in their homes as compared with the less difficult and expensive supervision of teachers in organized private schools.

Id. at 864, 263 P.2d at 688.

44. Appellant's Brief at 14, *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984). In his book, *Compelling Brief*, Stephen Arons noted:

Home-schooling controversies in effect bring out the ideological defense of government schooling:

1. The problem of conflict between families and schools is one of balancing the inter-

Thirty-four states permit some form of home instruction.⁴⁵

Regulation of home education varies considerably among the states that allow home instruction. At one extreme, Louisiana allows parents to teach their children at home with minimal supervision. Parents need only provide the State Board of Education with a proposed home study program and have their children take a standardized achievement test at the end of each school year.⁴⁶ At the other extreme, Michigan requires that "teachers for home instruction must be certified and instruction must be comparable to that provided in public schools."⁴⁷

Among those states that permit home instruction, it is often difficult to ascertain what parents must do to have a home study program approved by the state or local education authority. The primary reason for this confusion is that twenty-one states allow home instruction by permitting "equivalent" or "comparable" instruction outside of schools.⁴⁸ The determination of equivalency, as might be expected, varies considerably from state to state and from district to district within a state.⁴⁹

ests of the two. Parents do have important rights and responsibilities, but society has the predominant responsibility for family morals and beliefs. . . .

2. One of the obligations of the public that can legitimately be carried out through school policy is the protection of children from "bad" parenting. . . .

3. . . . Home schooling does not respect the right of children to differ from parents and impose an even more rigid orthodoxy upon a dissenting child than any school system could.

4. School is an essential force of social cohesion. . . .

5. The socialization of children in groups is essential. Only through peer-group schooling can children learn to get along in a highly independent society.

6. The mixing of children from different backgrounds and from families with differing beliefs and values is vital to peace in a pluralistic society. . . .

7. The adequate function of the American democratic system requires that every child be taught the values of liberty as well as the skills of literacy. . . .

8. Children who are educated at home . . . may become a social burden in a complex society and may be deprived of economic opportunity.

S. ARONS, *supra* note 24, at 121-23.

45. See Tobak & Zirkel, *supra* note 42, at 12.

46. LA. REV. STAT. ANN. § 17:236 (West 1982). See also Marcus, *As Busing Begins in Schools, Louisiana Clears Way for Teaching in Homes*, N.Y. Times, Sept. 25, 1981 at 14a, col. 1.

47. A.G. Op. No. 5579, Sept. 27, 1979 (interpreting MICH. COMP. LAWS § 380.1561 (1979)).

48. The following states have "equivalency" exceptions: Alabama, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and Wisconsin. Tobak & Zirkel, *supra* note 42, at 6-10. Nine of these states have clear-cut regulatory provisions, however: Alabama, California, Connecticut, Delaware, Idaho, Iowa, New York, Rhode Island, and South Dakota. *Id.*

49. Two decisions by the Rhode Island commissioner of education demonstrate this variance. In the case of Linda Rothwell, the state approved the home study program of a "dedicated and

Several states have statutory or regulatory guidelines governing home instruction. The most stringent of these guidelines specify teacher qualifications. Five states allow home instruction only if a teacher is certified, which rules out most parents.⁵⁰ Four states demand that teachers be "competent," paving the way for inconsistent rulings of the meaning of "competence."⁵¹ Other requirements govern the length of the school day and academic year and the nature of classroom materials.⁵²

State regulation that does not explicitly provide for home instruction and only implicitly refers to home instruction by way of open-ended "equivalency" statutes appears to be a thing of the past. The phenomenal growth of home schooling—in conjunction with state legislative dissatisfaction with recent court rulings—is spurring the development of more specific guidelines in several states.⁵³ These regulations undoubtedly will give rise to increased litigation. Parents will challenge the constitutionality of these provisions on due process and religious liberty grounds. In addition, a similar rise in litigation will occur in those states where state and local education officials interpret "equivalency" statutes in a restrictive manner. Home instruction is becoming a great source of conflict between religious sectors and the state.⁵⁴

II. PARENTS V. THE STATE

The conflict between the parent's interest in directing the educational and religious upbringing of their children and the state's interest in the adequate education of its youth is the subject of an ongoing legal controversy. An understanding of both of these interests is necessary to

concerned parent." Mrs. Rothwell was a high school graduate. Yet, in the case of Brigitta Van Dam, the state refused to approve the Van Dam home study program. Interestingly, the Van Dam children performed well on school administered tests. Additionally, Mrs. Van Dam has a master's degree in art education. *See Ward, supra* note 5.

50. Alabama, California, Michigan, Pennsylvania, and Virginia. Tobak & Zirkel, *supra* note 42, at 6-10.

51. Arizona, Hawaii, New York, South Dakota. *See id.*

52. *See id.* at 12.

53. Cray, *Educators Expect Fight Over Minimum Private-School Standards*, Denver Post, Aug. 11, 1981, at 3, col. 1 (Colorado attempted to establish private-school standards without considering the Christian educator's perspective).

54. John Whitehead, an attorney who represents religious causes, predicts that home instruction will be the most significant contemporary legal issue facing the Christian community. *See Devins, State Regulation, supra* note 4, at 361-62.

answer the question whether parents have a constitutional right to instruct their children in the home.

Education is one of the state's most compelling responsibilities. In *Brown v. Board of Education*,⁵⁵ for example, the Supreme Court commented:

Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society . . . in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education.⁵⁶

Philip Kurland similarly noted the central role of schooling in the "American dream." According to Kurland, in America, education became the great equalizer. Individuals could raise their consciousness, ethics, culture, or earning power through education. These benefits to the individual translated into benefits to society. "Thus the United States became one of the most schooled societies in the history of man."⁵⁷

Because education is not a fundamental right,⁵⁸ courts are reluctant to interfere with state regulations and procedures governing the structure of education.⁵⁹ The Supreme Court consistently has emphasized that public education is a matter of state and local concern and that federal courts should refrain from intervening in the daily operation of schools unless there is a clear violation of the Constitution.⁶⁰ The well-being of children is clearly within the authority of the state to regulate and protect.⁶¹ State power over the child may extend even beyond the exercise of constitutional rights by the parents. In *Prince v. Massachusetts*,⁶² for example, the Supreme Court upheld child labor laws over a legitimate free exercise claim. In so doing, the Court held that neither religion nor parenthood place the family beyond state regulation in the

55. 347 U.S. 483 (1954).

56. *Id.* at 493. See also cases cited in Clune, Coons, & Sugarman, *supra* note 36, at 376-78.

57. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 215 (1973).

58. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

59. Ironically, the state also has great authority to govern the structure of education because education is one of the state's most compelling responsibilities. See *supra* note 56 and accompanying text.

60. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

61. *Ginsburg v. New York*, 390 U.S. 629, 639 (1968).

62. 321 U.S. 158 (1943).

public interest.⁶³ Acting to guard the general interest in its youths' well-being, the state may restrict the parents' control by requiring regular school attendance or prohibiting child labor.⁶⁴

State intervention in the parent-child relationship can be justified under one of two standards. One standard governs state intervention pursuant to the state's interest as a collective entity. The other standard governs state intervention on behalf of the child as a developing individual.⁶⁵ The state's collectivist interest is merely an exercise of the state police power designed to promote the public welfare.⁶⁶

The scope of the legitimate governmental interference with the parent-child relationship on collectivist grounds is quite narrow. Judicial recognition of the fundamental nature of the parent-child bond mandates strict scrutiny of state efforts to interfere with that relationship. In *Prince v. Massachusetts*,⁶⁷ for example, the Supreme Court noted that "[i]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁶⁸ In *Roe v. Wade*,⁶⁹ the Supreme Court elaborated on the *Prince* ruling by suggesting that the fundamental privacy concept has "some extension" to family relationships.⁷⁰

63. *Id.* at 166. The *Prince* Court also recognized the primacy of parental authority over their children. See *infra* note 68.

64. 321 U.S. at 166.

65. See Knudsen, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506, 1511-17 (1974); Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373 (1976); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

66. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1199 (1980) ("A large number of state ends have been considered legitimate objectives of the police power, including the promotion not only of the public health, safety, morals, or general welfare, but also more abstract goals like aesthetic and family values.").

67. 321 U.S. 158 (1943).

68. *Id.* at 166. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), for example, the Supreme Court stated that "to marry, establish a home, and bring up children" is a constitutionally protected form of liberty. *Id.* at 399.

69. 410 U.S. 113 (1973).

70. *Id.* at 152-56. Similarly, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1973), the Supreme Court invalidated a zoning ordinance that prohibited extended family members from residing in a single family dwelling because "freedom of personal choice in matters and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 499. The plurality opinion was of the view that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition." *Id.* at 503-04. Similarly, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court invalidated a state statute providing that illegitimate children, upon the death of

Strict scrutiny analysis requires the state to demonstrate that its procedures are the least restrictive means available to effectuate some compelling state interest.⁷¹ Few state regulations governing family conduct can pass constitutional muster under this standard.⁷² To justify an in-

their mother, become wards of the state without a hearing on the parental fitness of the father. For the Court, "the interest of a parent in the companionship, care, custody, and management of his or her child come[s] to this court with a momentum for respect lacking when appeal is made to liberties which derive mainly from shifting economic arrangements." *Id.* at 651. *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (state must demonstrate compelling interest to interfere even indirectly—with a woman's decision to have a child); United States v. Orito, 413 U.S. 139, 142 (1973) (constitutional right of privacy includes right of marriage, procreation, motherhood, child rearing, and education); Loving v. Virginia, 388 U.S. 1 (1967) (freedom of choice in marital decisions); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing, in the family context, that "the specific guarantees in the Bill of Rights have penumbras . . . that help give them life and substance").

