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Comments

THE CONSTITUTIONALITY OF STATE HOME SCHOOLING STATUTES

I. INTRODUCTION

Home schooling is the education of children in the home as opposed to education in an institutional setting away from the home. Estimates of the number of families nationwide educating their children at home range as high as one million. Typically, the teachers in home schools are the parents themselves. While there are a variety of reasons why parents choose to undertake the considerable task of instructing their children at home, the primary reasons nearly always are academic or reli-

1. This Comment uses the terms "home schooling," "home education," and "home instruction" interchangeably.

2. See Mark Murphy, A Constitutional Analysis of Compulsory School Attendance Laws in the Southeast: Do They Unlawfully Interfere with Alternatives to Public Education?, 8 GA. ST. U. L. REV. 457, 457 (1992) (defining home schooling as "the teaching of a child in the home by the child's parent or guardian"); Brian D. Ray, A Comparison of Home Schooling and Conventional Schooling: With a Focus on Learner Outcomes 4 (1986) (unpublished Ph.D. dissertation, Oregon State University, available through Educational Resource Information Center (ERIC)) (defining home schooling as "a learning-teaching situation wherein children spend the majority of the conventional day in or near their home in lieu of attendance at a conventional institution of education").

3. See Donald D. Dorman, Michigan's Teacher Certification Requirement Applied to Religiously Motivated Home Schools, 23 U. MICH. J.L. REF. 733, 733 n.1 (1990) (estimating that between 10,000 and one million families educate their children at home); see also Murphy, supra note 2, at 457 (estimating that one million families educate their children at home (citing RAY E. BALLMAS, THE HOW AND WHY OF HOME SCHOOLING 15 (1987))); William Celis III, Schooling at Home Draws Lawsuits to Doorsteps, N.Y. TIMES, May 6, 1992, at B15 (citing Federal Education Department estimate of 500,000 children being educated at home); Karel Holloway, Alternative Schoolstyles, DAL. MORN. NEWS, Mar. 8, 1994, at 20A (estimating that 500,000 to one million children are educated at home); Thomas Toch et al., Schooling in Family Values, U.S. NEWS AND WORLD REP., Dec. 9, 1991, at 73 (estimating that over 300,000 children are educated at home).

4. See Ray, supra note 2, at 4 (concluding that "[p]arents or guardians are the primary educators of [home school] children"); J. Michael Smith & Christopher J. Klicka, Review of Ohio Law Regarding Home Schooling, 14 OHIO N.U. L. REV. 301, 301 (1987) (stating that “[t]he teachers in a home school are generally the parents”). According to Dr. Brian Ray's research, home school parents often share the following characteristics: both parents actively participate in instruction, with the mother serving as the teacher most of the time; both parents have attended or graduated from college; household income is $20,000-$30,000; both parents attend religious services regularly; and the family has three children. Ray, supra note 2, at 40-41.

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gious. Many parents simply have become disillusioned with the education available to their children in the public schools, and find private institutions too expensive or distant from the home to be a viable alternative. Religiously motivated parents often believe that they have a religious duty to personally educate their children, incorporating aspects of their faith into each lesson.

5. See, e.g., Debra D. McVicker, The Interest of the Child in the Home Education Question: Wisconsin v. Yoder Re-examined, 18 IND. L. REV. 711, 711 (1985) (stating that most significant motivations of home schoolers are “the perceived inadequacy of public schools and the rise of religious fundamentalism in the United States”); Smith and Klicka, supra note 4, at 302 (stating that “[t]here are two primary reasons that most [home school] parents have chosen to home school their children — religious and academic”).

A 1984 study identified six factors that motivate parents to instruct children at home: 1) perceived unsuitability of institutional education for the particular attributes of the child; 2) desire for control over the child’s education; 3) concerns about the child’s socialization; 4) disagreement with the basic approach of institutional instruction; 5) disagreement with course content; and 6) desire to take a personal interest in the child’s development. James M. Henderson, Missouri Home Education: Free at Last?, 6 ST. LOUIS U. PUB. L. REV. 355, 356-58 (1987) (citing D. Williams, Understanding Home Education: Case Studies of Home Schools 4 (April 1984) microformed on ERIC No. ED 244992 (Educational Resource Information Center)).