In contrast to this group of cases, the Supreme Court affirmed without opinion the district court in *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd without opinion*, 423 U.S. 907. The *Baker* court, in recognizing the legitimacy of a state's *parens patriae* power in the corporal punishment context, held that "parental control over childrearing" should not be considered a fundamental constitutional right "in the hierarchy of constitutional values." *Id.* at 299. The Supreme Court approved the use of corporal punishment in a subsequent decision, *Ingraham v. Wright*, 430 U.S. 651 (1977), without directly addressing the "fundamental rights" issue. The Court also approved an interference in the child-parent bond over a due process objection in *Wyman v. James*, 400 U.S. 309 (1971). *Wyman* held that the state's *parens patriae* interest in the child was sufficient to justify home visits by welfare caseworkers. *Id.* at 318-24. These decisions have been severely criticized for ignoring the primacy of the parent-child bond. *See* Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259 (1971); Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978). For other commentaries suggesting that the courts should subject state interferences with the family to strict scrutiny review, *see* Keiler, *Privacy, Children and their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459 (1982); *Developments in the Law*, *supra* note 66.

71. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1000-60 (1978).

72. The state has a legitimate police power interest in protecting public morals, however. Under a rational basis analysis applied to nonfundamental interests, for example, the Supreme Court upheld a Georgia law regulating the sale and distribution of obscene material. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). The state's asserted interests were "in the quality of life and in the 'mainten[ance] [of] a decent society.'" *Id.* at 58-60 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)). These interests are not sufficiently compelling to justify state interference in the family relationship. In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), for example, the Court held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *Id.* at 575 (mental patient's constitutional right to liberty violated by state confinement because he was neither dangerous nor incapable of surviving if unconfined). The Supreme Court's decisions in *Carey v. Population Servs. Int.*, 431 U.S. 698 (1977), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), also reflect this view. *Carey* held that there was no rational or substantial relationship between a law banning the distribution of contraceptives to minors and the state's asserted interest in discouraging juvenile sexual behavior. 431 U.S. at 706. *Eisenstadt* similarly held that there was no rational relationship be-

fringement of family affairs in the name of the state's collective interest, the state would have to demonstrate that its regulation prevents a near-certain societal harm. For example, regulations requiring children to be inoculated against contagious diseases embody one sufficiently strong state interest.⁷³ Whether less tangible dangers, such as the inability of an uneducated child effectively to exercise his franchise in a participatory democracy, constitute a sufficiently compelling state interest is a more difficult question. The Court's decision to uphold child labor laws in *Prince* suggested that the state might have such authority. Yet, in *Wisconsin v. Yoder*,⁷⁴ the Supreme Court held that the state's interest in compulsory education was not of sufficient magnitude to override a parent's interest in having the child exempted from public school for religious reasons.

States also attempt to justify their efforts to interfere in family affairs on the ground that the state has a right to protect the personal interests of a child—the state's role as *parens patriae*. The state's *parens patriae* power allows the state to interfere in family matters to protect the child's physical, educational, and emotional well-being.⁷⁵ The state may exercise its *parens patriae* power in the face of parental neglect.⁷⁶

No bright line exists between acceptable and unacceptable parental behavior. Clearly, the state can demand that a child receive life-saving medical treatment.⁷⁷ The line between parental punishment and child abuse or between inattention and abandonment, however, is not so clear. Until the Supreme Court's landmark 1967 decision, *In re*

tween restricting the sale of contraceptives to minors and the state's interest in deterring extramarital sexual conduct. 405 U.S. at 450-53.

73. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court upheld the right of the state to compel immunization of its citizens. For a discussion of the relevance of *Jacobson* to the compelled immunization of minors, see Note, *supra* note 65, at 1390 n.43.

74. 406 U.S. 205 (1972). *Prince*, speaking in general terms of "the crippling effects of child labor" 321 U.S. at 168, ignored the peculiar circumstances of the case. See *id.* at 173 (Murphy, J., dissenting). *Yoder*, on the other hand, focused on these particular circumstances. For this reason, Philip Kurland suggested that *Yoder* made *Prince* an "unworkable precedent." Kurland, *supra* note 57, at 243.

75. Note, *supra* note 65, at 1391-92.

76. S. KATZ, WHEN PARENTS FAIL 57 (1971). (Neglect statutes "in many respects, incorporate a community's view of parenthood. Essentially, they are pronouncements of unacceptable child practices.").

77. See, e.g., *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952); *State v. Perricne*, 37 N.J. 463, 181 A.2d 751 (1962), cert. denied, 371 U.S. 890 (1963); *In re Clark*, 21 Ohio App. 2d 86, 185 N.E.2d 128 (1962).

Gault,⁷⁸ courts were fairly deferential when reviewing an exercise of a state's *parens patriae* power.⁷⁹ *Gault* held that the *parens patriae* doctrine was of "dubious relevance" in the juvenile delinquency context and thus the state could not invoke it to immunize state delinquency statutes from constitutional scrutiny.⁸⁰ Following *Gault*, courts began to invalidate certain *parens patriae* exercises on procedural due process, void-for-vagueness, substantive due process, or first amendment grounds.⁸¹

States justify their compulsory education laws on both collectivist and *parens patriae* grounds. In *Wisconsin v. Yoder*,⁸² the Supreme Court recognized the legitimacy of both of these state interests. The Court approved the state's contention that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."⁸³ The Court also acknowledged the state's *parens patriae* rights: "Education prepares individuals to be self-reliant and self-sufficient participants in society."⁸⁴ Justice White, concurring, recognized a broader *parens patriae* interest, which included "the [state's] right to make a 'cultural' guess, the right to be able to predict the attributes of our future culture and design an 'educational package' to equip the child with the necessary cultural survival skills."⁸⁵ According to Justice White, "[a] state has a legitimate interest . . . in seeking to prepare [children] for the lifestyle that they may later choose."⁸⁶

Although the Court in *Yoder* recognized the legitimacy of a state's interest in mandating compulsory education, it upheld the claims of members of the Old Order Amish Faith who sought to exempt their children from high school attendance. First, the Court emphasized the

78. 397 U.S. 1 (1967).

79. See *Developments in the Law*, *supra* note 66, at 1221-27.

80. 397 U.S. at 44-56.

81. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1977) (substantive due process); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (first amendment); *Breed v. Jones*, 421 U.S. 159 (1975) (procedural due process); *Davis v. Smith*, 583 S.W.2d 37 (Ark. 1979) (void for vagueness). For a general discussion of this issue, see *Developments in the Law*, *supra* note 66, at 1227-42.

82. 406 U.S. 205 (1972).

83. *Id.* at 221.

84. *Id.*

85. *Id.* at 238-39 (White, J., concurring). See also Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLAMETTE L. REV. 562, 577 (1982).

86. 406 U.S. at 240 (White, J., concurring).

diluted state interest in educating fourteen and fifteen year old children who were socially acculturated and mentally developed.⁸⁷ Second, the Court accepted the proposition that the early teenage years were crucial in determining whether a child would remain a part of the Old Order Amish and, therefore, elevated the parents' interest in removing their children from school.⁸⁸

The exemption granted the Amish in *Yoder* should not be construed as unlimited license for parents to control the education of their children. At the outset, the Court noted: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a state."⁸⁹ In addition, the Court stressed the self-contained nature of the Amish community.⁹⁰ Apparently, the Court would not have exempted the children in *Yoder* from public school attendance if they seemed likely to become members of the mainstream society.⁹¹ Even if the children were to become part of the self-contained Amish community, the Court would not have permitted their removal if they were too young to have acquired basic academic skills.⁹² Finally, the Court suggested that it would not accord a similar right to parents who

87. *Id.* at 223-25. In response to this conclusion, Philip Kurland noted:

Never, I submit, has the concept of the importance of secondary education received such a blow from the judiciary. Secondary education may not be regarded by a state as essential to "the physical or mental health of the child or to the public safety, order, or welfare" of the state. What is the justification for compulsory secondary education then? How could a state ever meet the burden placed on it by the Court here to show that it has a valid interest in educating its children beyond the primary grades?

Kurland, *supra* note 57, at 229-30.

88. 406 U.S. at 217-18.

89. *Id.* at 213.

90. *Id.* at 215-17. The Amish Order is distinct from other religions in that their daily life and religious practice stem from their literal adherence to "the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world.'" *Id.* at 216.

91. *Id.* at 215-17. The majority paid little attention to evidence produced by the state that "a significant number of Amish children do leave the Old Order." *Id.* at 245 (Douglas, J., dissenting). Instead, the majority assumed that the child would choose as an adult to remain in the Amish community. *Id.* at 224-25.

92. *Id.* at 225 (Court recognized need for minimum academic standards to fulfill the "social and political responsibilities of citizenship"). Significantly, the Court approvingly cited testimony of education expert Donald Erickson "that the Amish succeed in preparing their high school age children to be productive members of the Amish community. . . . [T]heir system of learning through doing the skills directly relevant to their adult roles in the Amish community [is] 'ideal' and perhaps superior to ordinary high school education." *Id.* at 212.

wished to remove their child from school for nonreligious reasons.⁹³ The Court emphasized that “[the compulsory attendance law] carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.”⁹⁴

Despite the fact-specific nature of the opinion, much in *Yoder* suggests that parents have broad discretion to direct the upbringing of their children. Of foremost importance, the Court concluded that the state’s communitarian and *parens patriae* interests were not sufficiently compelling to justify interference with family matters. According to the Court, “this case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”⁹⁵ The Court’s willingness to look at the peculiar circumstances of the case suggests that parents, at least in the religious liberty context, will be able to make evidentiary showings as to the adequacy of their child-rearing to exempt their children from otherwise reasonable state education regulations.⁹⁶ *Yoder* also contains substantial language concerning the parent’s traditional rights in the child-rearing process. Exemplary of this language is the Court’s comment that “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now estab-

93. The Court noted:

[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, . . . their claims would not rest on a religious basis . . . [nor] rise to the demands of the Religion Clauses.

Id. at 215-16.

In many respects, this distinction between a parent’s right to direct the religious upbringing of his child and a parent’s right generally to direct his child’s upbringing is unpersuasive. Granted, the religious liberty interest might form the basis of a stronger constitutional claim for exemption. See, e.g., Boothby, *Government Entanglement with Religion: What Degree of Proof Is Required?*, 7 PEPPERDINE L. REV. 613 (1980); Devins, *A Fundamentalist Right to Education?*, Nat’l L.J., Feb. 21, 1983. Yet, parents have a fundamental liberty interest in deciding the general upbringing of their children. See *infra* notes 200-229 and accompanying text. Consequently, any state infringement on the parent-child relationship should demand of the state a demonstration that the intervention will serve its professed goal.