6. Dorman, supra note 3, at 736. This disillusionment is fueled by a range of factors, from general disenchantment with the perceived mediocrity of public school education to specific complaints about course content and the absence of individualized instruction. Id. Other examples of specific complaints about public schools include the inordinate amount of wasted time, the stifling of creativity and individuality, and concerns about safety and morality. Fahizah Alim, Changing the Rules, SACRAMENTO BEE, Aug. 27, 1993, at SCI.

7. See, e.g., John S. Baker, Jr., Parent-Centered Education, 3 NOTRE DAME J.L. ETHICS & PUB. POL’Y 535, 546 (1988) (noting that private school tuitions, that must be paid in addition to taxes paid for public schools, are obvious disincentive to enrollment in private schools as alternative to public school education); Murphy, supra note 2, at 458 (stating that one reason to home school is “[the] inability to afford private school tuition”).

8. See, e.g., State v. Jernigan, 412 So. 2d 1242, 1243-44 (Ala. Crim. App. 1982). In Jernigan, home schooling parents were convicted for violating Alabama’s compulsory school attendance laws based on their failure to send their children to a public school or an approved substitute. Id. The parents were devout Catholics and believed that their children’s religious salvation would be endangered if the children received a secular education at the local public school. Id. at 1243. Because there was no parochial school in their county, the parents thus decided to educate their children at home. Id.

Opposition to home schooling is grounded in the belief that home instruction is harmful to the social and intellectual development of the child. Opponents contend that the home environment cannot provide the interaction with other children that is a vital part of the maturation process and may result in social retardation. Critics also argue that parents may not be able to provide the quality of instruction that is found in widespread immorality in public schools, evidenced by lack of discipline, sexual permissiveness and drug and alcohol abuse. Devins, supra note 9 at 821.

A high percentage of home schoolers are conservative or born-again Christians. See Carol Kotlarczyk, Lesson Plans, Chi. TmB., Nov. 17, 1991, at D3 (stating that studies done by Home School Legal Defense Association indicate that 90% of home school parents are born-again Christians); see also Thomas Toch et al., supra note 3, at 75 (estimating that 75% of home schoolers are conservative Christians). Specifically, a significant number of Mormons, Seventh-Day Adventists, Amish and, more recently, Fundamentalist and Evangelical Protestants have elected to home school their children. See Baker, supra note 7, at 549.

Concerns about social retardation are exemplified by the worries of Joan Witherbee, an elementary school principal in the Chicago area, who questions how home school students will develop the nuances of social skills that non-home school students develop through group discussions and working cooperatively with peers. Kotlarczyk, supra note 9, at D3. The National Association of School Boards also believes that home schooling hinders the development of social skills. See William Celis III, Growing Number of Parents Are Opting to Teach at Home, N.Y. TIMES, Nov. 22, 1990, at A1 (quoting Gene Wilhoit, executive director of National Association of School Boards, as stating that: "[c]hildren should be in the traditional setting because home schooling takes away from a child's social skills . . . ").

Fears about loss of funding are justified. See Baker, supra note 7, at 543-45 (explaining that amount of state funding to public schools depends upon number of children in attendance). "School districts around the country receive an average of $4000 to $7000 in state and federal aid" per student and a district risks losing some or all of this amount when a student leaves one of its public schools. See Celis, supra note 3, at B15.

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public, private or parochial schools. One commentator has further asserted that home schools are "highly likely to be racially exclusionary." The result of these divergent interests has been, predictably, a heated battle in various state courts and legislatures over the legitimacy of home schooling.

This Comment will examine the heated debate that has arisen over home schooling. First, this Comment will discuss the history of compulsory attendance laws. Next, this Comment will examine the competing interests between parents and state governments in controlling the education of children, as delineated by the decisions of the United States

12. See Dorman, supra note 3, at 737. However, home school students have equaled or outperformed their public school counterparts on numerous national and state achievement tests. See Smith and Klicka, supra note 4, at 302-03 (citing separate studies of Dr. Raymond Moore (Moore, Research and Common Sense: Therapies for Our Home Schools, 84 TCHRS. C. REC. 355, 372-77 (Colum. U. 1982)) and state departments of Tennessee, Alaska, North Carolina and Washington, all of which concluded that home school students perform at or above-average levels on standardized achievement tests). Dr. Brian D. Ray of the National Home Education Research Institute states that there have been between 60 and 70 studies of home school students, all of which have produced similar results. See Holloway, supra note 3, at 20A (stating that 60 or 70 tests have found that home schooled students have "far higher average scores on nationally standardized tests than many public school students"). Additionally, an estimated 50% of home school students attend college, a rate comparable to that of public school students. See Toch et al., supra note 3, at 73.


Home schooling may indeed have been used for a discriminatory purpose in Duval County, Florida, where a father preached a religion of segregation to his children during home school. See T.A.F. & E.M.F. v. Duval County, 273 So. 2d 15, 18 (Fla. Dist. Ct. App. 1973) (noting that father was teaching children under auspices of church that encouraged racial segregation). Among the father's beliefs was the notion that it is sinful to associate with persons of African or Asian ancestry. Id.

Another possible use of home schooling for a discriminatory purpose occurred in the town of Arcadia, Florida. Larry Perl, 'Town Without Pity' Reflects on Treatment of Brothers with AIDS, Ft. MEYERS NEWS-PRESS, Dec. 13, 1992, at A6. When several brothers infected with the HIV virus enrolled in the local public school, an unspecified number of parents removed their children from the public school and began programs of home instruction. Id. Whether this action by the parents was motivated by health concerns or AIDS-related biases is difficult to determine. Id. However, the feelings of some in the community are portrayed by the fact that the family suffered through numerous bomb threats, protests and an arson attempt on their home before the county school board barred the infected brothers from class attendance. Arcadia Harks Back to Days of Bone Mitzvah, ST. PETERSBURG TIMES, July 3, 1992, at 1A.

14. For a complete discussion of compulsory attendance laws, see infra notes 17-23 and accompanying text.
Finally, this Comment will analyze the existing compulsory attendance laws of the fifty states and the District of Columbia.

II. COMPULSORY ATTENDANCE LAWS

The Massachusetts Bay Colony established the first compulsory education law in 1642. This law required parents to provide their children with a fundamental education that included reading, religion and a trade. It was not until 1852, however, that states began to mandate compulsory public school attendance. The changing demographics of the nation in the late nineteenth and early twentieth centuries led states to require attendance at state public schools; instead of merely requiring an education. Rapid urbanization, prompted by the industrial revolution and mass immigration, resulted in the need to educate very large and di-
verse populations. Public schools were viewed as the most powerful means of "promoting cohesion among a heterogeneous democratic people." As a result, nearly every state required public school attendance by the end of World War I.

These laws had a dramatic impact on home schoolers and continue to serve as a regulating source of home schools today. Although compulsory attendance laws regulate home schooling, parents have a constitutional interest in educating their children. This interest, however, often conflicts with the state's interests in compulsory attendance.

III. CONSTITUTIONAL FRAMEWORK

Several United States Supreme Court decisions have examined the government's power to regulate education. Although none of these cases has dealt with what could be termed a "classic" home school, the Court has set forth principles that are readily applicable to an analysis of the constitutionality of compulsory attendance laws that prohibit or regulate home schooling. Ultimately, the Court has chosen to balance parental interests in home schooling against state interests in the education of children, ignoring the interests of the child.

21. Burgess, supra note 20, at 70-71. The infusion of European immigrants into the northern cities from 1820 to 1914 included approximately 5 million Germans, 4.5 million Irish, 4.5 million Italians, 2.6 million Poles, 2.6 million English, and 2 million Jews, all of whose children would require an American education.


23. Burgess, supra note 20, at 70.

24. For further discussion of those United States Supreme Court cases examining the government's role in education, see infra notes 25-38 & 46-64 and accompanying text.