94. 406 U.S. at 218.

95. *Id.* at 230.

96. In this respect, the Court applied a different approach to the parent-state controversy in *Yoder* than in *Prince*. See *supra* note 74.

lished beyond debate as an enduring American tradition."⁹⁷ The Court further noted that the parents' right to prepare their children for additional obligations extended to "the inculcation of moral standards, religious beliefs, and elements of good citizenship."⁹⁸ Finally, in the case of free exercise challenges, the Court held that states should respect parental decisions unless it appears that their decisions "will jeopardize the health or safety of the child or have a potential for significant social burdens."⁹⁹

The *Yoder* Court did not, however, address the question whether an Amish child might have an independent right to attend public high school over his parents' objections.¹⁰⁰ Justice Douglas dissented on this issue, noting that:

It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today.¹⁰¹

This notion that children subrogate their rights to their parents is supported by several other Supreme Court decisions. In *Ginsberg v. New York*,¹⁰² for example, the Court upheld a state restriction on the sale of pornographic literature to minors. The regulation did not prevent parents from purchasing such literature for their minor children. The Court recognized that constitutional guarantees are premised on an individual's capacity for free choice.¹⁰³ Because children do not possess the full capacity for individual free choice and they do not know what is best for them, their parents' traditional role as their champion is entirely appropriate.¹⁰⁴ Similarly, in *Parham v. J.R.*,¹⁰⁵ the Court upheld a Georgia statute providing for admission to state mental hospitals through parental request. After admission, the hospital staff

97. 406 U.S. at 232.

98. *Id.* at 233.

99. *Id.* at 234.

100. The majority contended that this "is not an issue in the case. . . . The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires. . . ." *Id.* at 231.

101. *Id.* at 245 (Douglas, J., dissenting). For analyses of the *Yoder* case that stress the children's rights issue, see Knudsen, *supra* note 25; Note, *Adjudicating What Yoder Left Unresolved: Religious Rights for Minor Children After Danforth and Carey*, 126 U. PA. L. REV. 1135 (1978).

102. 390 U.S. 629 (1968).

103. *Id.* at 650.

104. *Id.*

105. 442 U.S. 584 (1979).

would decide whether the child should be released or kept under care. The Court held that reliance upon the parental request was proper because the law presumes that parents possess both maturity and judgment to guide their children, but more importantly, because the parent-child bond will cause the parents to act in the best interest of their child.¹⁰⁶

Support for the notion of parental control can also be found in a

106. *Id.* at 602. John Garvey similarly commented:

It is the parents who are most familiar with the effects a particular design might have on their child. They are also in the best position to understand the motives behind a child's wishes and, indeed, to know what the child's unrepresented wishes are. A family right to autonomy would maximize the communication between family members. Moreover, family members are likely to be more capable than the state of providing the kind of continuing understanding and care necessary after any decision has been made that affects the long-term welfare of the child.

Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CALIF. L. REV. 769, 816-17 (1978). The presumption that parents act in the "best interests" of their children also is evidenced by the fact that courts require parental consent generally for all but life-saving medical treatment. See Brown & Truitt, *The Rights of Minors to Medical Treatment*, 28 DEPAUL L. REV. 289 (1982); Ewald, *Medical Decision Making for Children: An Analysis of Competing Interests*, 25 ST. LOUIS U.L.J. 689 (1982); Sokolosky, *The Sick Child and the Reluctant Parent—A Framework for Judicial Intervention*, 20 J. FAM. L. 69 (1981-82); see also cases cited *supra* note 70.

Limiting this parental authority are several Supreme Court decisions that recognize the minor's right to privacy to make decisions concerning abortion and birth control. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), for example, invalidated a state statute that granted parents an absolute veto over a minor child's right to have an abortion. *Danforth* is distinguishable from *Parham* and *Ginsberg*, however. In *Parham*, professionals at the state hospital ensured that release was granted to sane children. Thus *Parham*, unlike *Danforth*, did not grant parents an absolute power over their child's liberty interest. *Ginsberg* also is distinguishable from *Danforth* on the ground that the quality of the right involved in *Ginsburg* is of a fundamentally different nature than that in *Danforth*. Another case supporting the notion that children can act independently of their parents is *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977). *Carey* granted minors a right to be free from blanket prohibitions against the distribution of contraceptives. Unlike *Danforth*, a parental veto was not at issue in *Carey*. Although *Carey* and *Danforth* speak in favor of a minor's right to act independently of their parents, minors who would be capable of exercising this right are teenagers. Teenagers presumably are more mature than younger children. Consequently, *Danforth* and *Carey* might not limit parental authority over children at an earlier age. For a similar argument, see Note, *supra* note 57. Additionally, in *Bellotti v. Baird*, 433 U.S. 622 (1979), the Supreme Court suggested that a state could require minor children to obtain either parental consent or court approval for an abortion. The Court observed that such a statutory scheme would preserve the child's rights, and at the same time provide a legitimate reinforcement of parental authority by the state. For the Court:

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Id. at 638-39.

group of Supreme Court cases that upheld constitutional claims made by schoolchildren against actions taken by local boards of education.¹⁰⁷ In this group of cases, the Court did not treat the children as autonomous actors and their parents as interfering with their autonomy.¹⁰⁸ Finally, parental dominion over children apparently exists even when a mature child seeks emancipation from his family.¹⁰⁹

Judicial deference to parental control thus often is grounded in pragmatic terms. A recent commentary summarized the reasons for this deference as follows: (1) parents are more sensitive to their child's needs than the state can possibly be; (2) parents will probably act in the child's best interest because of the close familial relationship; (3) the parental right to control the child's upbringing preserves the diversity of American society and serves as a barrier to state indoctrination.¹¹⁰

The *Yoder* Court's exemption of Amish children from compulsory attendance laws is the strongest Supreme Court statement on parental authority over their children's education. To the extent that the Court was addressing parents' religious claims, the Court's delineation of the extent of parental authority holds true. *Yoder*, however, contains too much language about the general authority of the state in education to be considered a strong precedent in favor of nonreligious claims.¹¹¹

107. See *Island Tree Union School Dist. v. Pico*, 457 U.S. 853 (1982) (right to receive information); *Plyer v. Doe*, 457 U.S. 202 (1982) (equal educational opportunity-nationality); *Goss v. Lopez*, 419 U.S. 565 (1975) (procedural due process); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (equal educational opportunity-race); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (free speech); *West Virginia v. Barnette*, 319 U.S. 614 (1943) (freedom of conscience). But see *supra* notes 69 & 106 (discussion recognizing limitations both in the parent-child bond and in parental authority over children).

108. Burt, *Developing Constitutional Rights of, in and for Children*, 39 LAW & CONTEMP. PROBS. 118, 123 (1975).

109. See, e.g., *In re Polovchak*, 97 Ill. 2d 212, 432 N.E.2d 873 (1983). *Polovchak* involved the right of a twelve-year old to seek emancipation from his parents when his parents decided to return to the Ukraine. Applying the standard that a minor should be separated from his parents if he was incorrigible, a frequent runaway, or his acts posed serious hazards to himself or others, the Illinois Supreme Court concluded that the parents had a right to retain custody of their child. Because the United States had already granted the child asylum, the *Polovchak* decision is of little practical significance. Yet, *Polovchak* does indicate the general unwillingness of courts to break the parent-child relationship, even at the child's request.

110. *Developments in the Law*, *supra* note 66, at 1354; see also *supra* note 107. In addition to these pragmatic concerns, John Garvey noted that there is a legitimate parental interest in "living one's life through one's children, [which] might be called the parent's right to exercise his religion through the child, and to extend through the child ideas, language, and customs which the parent believes to be important." Garvey, *supra* note 106, at 806.

111. See *supra* notes 82-94 and accompanying text. For a criticism of *Yoder's* elevation of religious liberty claims over due process claims, see Kurland, *supra* note 57; *supra* note 93.

Nonreligious claims find strong support in a group of decisions from the 1920's that recognized the due process rights of parents to direct their child's upbringing.¹¹² The first case, *Meyer v. Nebraska*,¹¹³ involved a state regulation that prohibited the teaching of any language other than English through the eighth grade. Under this regulation, a court held a private tutor criminally liable for teaching German to an elementary school student. The Supreme Court found the regulation unconstitutional because "[a teacher's] right to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [fourteenth] [a]mendment."¹¹⁴ The *Meyer* Court acknowledged that "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand discussions of civic matters is easy to appreciate."¹¹⁵ Analogizing Nebraska's statute to Plato's Sparta,¹¹⁶ the Court noted that such efforts to homogenize the young represent "ideas touching the relationship between individual and State [that are] wholly different from those [pluralistic notions] upon which our institutions rest. . . ."¹¹⁷

Expanding on *Meyer*, the Court in *Pierce v. Society of Sisters*¹¹⁸ explicitly recognized the right of parents to direct the upbringing of their children. In *Pierce*, the Court held unconstitutional an Oregon statute that required all children to attend public schools. The Court ruled that the State could not outlaw private schooling and that the Oregon statute would cause a state-imposed standardization that is contrary to the fundamental theory of liberty upon which American government is based. "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."¹¹⁹

112. See cases cited in Knudsen, *supra* note 65, at 1511 n.24; see also *infra* notes 113-29. The following discussion is adapted from Devins, *State Regulation*, *supra* note 4, at 363-65.

113. 262 U.S. 390 (1923).

114. *Id.* at 400.

115. *Id.* at 402.

116. According to the Court, Plato recommended that parents raise their children in common so that "no parent is to know his own child, nor any child his parent." *Id.* at 401-02.

117. *Id.* at 402.

118. 268 U.S. 510 (1925).

119. *Id.* at 535. The Court, however, recognized that:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils, to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship

In the last of the early twentieth century decisions, *Farrington v. Tokushiage*,¹²⁰ the Court held unconstitutional a statute that sought to promote the "Americanism" of pupils attending foreign language schools in the territory of Hawaii. This legislation gave the territorial government the power to prescribe the schools' curriculum, entrance qualifications, attendance requirements, textbooks, and teacher qualifications. In addition, the territorial government received the authority to regulate the physical plant of schools, inspect facilities and teaching, collect fees, and issue permits.¹²¹ The Court held that these regulations violated the parents' due process rights and their right to control their children's education.¹²²

The right of parental control has only questionable significance to future challenges to state regulation. First, the *Pierce*, *Meyer*, and *Farrington* cases involved unusual regulations. The regulation in *Meyer* was not related to a legitimate state interest. The statutes in *Pierce* and *Farrington* completely eliminated the private school option. Most contemporary state regulations are related to a legitimate state interest and are not as obtrusive on the private school option as the regulations in *Pierce* and *Farrington*.¹²³ Second, the judiciary in the early twentieth century was extremely protective of individual rights that seemed threatened by any form of governmental action.¹²⁴ Presently, the Supreme Court explicitly recognizes the constitutionality of reasonable state regulations of private schools that promote a compelling state interest in education. In *Board of Education v. Allen*,¹²⁵ for example, the Court observed that "[s]ince *Pierce*, a substantial body of case law has

must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 534.

120. 273 U.S. 284 (1927).

121. *Id.* at 291-95. See also J. Walther, State Regulation of Nonpublic Schools, 39 (1982) (unpublished Ph.D. dissertation, University of Illinois).

122. The Court stated:

They give affirmative direction concerning the intimate and essential details of such schools, their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks. Enforcement of the Act probably would destroy most, if not all, of them; and, certainly it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child.

273 U.S. at 298.

123. See *supra* notes 110-22 and accompanying text.

124. See LAW AND PUBLIC EDUCATION 32 (S. Goldstein & E. Gee, eds. 1980).

125. 392 U.S. 236 (1968).

confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training and cover prescribed subjects of instruction."¹²⁶ In other words, because the state cannot abolish parochial schools, it must satisfy its secular interests in education via private schools. Therefore, the state must have the authority to regulate the secular educational function of private schools.¹²⁷ Numerous other Supreme Court decisions have recognized the rights of a state to impose reasonable regulations on its private schools.¹²⁸ But the Supreme Court has yet to determine where it should draw the line between reasonable and unreasonable state regulations.¹²⁹

III. COURT DECISIONS

The state courts also have not satisfactorily resolved the issue whether a state can constitutionally prohibit home instruction. Several courts have intimated that no such constitutional right exists.¹³⁰ Other courts have recognized the possibility that such a right is grounded in the due process clause of the fourteenth amendment¹³¹ or the free exer-

126. *Id.* at 245-46.

127. *Id.* at 247.

128. *See* authorities cited in Note, *supra* note 38, at 811-12 n.59.

129. *See* Devins, *supra* note 93.

130. *See* *Hanson v. Cushman*, 490 F. Supp. 109, 114 (W.D. Mich. 1980) ("The plaintiffs' claimed right to educate their children through a program of home study free from [state] requirement[s] . . . does not rise above a personal or philosophical choice, and therefore is not within the bounds of constitutional protection."); *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 455, 461 (N.D. Ill. 1974) (same); *State v. Hoyt*, 84 N.H. 38, 40, 146 A. 170, 171 (1929) ("The state being entitled to supervise education, it is not an answer to a charge of failure to furnish supervised instruction to show that equivalent unsupervised instruction is given."); *Shoreline School Dist. No. 412 v. Superior Court*, 55 Wash. 2d 177, 346 P.2d 999, 1003 (1960), *cert. denied*, 363 U.S. 814 (1960) ("We find no merit in the contention of the [parents] that they are excused from the penalties of the compulsory school attendance law because school attendance is repugnant to their religion.").

131. *See* *Perchemlides v. Frizele*, No. 16641, at 9 (Mass. App. Ct., Nov. 13, 1978) ("Nonreligious as well as religious parents have the right to choose from the full range of educational alternatives for their children."); *Pierce v. New Hampshire State Bd. of Educ.*, 122 N.H. 762, 768, 451 A.2d 363, 367-68 (1982) (Douglas and Brock, J.J., concurring) ("approval requirements for nonpublic school education may not unnecessarily interfere with traditional parental rights"); *People v. Turner*, 277 A.D. 317, 319-20, 98 N.Y.S.2d 886, 888 (N.Y. App. Div. 1950) ("provided the instruction given is adequate and the sole purpose . . . is not to evade the statute, instruction given to a child at home by its parent, who is competent to teach, should satisfy the requirements of the compulsory education law").

cise clause of the first amendment.¹³² Yet, all of these cases have involved state procedures that did not foreclose the home study alternative. In North Carolina, however, recent state and federal challenges to that state's absolute prohibition of home instruction address this central issue.¹³³

The first North Carolina suit, *Duro v. District Attorney, Second Judicial District*,¹³⁴ raises the general issue whether the state can prohibit home instruction over the religious liberty objections of parents. In August, 1982, federal district Judge F.T. Dupree, Jr., held the state prohibition unconstitutional as applied to the Duro parents.¹³⁵ The Fourth Circuit Court of Appeals overturned this decision in July, 1983.¹³⁶ The Supreme Court declined review.¹³⁷ The second lawsuit, *Delconte v. State*,¹³⁸ raises the narrow issue whether a home can be viewed as a private school for compulsory education purposes by satisfying state requirements for nonpublic schools. In January, 1983, a North Carolina trial court answered the question in the affirmative.¹³⁹ The North Carolina Court of Appeals overturned the trial court.¹⁴⁰ The Supreme Court of North Carolina has agreed to review the case.

The balancing of parental and state interests in North Carolina is especially complicated because of a 1979 state enactment which effectively deregulated nonpublic schools.¹⁴¹ Under this statute, a nonpub-

132. See *State v. Nobel*, Nos. S 791-0114-A, S-791-0115-A at 8 (Mich. Dist. Ct., Allegheny County, Jan. 9, 1980) ("No evidence has been introduced in this case that would demonstrate that the state has a compelling interest in applying teacher certification laws to the Nobels [parents] or that the educational interest of the State could not be achieved by a requirement less restrictive on the religious beliefs of the Nobels.")

133. *Duro v. District Attorney*, No. 81-13-Cov.-2 (E.D.N.C. Aug. 20, 1982), *rev'd*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984); *Delconte v. State*, 65 N.C. App. 262, 308 S.E.2d 898 (1983).

134. No. 81-13-Civ.-2 (E.D.N.C. Aug. 20, 1982), *rev'd*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984).

135. No. 81-13-Civ.-2 (E.D.N.C. Aug. 20, 1982).

136. 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984).

137. 104 S. Ct. 998 (1984). It has long been recognized that denial of certiorari by the Supreme Court neither speaks to the merits nor constitutes a precedent regarding the grant or denial of certiorari. See, e.g., *United States v. Carver*, 260 U.S. 482, 490 (1923). Yet, there is reason to think that denial of certiorari "shows a lack of strong belief that the decision below was wrong and that it was important enough to be reversed by the Supreme Court." Linzer, *The Relevancy of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1303 (1979).

138. No. 82-CVS--0176 (Harnett County Jan. 7, 1983); No. 8311-SC-371 (11th Dist.).

139. *Id.*

140. *Delconte v. North Carolina*, 65 N.C. App. 262, 308 S.E.2d 898 (1984).

141. N.C. GEN. STAT. § 115C-378 (1980). The state legislature passed this statute in response

lic school would satisfy state standards merely by maintaining attendance and disease immunization records and by periodically administering a nationally recognized student competency examination.¹⁴² The court's understanding of this statutory provision has been determinative in North Carolina lawsuits. In *Duro*, the federal district court concluded that the state's interest in education "is little more than an empty concern."¹⁴³ Relying, in part, on the Supreme Court's *Wisconsin v. Yoder* decision,¹⁴⁴ the district court held that because the North Carolina legislature "has abdicated its interest in the quality of education received by students in nonpublic schools in favor of 'the rights of conscience,'" ¹⁴⁵ the state interest was outweighed by the parents' religious liberty interest. In concluding that the state did not assert a compelling enough interest to justify prohibiting home instruction, the district court characterized the justification for the state prohibition as hollow. North Carolina did not allow for home instruction because it had no mechanisms to assure that children in the home were receiving adequate education. The district court did point out, however, that the state did not have a mechanism to assure that children in private schools were receiving an adequate education.¹⁴⁶

The district court decision, in many respects, was fact-specific. The court did not decide whether nonreligious parents could prevail on a similar claim. The court also emphasized that the state "could develop a mechanism permitting home instruction under supervision. . . ."¹⁴⁷ Finally, the court did not address the issue whether a state with comprehensive nonpublic school regulations could prohibit home study.

The Fourth Circuit reversal of the district court decision spoke in more general terms. First, the appellate court "disagree[d] with the district court that the state had abdicated its interest in the quality of education received by students in nonpublic schools."¹⁴⁸ Deregulation, for the appellate court, did not limit the state's compelling interest in com-

to a state court decision which upheld—over religious liberty objections—comprehensive regulations of private schools, including teacher certification. *State v. Columbus Christian Academy* No. 78 (Wake County, N.C. Super. Ct. Sept. 1, 1978), *vacated as moot and dismissed*, (N.C. May 4, 1979).

142. N.C. GEN. STAT. § 115C-378 (1980).

143. No. 81-13-Civ.-2 (E.D.N.C. Aug. 20, 1982) at 7.

144. 406 U.S. 205 (1972). See *supra* notes 82-109 and accompanying text.

145. *Id.* at 6.

146. *Id.* at 6.

147. *Id.* at 7.