25. See, e.g., James C. Easterly, "Parent v. State:" The Challenge to Compulsory School Attendance Laws, 11 Hamline J. Pub. L. & Pol'y 83, 88 (1990) (recognizing that "[e]ven though the [Supreme Court cases are] frequently cited for or against the right of parents to educate their own children, none of those cases directly addressed the issue of parental rights to educate their children at home"); Brendan Stocklin-Enright, The Constitutionality of Home Education: The Role of the Parent, the State and the Child, 18 Willamette L. Rev. 563, 564 (1982) (noting that "the constitutional decisions of the United States courts . . . do not provide an unclouded beacon to light our way, but without these cases there would be no constitutional buttress whatsoever between the education choices of the family and of the state").

26. See Murphy, supra note 2, at 459 (finding that "the Court has tended to analyze these cases from the standpoint of parental interests versus state's interests in a child's education"). To date, the Court has not included the interests of the children in its constitutional analysis. Id. at 459-60. For the viewpoint that a child's interest in his or her own education should be included in the Court's analysis, see Ira C. Lupu, Home Education, Religious Liberty, and the Separation of Powers, 67 B.U. L. Rev. 971, 976-80 (1987) (dismissing home schooling decisions that focus only on interests of parents and state, and ignore interests of child, as "bilateral and oppositional rhetoric"); McVicker, supra note 5, at 717-21 (arguing that interests of child are not adequately represented either by interests of state or in-
A. State Interests

States have an undeniably strong interest in controlling education. As early as 1925, the United States Supreme Court recognized the state interest in education in *Pierce v. Society of Sisters.*27 In *Pierce,* the Court stated that "[n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, . . . [and] to require that all children of proper age attend some school."28 Thirty years later, in *Brown v. Board of Education,*29 the Court recognized that "education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."30 Finally, in *Wisconsin v. Yoder,*31 the Court stated that "[t]here 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."32

27. 268 U.S. 510 (1925). *Pierce* involved a challenge to Oregon's Compulsory Attendance Act, that required parents and guardians of children between eight and sixteen years of age to send their children to the public school in their district. *Id.* at 530. The Society of Sisters and Hill Military Academy, two incorporated private schools located in the state, sought injunctions enjoining enforcement of the Act, alleging that the Act conflicted with the right of parents to choose their children's schools, the right of children to influence their parents' choice of school and the right of schools and teachers to engage in a useful business or profession. *Id.* at 531-33. The Court struck down the Act, holding that it constituted an arbitrary, unreasonable and unlawful interference with the schools' businesses and properties. *Id.* at 535-36. For further discussion of *Pierce,* see *infra* note 28 and accompanying text.

28. *Id.* at 534.


30. *Id.* at 493. In *Brown,* the Court explicitly rejected the "separate but equal" doctrine of racial segregation in public schools, finding that intangible factors, such as a feeling of inferiority among black students, render separate but equal educational facilities inherently unequal and a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 493-96.


32. *Id.* at 213. In *Yoder,* Amish parents were convicted under Wisconsin's compulsory attendance law for refusing to send their children to public or private school after the children had graduated from the eighth grade. *Id.* at 207-08. The Amish contended that high school attendance was contrary to the Amish religion and that the compulsory attendance law violated their rights under the First and Fourteenth Amendments. *Id.* at 208-09. The Wisconsin Supreme Court held that the application of the compulsory attendance law violated the rights of the Amish under the Free Exercise Clause of the First Amendment. *Id.* at 215. The United States Supreme Court affirmed, holding that the statute violated the Amish right to free exercise of religion. *Id.* at 234-36. For further discussion of *Yoder,* see *infra* notes 33-39 and accompanying text.
The Yoder Court recognized two specific state interests in support of compulsory education. First, states have an interest in ensuring that citizens receive enough education to prepare them to participate effectively in a democratic political system. Second, states have an interest in citizens receiving an education that will allow them to be self-sufficient members of society. Based upon the Court's acceptance of these state interests, states have the constitutional authority to require the education of children.