148. 712 F.2d at 98.

pulsory education. Apparently, the appellate court would view *any* state regulation as preserving that compelling state interest. Second, the Fourth Circuit held that *Wisconsin v. Yoder* did not provide a source for the parents' constitutional interest in home instruction. The appellate court viewed *Yoder* as a very narrow ruling—stressing the “self contained” nature of the Amish community and the limited exemption from secondary schooling sought by the Amish.¹⁴⁹ The appellate court, unlike the district court, did not view *Yoder* as balancing the state's interest in compulsory education against the parents' religious liberty interest.¹⁵⁰ Instead, the Fourth Circuit viewed *Yoder* as a fact-specific holding inapplicable to other types of religious exemption claims. Consequently, the appellate court rejected the parent's claim because “Duro [the parent] has not demonstrated that home instruction will prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system. . . .”¹⁵¹ This ruling, by placing the burden of proof on the parents, represents a dramatic shift from *Yoder*, which sought to balance the competing interests of the parent and the state. Under the Fourth Circuit ruling, the state apparently has an absolute right to prohibit home instruction.

The *Delconte* lawsuit involves the fairly technical questions of whether and when a home is the legal equivalent of a school. Unlike the parents in *Duro*, the parents in *Delconte* sought to have the state approve their home as a school.¹⁵² The trial court in *Delconte* agreed with the parents because their “home school” satisfied state regulations governing nonpublic schools.¹⁵³

149. *Id.*

150. *Id.* (“The facts in the present case are readily distinguishable from the situation in *Yoder*. The Amish were a ‘rural self-sufficient community.’ Additionally, the appellate court never addressed the issue whether parents might have a due process right to teach their children at home.”). See *supra* notes 112-29. Clearly, since *Yoder* recognized that religion-based claims were more compelling than secular claims, the parents would have lost on this issue. See *supra* note 93. Significantly, Mr. Duro's attorney never raised this issue in his brief before the appellate court.

151. 712 F.2d at 99. Significantly, in their statement of the facts, the appellate court noted that “despite Duro's concern that his children be sheltered from corrupting influences, he admits that when they reach eighteen years of age, he expects them to ‘go out and work . . . in the world.’” *Id.* at 97.

152. The state refused to approve the *Delconte* “school” because the Attorney General opined that home instruction does not qualify as an approved nonpublic school. No. 82-CVS-01766 (Harnett County, Jan. 7, 1983).

153. *Id.* at 10. In accordance with the district court ruling in *Duro*, the *Delconte* court noted that even “[i]f the ‘Hallelujah School’ were not entitled to recognition as a ‘qualified school,’ the

The state court of appeals disagreed and noted that the state legislature had failed to respond to formal state attorney general opinions that a home school does not function as a qualified nonpublic school. The court held "that 'school' means an educational institution and does not include home instruction."¹⁵⁴

The appellate court also overturned the trial court ruling on the religious liberty issue. The appellate court viewed a total prohibition of home instruction as permissible because "[t]he state [would otherwise have] no means by which to insure that children who are at home are receiving an education."¹⁵⁵ In light of the United States Supreme Court's denial of certiorari in *Duro*, it is unlikely that the North Carolina Supreme Court would upset the Fourth Circuit's ruling on the religious liberty issue in *Duro*. Consequently, if parents are to prevail in *Delconte*, it seems likely that they will prevail on statutory grounds. If the North Carolina Supreme Court reverses on statutory grounds it will grant to parents that which *Duro* might have denied them on constitutional grounds.¹⁵⁶ At the same time, such a decision would not serve as a precedent in favor of a parent's constitutional right to teach his child at home.

Other state courts have struggled with the constitutional status of home instruction, but none have approved a total prohibition as North Carolina has. One explanation for the failure of courts to determine whether parents have a constitutionally based right to teach their children at home is that courts are able to characterize a home as a school for compulsory school attendance law purposes.¹⁵⁷ In *People v.*

enforcement of North Carolina's compulsory attendance law upon the plaintiff [parent] would violate the plaintiff's rights under the free exercise clause of the First Amendment. . . ." *Id.*

154. *Delconte*, 65 N.C. App. at —, 308 S.E.2d at 903.

155. *Id.* at —, 308 S.E.2d at 904.

156. The only difference would be that parents, under *Delconte*, must register their home schools with the state.

157. Many courts in this situation are unwilling to characterize a home as a school, however. See *State v. Lowry*, 191 Kan. 701, 703, 383 P.2d 962, 964 (1963) ("To determine whether or not the defendants [parents] were operating a private school, this court will look to the purpose, intent and character of the endeavor."); *State v. Hoyt*, 84 N.H. 38, 39, 146 A. 170, 170-171 (1929) ("[the courts require an institutional setting since] [t]he association with those of all classes of society, at an early age and upon a common level, is not unreasonably urged as preparation for discharging the duties of a citizen"); *Knox v. O'Brien*, 7 N.J. Super. 608, 72 A.2d 389 (N.J. Super. Ct. Law Div. 1950) (same position as the *Hoyt* court); *Shoreline School Dist. No. 42 v. Superior Court*, 55 Wash. 2d 177, 346 P.2d 999 (1960), cert. denied, 363 U.S. 814 (1960) (same position as the *Counort* court); *State v. Counort*, 69 Wash. 361, 363, 124 P. 910, 911 (1912) ("requirement [that children

Levisen,¹⁵⁸ for example, the Illinois Supreme Court interpreted the state's public-or-private-school-only compulsory attendance law to permit home study. The court characterized the *Levisen* home as a private school because "[t]he object [of compulsory attendance] is that all children shall be educated, not that they shall be educated in any particular manner or place."¹⁵⁹ Consequently, the court found controlling evidence that indicated that the *Levisen*'s child was receiving equivalent or superior instruction at home for five hours a day in all the required courses, and that her academic performance was comparable to her public school peers.¹⁶⁰ Because of the court's disposition of the case, it concluded that it was "unnecessary to consider the further contention that the statute violates the constitutional right of parents to direct the education of their child."¹⁶¹

Another reason why courts have not resolved the constitutional issue is that it has never been squarely presented to the courts. In *State v. Lowry*,¹⁶² for example, the Kansas Supreme Court upheld a public-or-private-school-only statute on statutory grounds because the only question presented to the court was whether a home instruction program constituted a private school.¹⁶³ Similarly, several home study lawsuits have addressed secondary issues involving the permissibility of expansive state regulation.¹⁶⁴ These courts have not had to reach the threshold constitutional issue because some type of home instruction alternative was available in the state. Finally, attorneys representing

attend a local public school or approved private school] means more than home instruction; it means the same character of school as the public school . . .").

158. 404 Ill. 574, 90 N.E.2d 213 (1950). For similar rulings, see *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452 (N.D. Ill. 1974); *State v. Peterman*, 70 N.E. 550 (Ind. 1904).

159. 404 Ill. at 577, 90 N.E.2d at 215. The court, however, went on to note that its decision did "not imply that parents may, under a pretext of instruction by a private tutor or by the parents themselves evade their responsibilities to educate their children." *Id.* at 571, 90 N.E.2d at 215.

160. *Id.* at 577, 90 N.E.2d at 214-15.

161. *Id.* at 578, 90 N.E.2d at 216.

162. 191 Kan. 701, 383 P.2d 962 (1963). Similarly, in *T.A.F. v. Duval County*, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973) the parents failed to raise pertinent constitutional issues.

163. In *In re Sawyer*, 234 Kan. 436, 672 P.2d 1093 (1984), however, the Kansas Supreme Court upheld the Kansas statute on constitutional as well as statutory grounds. Noting that education is not a fundamental right, the *Sawyer* court held that, "[t]he standard of review to be applied then, is whether the state's system has some rational relationship to a legitimate state purpose." *Id.* at —, 672 P.2d at 1098.

164. See, e.g., *Hanson v. Cushman*, 490 F. Supp. 190 (W.D. Mich. 1980) (teacher certification); *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452 (N.D. Ill. 1974) (discretionary approval authority vested in school district); *T.A.F. v. Duval County*, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973) (qualified tutor); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980) (teacher certification).

both the state¹⁶⁵ and parents¹⁶⁶ have failed either to raise the "parental rights" issue¹⁶⁷ or to garner sufficient evidence supporting such a claim.¹⁶⁸

Although the authority of a state to prohibit home instruction is an open question, the states permitting home study clearly have authority to regulate the home educational option. In a study of home education lawsuits, James Tobak and Perry Zirkel concluded: "[w]here the statute has an explicit exception and specific requirements for home study, courts have adamantly rejected the arguments of parents that home study qualifies as a private school. Similarly, courts have insisted upon compliance with the procedural prerequisites specified in the statute."¹⁶⁹ An example of these parents' failure to demonstrate that home instruction constitutes a private school is found in the Florida appellate court decision of *T.A.F. v. Duval County*.¹⁷⁰ In *Duval*, the appellate court demanded that parents satisfy a state provision requiring that home study be "at home with a private tutor who meets all requirements prescribed by law and regulation of the state Board of Education."¹⁷¹ Parents in *Duval* sought to have their Christian home study

165. See *supra* note 132 (discussing *State v. Nobel*).

166. See *State v. Moorhead*, 308 N.W.2d 60, 64 (Iowa 1981) ("These objections to [equivalent instruction provisions] were not raised in defendant's [parents] motion to dismiss. Nor does the record show that they were raised at any other time prior to this appeal."); *State v. Shaver*, 294 N.W.2d 883, 893 (N.D. 1980) ("No attempt was made at the trial to show how compliance with the law would affect the religion of the parents or the children."); *State v. Kasuboski*, 87 Wis. 2d 407, 413, 275 N.W.2d 101, 104 (Wis. Ct. App. 1978) ("The Kasuboskis did not present evidence on an affirmative defense of attendance at an adequate private school.").

167. Of great significance, the Christian Law Association, one of the most active litigators of parents' religious rights in home instruction lawsuits, refuses to raise the defense of excessive government entanglement with religion. These lawyers are strict separationists and thus claim that to raise the defense of excessive government entanglement with religion is to concede that some government intervention is permissible. See Minnery, *Does David Gibbs Practice Law as Well as He Preaches Church-State Separation*, *Christianity Today*, Apr. 10, 1981, at 48. This separationist tactic has been criticized both for its failure to recognize that some government regulations are appropriate and for its weakness as a legal argument. See W. Ball, *Memorandum to Our Fundamentalist Christian Friends and Other Friends of Religious Liberty*, Apr. 14, 1984 (copy on file with author). For a discussion of cases where relevant constitutional issues were not raised, see *supra* note 163.