Although the state interest in controlling education is strong, this interest is not absolute. The state interest is subject to a balancing process when it infringes upon the fundamental rights and interests of citizens. These fundamental rights and interests are specifically protected by the Free Exercise Clause of the First Amendment and "the traditional interest of parents with respect to the religious upbringing of their children." Also, parents have a right to control how their children are raised. To survive constitutional attack, the state interest must outweigh any such fundamental right or interest.

B. Parental Interests and Objections to Compulsory Attendance Laws

Two parental interests have formed the basis for the Court's limitations on the state's powers to control education: the right of parents to control the upbringing of their children and the right of parents to the free exercise of religion. The right of parents to raise their children in the manner of their choosing derives from the guarantee of liberty found in the Due Process Clause of the Fourteenth Amendment. The right to

33. Id. at 221.
34. Id.
35. Id. In his concurring opinion in Yoder, Justice White offered a third state interest, the interest of a state "not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past." Id. at 240 (White, J., concurring).
36. See Baker, supra note 7, at 545 (noting that "constitutional decisions . . . have recognized the states' 'compelling interest' in requiring schooling"); Patricia M. Lines, Private Education Alternatives and State Regulation, 12 J.L. & Educ. 189, 198 (1983) (stating that "[t]he basic premise [of compulsory attendance laws]—that states have authority to require education for children—is widely conceded"); Stocklin-Enright, supra note 25, at 578 (stating that "[c]learly . . . the state has a vital interest in ensuring that its citizens are educated to an adequate level enabling them to operate the machinery of state").
37. Yoder, 406 U.S. at 214.
38. Id.
39. Id.
40. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that "[w]ithout doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children"). For further discussion of the parent's rights under Due Process Clause, see infra notes 46-83 and accompanying text.
freedom from government interference in the exercise of religion arises from the Free Exercise Clause of the First Amendment. Additionally, parents have other grounds to challenge compulsory attendance statutes, including vagueness, lack of a neutral, detached magistrate, a violation of the Establishment Clause, or an equal protection violation under the Fourteenth Amendment.

1. Due Process: Parental Fundamental Right or Mere Liberty Interest?

The Court first indicated that state interests in education were subject to limitation by a parent's right to due process in *Meyer v. Nebraska*. In *Meyer*, a tutor was convicted under a Nebraska statute that prohibited teaching any foreign language to a student who had not yet reached the eighth grade. In holding that the statute violated the tutor's right to teach under the Fourteenth Amendment, the Court also suggested that the Due Process guarantee of liberty protected the parents' right to employ a teacher to instruct their children in the German language. The Court defined this guarantee of liberty to include "the right of the individual... to marry, establish a home and bring up children." Although Nebraska had the power to compel school attendance and reasonably reg-
ulate school affairs, the Court found the statute to be unrelated to any valid state purpose and to violate the parents' liberty interest in directing their children's education.

Two years after Meyer, in Pierce v. Society of Sisters, the Court struck down an Oregon compulsory attendance statute requiring parents to send their children to public school. The statute, which the Court feared would eliminate all of the private schools in the state, was found to interfere unreasonably with the liberty of parents to direct the upbringing and education of their children. The Court emphasized that the Oregon statute did not possess even a reasonable relationship to a legitimate state objective, adding that "[t]he child is not the mere creature of the State; those who nurture him [or her] and direct his [or her] destiny have the

50. Id. at 402. According to the Court, "[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." Id.

51. Id. at 403. In fact, the Court specifically concluded that "the Statute as applied is arbitrary and without reasonable relation to any end within the competency of the State." Id.

52. Id. at 400. The Court's finding that the Nebraska statute violated the parents' liberty interest in directing their children's education is, however, clearly dicta. See Easterly, supra note 25, at 86-87 (noting that because parents were not parties to action in Meyer, Court's holding could not be based upon rights of parents to educate their children, but rather was based on tutor's substantive right to pursue legitimate business or profession).

53. 268 U.S. 510 (1925).

54. Id. at 534-35. In Pierce, Society of Sisters, a private corporation designed "to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property," established schools that provided both secular and religious educations. Id. at 531-32. Prior to the enactment of the statute, the corporation had profited from parents who had chosen to send their children to its schools. Id. at 532. The compulsory education statute, however, resulted in a reduction in corporate revenue because many parents were forced to withdraw their children from the corporation's schools and place them in public schools. Id. Thus, Society of Sisters alleged that the Oregon compulsory education statute conflicts with the rights of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. Id.

55. Id. at 534. The statute required every parent and guardian having custody of a child between the ages of eight and sixteen years to send the child to a public school in the district where the child resides. Id. at 530. Noncompliance with the statute was punishable as a misdemeanor. Id. The statute provided exemptions for children "who are not normal, or who have completed the eighth grade, or who reside at considerable distances from any public school, or whose parents or guardians hold special permits." Id. at 530-31.

56. Id. at 534-35. However, because the appellees in the case, including the Society of Sisters, were corporations, they could not claim the protections of the liberty guarantees of the Fourteenth Amendment. Id. at 535. The Court nonetheless ruled in favor of the appellees, holding that the Oregon statute constituted an arbitrary, unreasonable and unlawful interference with appellees' business and property. Id. at 535-36.
right, coupled with the high duty, to recognize and prepare him [or her] for additional obligations.\textsuperscript{57} Since 1925, when \textit{Pierce} provided parents who send their children to private schools with an exemption from compulsory public school attendance, no state has attempted such a direct attack on private schools.\textsuperscript{58}

Another case of this period, \textit{Farrington v. Tokushige},\textsuperscript{59} involved a Hawaii statute that regulated private schools to such a degree that they would be nearly indistinguishable from public schools.\textsuperscript{60} The Hawaii statute regulated teacher qualifications, curricula, textbooks, entrance requirements and languages spoken in the state's private foreign language schools.\textsuperscript{61} The Court stated that such interference went beyond "mere regulation" and impermissibly burdened the parents' right to direct their children's education without unreasonable restrictions.\textsuperscript{62}

\textsuperscript{57} Id. at 535.

\textsuperscript{58} See Lines, \textit{supra} note 36, at 198 (stating that "no state has launched a similar, direct attack on private schools" since decision in \textit{Pierce}).

\textsuperscript{59} 273 U.S. 284 (1927).

\textsuperscript{60} Id. at 298. In \textit{Farrington}, members of numerous voluntary unincorporated associations conducting foreign language schools for instruction of Japanese children in the Territory of Hawaii sought and obtained an injunction prohibiting the enforcement of a Hawaiian statute that severely regulated the Territory's Japanese speaking schools. \textit{Id.} at 290-91. The United States Supreme Court, affirming the decision of the Ninth Circuit Court of Appeals, upheld the injunction on the grounds that the statute unreasonably regulated the Territory's private schools and placed unreasonable restrictions on the right of parents to direct the education of their children. \textit{Id.} at 298-99. The Court stated that enforcement of the statute, that gave "affirmative direction concerning the intimate and essential details" of the Territory's private schools, would likely "destroy most, if not all," of the Japanese speaking private schools targeted by the Act. \textit{Id.}

\textsuperscript{61} Id. at 293-95. The Act provided, in pertinent part, that "[n]o person shall teach in a foreign language school unless and until he shall have first applied to and obtained a permit so to do." \textit{Id.} at 293. No such permit would be granted "unless and until the department [of public instruction] is satisfied that the applicant . . . is possessed of the ideals of democracy; knowledge of American history and institutions, and knows how to read, write and speak the English language." \textit{Id.} The Act further provided that no student may "attend any foreign language school for more than one hour each day, nor exceeding six hours in any one week," and granted the Department of Public Instruction the power "to prescribe by regulations the subjects and courses of study of all foreign language schools, and the entrance and attendance prerequisites or qualifications . . ., and the textbooks used in any foreign language school." \textit{Id.} at 294.