168. See cases cited *supra* notes 165 & 166; see also *State v. Riddle*, 285 S.E.2d 359, 364 (W. Va. 1981) ("[I]t is not appropriate for a person to entirely disregard the statute, await criminal prosecution, and then assert a first amendment defense.").

169. Tobak & Zirkel, *supra* note 42, at 58.

170. 273 So. 2d 15 (Fla. Dist. Ct. App. 1973).

171. *Id.* at 17. Many states with specific regulations governing home instruction are more comprehensive in their regulation of home study programs than in their regulation of nonpublic

program classified as a private school and thereby avoid the private tutor requirement. The *Duval* court required the parents to comply strictly with the home instruction statutory procedures and did not discuss whether the "private tutor" requirement unjustifiably burdened religious liberty interests.¹⁷²

More complex than the "home as private school" issue is the question whether parents must comply with specific requirements for home instruction. No case has adequately addressed this issue. Instead, courts have narrowed their focus to the state's need for compliance with state procedures governing the process of state approval of home instruction. Typical of these decisions is an Ohio appellate court case, *Akron v. Lane*.¹⁷³ *Lane* involved a parent's removal of his hearing-impaired daughter from the public school system because he was dissatisfied with her progress in special education classes. Although the parent provided for his daughter's instruction by engaging an allegedly certified teacher of the deaf, he did not obtain a statutorily required approval of his home study program. Consequently, he was charged with violating Ohio's compulsory education law. The court found the parent guilty, despite his claim that he was providing his daughter with equivalent education. Affirming his conviction, the appellate court held that the equivalency issue was "immaterial to the instant prosecution" because the parent did not comply with state procedures governing the approval of a home study program.¹⁷⁴ *Lane* was limited to a question of statutory interpretation. Yet, even when the constitutional right of parents to direct the religious upbringing of their children is at

schools. Consequently, parents in these states often try to have their home characterized as a private school. *T.A.F. v. Duval County* presented such a situation. Another Florida case that reached this conclusion is *State v. N.M.*, 407 So. 2d 987 (Fla. Dist. Ct. App. 1981). Rejecting the parent's argument, the court stated: "That there is no statutory authority regulating the establishment of private schools in Florida does not mean that Florida parents, unqualified to be private tutors, can proclaim their homes to be private schools and withdraw their offspring from public schools." *Id.* at 990. For similar rulings, see *People v. Turner*, 121 Cal. App. 2d 861, 263 P.2d 685 (1953), *appeal dismissed*, 347 U.S. 972 (1954); *Grigg v. Commonwealth*, 224 Va. 356, 297 S.E.2d 799 (1982). For a discussion of why states might want to regulate home instruction more extensively than private schools, see *supra* notes 42-43 and accompanying text.

172. See also *Gunnison Watershed School Dist. v. Funk*, No. 81-JV-2 (Colo. Dist. Ct., Gunnison County, Apr. 17, 1981) (parents similarly failed to raise the religious liberty issue in their efforts to have their home study program recognized by the state as a private school).

173. 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979).

174. *Id.* at 95, 461 N.E.2d at 644. For a similar holding, see *Gunnison Watershed School Dist. v. Cox*, No. 81-JV-2 (Colo. Dist. Ct., Gunnison County, Apr. 17, 1981); see also *Tobak & Zirkel*, *supra* note 42, at 54-55 (discussing those and similar cases).

issue, courts have similarly held that the parents must comply with state procedures prior to adjudication of the constitutional issue.¹⁷⁵

Substantial doubt also exists over the extent to which a state has the authority to require that home instruction must be equivalent to the instruction provided in schools. To a large extent, the resolution of this issue depends on where the courts place the burden of proof. Must the parent establish equivalency or must the state establish non-equivalency?¹⁷⁶ In constitutional challenges to "equivalency" standards, evidentiary or other problems have prevented the courts from squarely addressing the parental rights and religious liberty issues.¹⁷⁷

Vague statutes, incomplete evidentiary records, and very narrow rulings on the home instruction issue typify this body of case law. Consequently, the scope of permissible state authority and the rights of parents to direct the religious upbringing of their children remain undefined.

In 1978, a Massachusetts trial court endorsed parental authority in a secular context in *Perchemlides v. Frizzle*.¹⁷⁸ *Perchemlides* held that parents are constitutionally entitled to "the right to choose from the full range of educational alternatives for their children."¹⁷⁹ The *Perchemlides* court was primarily concerned with preserving parental choice. The Massachusetts court believed that it had to create "special standards" to maintain home instruction as a viable alternative.¹⁸⁰ The court thus held that approval of a home instruction program should not include such factors as the parents' motives, the lack of an identical curriculum to that provided in the public schools, socialization, and the creation of a precedent for future home instruction proposals if the

175. See *State v. Moorhead*, 308 N.W.2d 60 (Iowa 1981); *Rice v. Commonwealth*, 188 Va. 244, 49 S.E.2d 342 (1948); *State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981); *State v. Kasuboski*, 83 Wis. 2d 909, 275 N.W.2d 101 (1978).

176. Compare *Jernigan v. State*, 412 So. 2d 1241, 1247 (Ala. Crim. App. 1982) ("as we have indicated, the defendants have not demonstrated that they can and will continue to provide an equivalent education, and it is not incumbent upon the state to verify the same.") with *State v. Nobel*, S-7-91-0114-A (Mich. Dist. Ct., Allegheny County, Jan. 9, 1980) (discussed *supra* note 132). For comprehensive discussion of the significance of burden of proof, see Tobak & Zirkel, *supra* note 42, at 41-46; Lines, *supra* note 42, at 212-14.

177. See *supra* notes 165-68 and accompanying text.

178. Civil Act No. 16641 (Mass. Super. Ct., Nov. 13, 1978). For an excellent discussion of this case, see S. ARONS, *supra* note 24, at 75-134.

179. Slip op. at 9.

180. *Id.* at 11.

plan was approved.¹⁸¹ The most significant aspect of *Perchemlides* is the court's ruling on the "socialization" issue:

The question here is, of course, not whether the socialization provided in the school is beneficial to a child, but rather, who should make that decision for any particular child. Under our system, the parent must be allowed to decide whether public school education, including its socialization aspects, is desirable or undesirable for their children.¹⁸²

Although considered a significant victory for parents' rights, *Perchemlides* does not significantly constrict the discretion afforded public school officials.

In stark contrast to *Perchemlides*, some state courts have held "socialization" to be an essential component of compulsory education. In its 1929 *State v. Hoyt*¹⁸³ decision, the New Hampshire Supreme Court upheld a public-or-private-school-only statute by finding that it was not unreasonable for the state to require education to include a "socialization" component.¹⁸⁴ Similarly, two New Jersey courts have interpreted the statutory language "equivalent instruction elsewhere than at public school" to include "socialization."¹⁸⁵ In one of these cases, the court was so bold as to state:

Education must impart to the child the way to live. This brings me to the belief that . . . it is almost impossible for a child to be adequately taught in his home. I cannot conceive how a child can receive in the home instruction and experiences in group activity and in social outlook in any manner or form comparable to that provided in the public school.¹⁸⁶

A subsequent New Jersey decision nullified this opinion, labeling the socialization rationale "untenable."¹⁸⁷

Home study decisions also demonstrate conflicting judicial views concerning the religious liberty interests of parents in the upbringing of

181. See Stocklin-Enright, *supra* note 85, at 598-99 (discussing *Perchemlides*).

182. Slip op. at 13.

183. 84 N.H. 38, 146 A. 170 (1929).

184. *Id.* at 39, 146 A. at 170-71. *Hoyt* was severely restricted in New Hampshire in *In re Pierce*, 122 N.H. 762, 451 A.2d 363 (N.H. 1982). See *supra* note 86 (discussing *Pierce*).

185. *Stephens v. Bongart*, 15 N.J. Misc. 80, 189 A. 131 (Essex County Ct., 1937); *Knox v. O'Brien*, 7 N.J. Super. 608, 72 A.2d 389 (N.J. Div. Super. Ct. Law Div. 1950).

186. *Stephens v. Bongart*, 15 N.J. Misc. 80, 92, 189 A. 131, 137 (Essex County Ct., 1937).

187. *State v. Massa*, 95 N.J. Super. 382, 386, 231 A.2d 252, 255 (N.J. Div. Super. Ct. Law Div. 1967). *But see In re Sawyer*, 234 Kan. 436, —, 672 P.2d 1093, 1096 (1983) (citing favorable testimony that, regardless of the parent's competence as a teacher "a school with more children would be generally better for any child since it would provide more social interaction outside of the home").

their children. In *State v. LaBarge*,¹⁸⁸ for example, the Vermont Supreme Court noted that compulsory school attendance must—in some instances—yield to first amendment concerns and thus a state would find it difficult to relegate children only to “approved” educational institutions.¹⁸⁹ Similarly, in *State v. Nobel*,¹⁹⁰ a Michigan trial court held that the state could not require parents to be certified if they teach their children at home for religious reasons unless the state introduces evidence that it “has a compelling interest in applying teacher certification laws to the [parents] or that the educational interest of the state could not be achieved by a requirement less restrictive on the religious beliefs of the [parents].”¹⁹¹ The *Nobel* court ruled in favor of the parents, concluding that the state was only trying to apply teaching certification requirements uniformly and was not necessarily concerned with the quality of the teaching.¹⁹²

Several state court decisions have rejected the religious liberty rights of parents, however. In *State v. Riddle*,¹⁹³ for example, the West Virginia Supreme Court rejected a religious liberty challenge to a state law that required the local school superintendent to approve home study programs. The court supported its holding as follows: “There are numerous urgent public policy reasons for having all children between the ages of 7 and 16 somewhere within the supervision of the county boards of education.”¹⁹⁴ This position evidences a skepticism to the capability of parents to care for their children adequately.¹⁹⁵ Displaying a similar skepticism, the Alabama Court of Criminal Appeals, in *Jernigan v. State*,¹⁹⁶ validated a state law requiring certified private tutors to conduct home study programs. The court held that the law did not improperly interfere with the parents’ religious liberty rights because the burden of proof is on the parents to demonstrate that they

188. 134 Vt. 276, 357 A.2d 121 (1976).

189. *Id.* at 280, 357 A.2d at 124. *LaBarge*, however, was decided on statutory grounds.

190. No. S791-0114-A (Mich. Dist. Ct., Allegheny County, Jan. 9, 1980).

191. *Id.* at 8.

192. *Id.* at 10.

193. 285 S.E.2d 359 (W. Va. 1981).

194. *Id.* at 364.

195. For example, the *Riddle* court also noted: “Our [public] schools not only teach, but they are also responsible for ministering to the health needs of children by providing a reservoir of professional expertise capable of ferreting out health-related problems at an early stage.” *Id.* In light of the constitutionally protected right to attend nonpublic school, this justification seems preposterous.

196. 412 So. 2d 1242 (Ala. Crim. App. 1982).

can and will provide an equivalent education.¹⁹⁷ This rationale is totally at odds with that of *State v. Nobel*.¹⁹⁸ Other state courts have avoided decisions on religious liberty rights by characterizing parental claims as philosophical rather than religious.¹⁹⁹

IV. THE SCOPE OF LEGITIMATE STATE AUTHORITY

Resolution of the threshold constitutional issue of whether parents have a right to educate their children at home arguably is contingent on a determination of the nature of the state's interest in education.²⁰⁰

197. *Id.* at 1247. See *supra* note 107 (discussing *State v. Nobel*).

198. The North Dakota Supreme Court decision, *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980), is quite similar to *Jernigan*, however. In upholding a teacher certification requirement over a religious liberty objection, the *Shaver* court contended that the judiciary should defer to state education policy decisions because "courts are ill-equipped to act as school boards and determine the need for discrete aspects of a compulsory school education program." *Id.* at 889-900. This position is inconsistent with the Supreme Court's recognition of the need for judicial scrutiny if the state's actions "directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

199. See, e.g., *State v. Moorhead*, 308 N.W.2d 60, 64 (Iowa 1981) (religion was not an issue because parents "did not present any evidence of their religious beliefs or of the manner in which chapter 299 interferes with the exercise of those beliefs"); *State v. Kasuboski*, 87 Wis. 2d 407, 414, 275 N.W.2d 101, 105-06 (1978) ("[because] [i]t is only the auxiliary church operated by the Kasuboskis in their home that has . . . a tenet [mandating home study, it can be concluded] . . . that the Kasuboskis removed their children from the public school on the basis of ideological or philosophical beliefs. . . .").

200. Government regulation that significantly burdens the free exercise of religion cannot withstand constitutional challenge unless it represents "the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). But the exemption of any religious activity from regulation is not constitutionally required where it would "unduly interfere with the fulfillment of the [compelling] government interest." *United States v. Lee*, 455 U.S. 252, 259 (1982).

Constitutional standards under the due process clause are uncertain. *Yoder* suggests that the state need not satisfy the "compelling interest-least restrictive means" test. See *supra* note 93. In addition, some state courts have concluded that when parents do not establish state infringement on sincere religious beliefs, which is necessary to trigger free exercise clause review, then the state regulation need only bear a rational relation to some legitimate government interest. See, e.g., *State v. Kasuboski*, 87 Wis. 2d 407, 414, 275 N.W.2d 101, 106 (1978). Other courts, however, have demanded that the state establish that its regulatory system further some "sufficiently substantial" state interest. See *supra* notes 78-82 and accompanying text (discussing *Perchemlides v. Frizzle*); see also *In re Pierce*, at 768, 451 A.2d at 367 (Douglas and Brock, J.J., concurring). ("[W]hile the State may adopt a policy requiring that children be educated, it does not have the unlimited power to require that they be educated in a certain way at a certain place."). In the context of a Christian school lawsuit, the Ohio Supreme Court in *State v. Whisner*, 47 Ohio St. 2d 181, 201-18, 351 N.E.2d 750, 768-71 (1976), invalidated a comprehensive state regulatory scheme partially on the ground that it improperly interfered with parents' liberty interest in directing the upbringing of their children. Judicial recognition of the fundamental nature of parental rights in the upbringing

The *Yoder* majority recognized both the state's communitarian interest in effective citizen participation in the political system and the state's *parens patriae* interest in ensuring that the state's youth develop the skills necessary for economic self sufficiency.²⁰¹ Both of these recognized state interests are inexact terms subject to normative judicial analysis. Varying judicial determinations on the constitutionality of state regulations governing Christian schools indicate the subjective nature of the analysis.²⁰²

Some educators view the state's communitarian interest in an educated populace as an interest in a populace that shares similar political and social views. These educators are known as Cultural Transmission theorists or Skinnerians.²⁰³ For the Skinnerians, education is a means for the state to maintain social order by perpetuating its value system. Formal education then consists of transmitting the knowledge, the skills, and the social and moral rules of the culture. In addition, Cultural Transmission theorists view education as the oil which lubricates

of children supports the "sufficiently substantial" standard, not the rational relationship test. *See supra* notes 64-81, 93 & 113-29; *infra* notes 202-22 and accompanying text.

201. Justice White, concurring in *Yoder*, argued that the state had a broader interest in anticipating the future needs of its young. *See supra* notes 85 & 86.

202. The current state of judicial decision-making in Christian school lawsuits is apparent in the varying judicial perceptions of teacher certification requirements. In *Kentucky State Bd. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), the Kentucky Supreme Court, in holding a teacher certification requirement unconstitutional, contended that

[i]t cannot be said as an absolute that a teacher in a nonpublic school . . . will be unable to instruct children to become intelligent citizens. . . . [T]he receipt of a 'bachelor's degree from a standard college or university' is an indicator of the level of achievement, but it is not a *sine qua non* the absence of which establishes that private and parochial school teachers are unable to teach their students to intelligently exercise the elective franchise.

Id. at 884. The Ohio Supreme Court has similarly held such certification requirements unconstitutional. *State v. Whisner*, 47 Ohio St. 2d 181, 218, 351 N.E.2d 750, 771 (1976).

In stark contradiction to these decisions, the Nebraska Supreme Court upheld a teacher certification requirement in *State v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (Neb. 1981). The *Faith Baptist* court argued as follows:

[I]t cannot be fairly disputed that such a requirement is neither arbitrary and unreasonable. Additionally, we believe it is also a reliable indicator of the probability of success in that particular field. We believe that it goes without saying that the State has a compelling interest in the quality and ability of those who teach its young people.

Id. at 816-17, 301 N.W.2d at 579.

A Nebraska court used similar reasoning in upholding comparable teacher certification regulations. *State v. Columbus Christian Academy*, No. 78 (Wake County, Super. Ct., Sept. 1, 1978) at 14, *vacating as moot*, (N.C. May 4, 1979).

203. *See Kohlberg & Mayer, Development as the Aim of Education*, 42 HARV. EDUC. REV. 449, 452-54 (1972).

and, hence, ensures the smooth operation of a predefined (by the state) machine (the child).²⁰⁴

In contrast to the Skinnerian approach,²⁰⁵ the progressive theory of education holds that education should nourish the child's natural interaction with a developing society or environment. For the Progressives, education plays an integral role in the development of a "successful" human being. First, education aids the child's personal development as an individual *qua* individual. Second, education serves to help create or maintain a healthy state because education encourages the populace to take an active role in the positive shaping of its environment. Formal education then serves as a way for the child to develop as an individual who is a part of greater society. Progressive education theorists view education as the acquisition and development of problem-solving techniques so that children will be able to face the problems of "tomorrow" without losing hold of either their personalities or their culture.

Under the Progressive view, the state should encourage its citizens to develop and refine their personal interests so that they can participate effectively in the political marketplace. In other words, the state should not attempt to breed homogeneity through its educational system. Progressives emphasize the need to produce graduates capable of independent and critical assessment of American society.²⁰⁶

Progressive education theorists recognize that the state has a legitimate interest in demanding that all students become literate and possess a basic understanding of the structure and underlying values of government. Cultural Transmission theorists, on the other hand, would grant the state much broader authority. These theorists believe that the state should seek to inculcate in the child a set of state-selected

204. See Diamond, *The First Amendment and the Public Schools*, 59 TEX. L. REV. 477, 498 (1981) ("Sociologists generally accept the necessity of society's transmitting its cultural and moral values to the next generation through a process of socialization; in the United States this socialization process occurs not only in the family, but also in the public education system.").

205. See Kohlberg & Mayer, *supra* note 203, at 454.

206. See Finn, *Public Support for Private Education II*, American Education, June, 1982, at 9 ("Public policy should foster educational pluralism and diversity that are responsive to those differences within the society rather than seeking to impose a uniform or homogeneous definition of schooling."); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1134 (1979) ("The use of public schools to instill political values poses a serious threat to the market place of ideas and the integrity of the democratic process."); see also Dewey, *Education as Politics*, 32 New Republic 139 (1922); Katz, *The Present Moment in Educational Reform*, 41 HARV. EDUC. REV. 342 (1971).

values. Although some courts have recognized the state's communitarian interest in socialization,²⁰⁷ that view is now generally discredited.²⁰⁸ In fact, the Supreme Court's explicit recognition of a parent's right to real choice in the shaping of his child's education undercuts much of the communitarian interest espoused by Cultural Transmission theorists.²⁰⁹ The Progressive's notion of communitarian interest is, however, consistent with these court decisions.²¹⁰ The state, under its communitarian interest, can legitimately mandate minimum academic standards concerning basic academic skills and an understanding of the nature of our political system. Yet, this communitarian interest would not allow for the prohibition of home instruction.

The state's *parens patriae* interest, like its communitarian interest, is subject to varying interpretation. *Yoder* explicitly recognized the state's *parens patriae* interest. "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child."²¹¹ This vaguely defined interest, on the one hand, could allow the state to regulate fairly specific details of child rearing. On the other hand, interpreted differently, this formulation of the state's interest might grant parents nearly unlimited authority in the upbringing of their children.

One theory supporting the prohibition of home instruction or the development of expansive regulations governing home study under the state's *parens patriae* interest is the "other guy" rationale.²¹² The "other guy" approach holds that without regulations, parents will abuse the system and improperly educate their children. Under this theory, regulations are appropriate in instances where a state cannot afford to trust parents to direct the upbringing of their children. Proponents of ex-

207. *See supra* notes 185-88 and accompanying text.

208. *See supra* notes 130 & 182. Also supporting this conclusion is the Supreme Court's recent decision in *Board of Educ. Island Trees Union School Free Dist. v. Pico*, 457 U.S. 853 (1982). *Pico* prohibited school boards from removing library books for ideological reasons. By holding that the first amendment protects a student's right to receive political information, the Court suggested that social homogenization is not a proper goal of education. *See also supra* notes 123-29 and accompanying text (discussing parental rights to send children to private schools over similar state homogenization objections).

209. *See supra* notes 112-29 and accompanying text.

210. *See supra* notes 205 & 206.

211. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

212. This label is borrowed from an essay by Robert Baker, R. BAKER, *STATUTE LAW AND JUDICIAL INTERPRETATION IN THE TWELVE YEAR SENTENCE* (Rickenbacker ed. 1974).

pansive state *parens patriae* powers in education generally support the Cultural Transmission theory of education.

The “other guy” approach is not universally accepted. Many feel that state intervention should be a matter of last resort. Psychologist Joseph Goldstein, for example, concluded his analysis on state supervision of parental autonomy in the health care field by noting that the lack of societal consensus regarding state intrusion into parental autonomy justifies a check on “the use of state power to impose highly personal values on those who do not share them.”²¹³ In a similar vein, Professor Robert Burt commented that there is a natural presumption favoring the parents and limiting state intervention into the parent-child bond.²¹⁴

Under an expansive “other guy” approach, the state might well be able to justify a total prohibition of home instruction. Home instruction, after all, grants more responsibility to the family than any other educational alternative. This view is in conflict with the general trust accorded parents in the upbringing of their children, however.²¹⁵ For example, the common law view presumed that the parents’ natural affection for their children as well as their knowledge and superior opportunities to discover the child’s capabilities would ensure that the parents promoted the child’s best interests.²¹⁶

In addition to the parents’ unique ability to act in the best interest of their children, children generally approve of their parents’ actions and want to keep the child-parent bond strong.²¹⁷ For example, one recent

213. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 670 (1977).

214. According to Professor Burt:

A presumption favoring parents corresponds both to the social reality that state child rearing interventions are inherently difficult enterprises and to the psychological reality that an intensely intimate bonding between parent and child lays the best developmental foundation for this society’s most prized personality attributes. A court should view all state claims to contravene parental desires with the same skeptical eye—but it should be prepared to sanction all interventions that satisfy its generally applicable criteria.

Burt, *supra* note 108, at 127.

215. *Id.*

216. *See Trustees of Schools v. People*, 87 Ill. 303, 308 (1877); *see also* references listed in Moskowitz, *Parental Rights and State Education*, 50 WASH. L. REV. 623, 623-26 (1975).

217. *See* Burt, *supra* note 108, at 128-32; *see also* J. BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* 80 (1965) (“Efforts made to ‘save’ a child from his bad surroundings and to give him new standards are commonly of no avail, since it is his own parents, for good or ill, he values and with whom he is identified.”). *But see* D. HOULGATE, *CHILDREN, PATERNALISM, AND RIGHTS TO LIBERTY*, in *HAVING CHILDREN* (O. O’Neill & W. Ruddick, eds.) (arguing in favor of a mature child’s right to self-development).

court decision recognized that “[a] child is not a creature of the state. A child’s first allegiance is to his family and parental rights and responsibilities in the education of children come before the state’s.”²¹⁸ For the past fifteen years, courts have recognized the propriety of parental control and limited state intervention into family affairs on several constitutional grounds.²¹⁹

The increasing recognition of parental authority limits but does not undercut the state’s *parens patriae* authority in nonpublic education. The state clearly has a legitimate interest in ensuring that all children are afforded the opportunity to become viable members of contemporary society. Yet, the state must demonstrate that its actions will serve this legitimate purpose before it interferes with the parent-child relationship. Robert Burt, looking at Supreme Court decisions protecting other “fundamental rights” from state intrusion, suggested the following standard: “[1] Has the need for state intervention been convincingly identified, and [2] is there a close correspondence between that need and the means proposed to satisfy that need.”²²⁰ In other words, “when the state contravenes parental decisions in child rearing with the claimed purpose of benefiting the child, the state must present a convincing case that its intervention, in fact, will serve its professed goal.”²²¹

A state would be hard pressed to justify a total prohibition of home instruction under the Burt standard. North Carolina, in the *Duro* lawsuit, contended that it “‘does not permit home instruction because [it] has no mechanism by which to assure that children in a home with their parents are provided access to any education whatsoever.’”²²² This justification seems spurious because the state could demand that home study students be taught by a capable teacher or pass competency examinations. In short, it would appear that the state could satisfy its *parens patriae* interest in education through less restrictive means than the total prohibition of the home study alternative.

The state clearly has authority to impose some regulations on home study programs. It is, however, difficult to draw the line separating per-

218. *Milliken v. Green*, 389 Mich. 1, 57-60, 203 N.W.2d 457, 483 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973).

219. *See supra* note 93.

220. Burt, *supra* note 108, at 127.

221. *Id.*

222. *Duro v. District Attorney*, No. 81-13-Civ.-2 at 6 (E.D.N.C. Aug. 20, 1982).

missible from intrusive regulations. Regulations governing core curriculum, length of school day and school year, student reporting, and competency examinations are clearly constitutional. Expansive curriculum requirements or state prescribed textbooks, however, are unconstitutional.²²³ The real difficulty lies in the evaluation of intermediate curriculum and teacher certification requirements. Teacher certification is a particularly knotty issue because in many cases requiring certification will effectively foreclose the home study alternative. Considering that competency examinations can ensure adequate achievement prior to academic advancement, it would appear that teacher certification requirements that are so stringent as to preclude the home education option probably are unconstitutional.²²⁴

Competency examinations provide the best vehicle to balance the state's interest in an educated populace against a parent's interest in directing the upbringing of his children.²²⁵ State objections to achievement tests are unconvincing as a policy matter. The state contends that its objective is not merely to identify those students who do not learn their lessons; rather, it is to promote the likelihood that the educational system will provide every child with the basic education to function effectively in society. Thus the State may view after-the-fact regulations as an ill-fitted substitute for state-imposed educational standards. Underlying (and ultimately fatal to) this argument is a presumption that a substantial enough number of home study students will fail to justify state-imposed burdens on pluralism, religious liberty, and parental rights. The evidence, however, is to the contrary.²²⁶ If anything, it appears that parents who teach their children at home are doing a

223. Court rulings on the analogous issue of the constitutionality of state regulations governing Christian day schools support this conclusion.

224. The state can still require ad hoc determinations of competency. The state, however, probably cannot demand that parents comply with such formalistic criteria as receipt of a college diploma.

225. For an alternative suggestion, see Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. FAM. L. 353, 374-77 (1978-80) (recommending home visits and other types of professional evaluation).

226. See *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess., 554-56 (1979) (Testimony of Dr. Paul Kienel, Executive Director of the Association of Christian Schools International). It is also worth noting that "the prosecutor on the trial of the *Whisner* case objected to the introduction of the Stanford Achievement Test scores on the Tabernacle Christian students as irrelevant and immaterial. Apparently, the State took the position that compliance with the minimum standards was indispensable to an adequate education." Rice, *supra* note 27, at 886.

better job than the public schools.²²⁷ Courts that have addressed this issue in the control of state regulation of Christian schools are evenly divided on the adequacy of competency tests issue.²²⁸

V. CONCLUSION

It is impossible to provide a hard and fast determination of what the state can and cannot do in its regulation of home study programs. Yet, neither the state's communitarian interest in a well-functioning open political system, or its *parens patriae* interest in the eventual economic self-sufficiency of its youth, is sufficiently strong to justify a total prohibition of home instruction.²²⁹ A parent's right to direct the religious upbringing of his child should carry with it the right to a meaningful home study option. It is unfortunate that the Supreme Court passed up the opportunity to review the *Duro* case. Until the Supreme Court chooses to review this issue, it appears that the basic questions concerning parental authority in the instruction of their children will be discerned through an entangled body of state court decisions.

227. See Heard, *Church-Related Schools: Resistance to State Control Increases*, Educ. Wk., Feb. 17, 1982, at 1, 10, 18.

228. Compare *Kentucky State Bd. v. Rudasill*, 589 S.W.2d 877, 884 (Ky. 1979) (encourages the use of such tests) with *State v. Faith Baptist Church*, 207 Neb. 802, 816-17, 301 N.W.2d 571, 579-80 (1981) (criticizes the use of such tests).

"Christian schools have generally been willing to submit their 'product' voluntarily to reasonable evaluation by the State through achievement testing." Note, *State Regulation of Private Religious Schools in North Carolina—A Model Approach*, 16 WAKE FOREST L. REV. 405, 416 (1980). Christian school leaders, however, have expressed concern that the state may impose otherwise impermissible curriculum requirements through extensive testing. See Ball, *supra* note 13, at 337-38. It should also be noted that many Christian school leaders and some courts contend that the state can satisfy its interest in education by requiring that Christian school students take and perform satisfactorily on a nationally recognized achievement test. See *Kentucky State Bd. v. Rudasill*, 589 S.W.2d 877, 884 (Ky. 1979); Devins, *supra* note 93. This position, however, has been rebuked by some commentators and courts. See, e.g., *State v. Faith Baptist Church*, 207 Neb. 802, 813-17, 301 N.W.2d 571, 578-80 (Neb. 1981).

229. For a similar conclusion, see Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 809 (1975) ("At the very least the substantive due process theory calls into question the constitutionality of compulsory education for many children."); Note, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. REV. 191, 206 ("any compulsory education statute which does not allow [or places severe limits on] home instruction . . . should be struck down as violative of the Constitution").

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