\textsuperscript{62} Id. at 298-99. Because the plaintiffs in \textit{Farrington} were not the parents but rather the affected schools, the Court's holding must rest upon the statute's denial of school owners the reasonable choice and discretion of how to operate their schools. \textit{Id.} at 298. The Court is not clear about the basis for its holding, however, stating simply that the statute violates the Fifth Amendment's prohibition, applicable to territorial governments, against depriving any person of life, liberty or property without due process of law. \textit{Id.} at 299. In dicta however, the Court appears to address the effect of this statute on parental liberties as well as the rights of owners. \textit{See id.} (stating that statute "would deprive parents of fair opportunity to procure for their children instruction which they think important" and affirming fact that "[a] Japanese parent has the right to direct the education of his own child without unreasonable restrictions").
Thus, while the Supreme Court has never specifically held that parents have a fundamental right to educate their children in a home school, the relevant language of the case law can easily be interpreted to suggest that parents do indeed possess this right, subject to reasonable regulation by the state. In fact, most commentators take this view, arguing that the parent's interests should be afforded strict scrutiny, and that only a compelling state interest can outweigh this parental right.

Courts, however, generally have balked at recognizing a fundamental parental right to direct their children's education. Most recently, the

63. See Easterly, supra note 25, at 86 (finding that Supreme Court has clearly not yet addressed issue of whether parents have fundamental right to educate their children at home). The Court, however, in Wisconsin v. Yoder, 406 U.S. 205 (1972), has cited approval of both Meyer and Pierce. Id. at 232-34. Although the holding of Yoder is limited to religious objections to compulsory school attendance, the Court, noted that the case involved the fundamental interests of parents to guide the education of their children. Id. at 232. The Court observed that “[t]he primary role of the parents in the upbringing of their children is now established beyond debate as an American tradition.” Id. For a brief discussion of the facts of Yoder, see supra note 32. For further discussion of religious objections to compulsory school attendance and the impact of Yoder, see infra notes 89-101 and accompanying text.

64. See, e.g., Burgess, supra note 20, at 74-75 (arguing that “[t]he Supreme Court decisions . . . reflect a consistent recognition of parental privacy interests and fundamental rights in the education of children”); Alma C. Henderson, The Home Schooling Movement: Parents Take Control of Educating Their Children, ANN. SURV. AM. L. 985, 992 (1991) (concluding that Supreme Court’s decisions suggest that Fourteenth Amendment protects parental right to teach children at home); Branton G. Lachman, Comment, Home Education and Fundamental Rights: Can Johnny's Parents Teach Johnny?, 18 W. St. U. L. Rev. 731, 742 (1991) (observing that “[i]t appears that parental liberty regarding education is a fundamental right”); Murphy, supra note 2, at 471 (contending that Court’s language in Pierce, Meyer, Farrington and Yoder demonstrates Court recognition of the fundamental right of parents to direct the education of their children); Smith & Klicka, supra note 4, at 319 (asserting that “[i]t is beyond dispute that parents have a fundamental right to direct the education and upbringing of their children that supersedes the State’s limited interest in regulating education”); Dwight E. Tompkins, An Argument for Privacy in Support of the Choice of Home Education by Parents, 20 J.L. & EDUC. 301, 308-11 (1991) (proposing that reasonable construction of Supreme Court decisions supports fundamental right of privacy protecting parental choice of home education).

For the view that Supreme Court decisions do not clearly recognize such a right, see Devins, supra note 9, at 823 (finding that Supreme Court decisions provide no clear guidance); Lupu, supra note 26, at 974 (discussing judicial questioning of validity of Meyer, Pierce and Farrington).

65. See, e.g., Murphy v. Arkansas, 852 F.2d 1039, 1043 (8th Cir. 1988) (finding no fundamental right of parents to supervise their children's education); Null v. Board of Educ., 815 F. Supp. 937, 939-40 (S.D. W. Va. 1993) (finding that parents do not possess fundamental right to direct their children's education, but rather only general liberty interest subject to reasonable state regulation); Hinrichs v. Whitburn, 772 F. Supp. 423, 432 (W.D. Wis. 1991) (finding no cases recognizing existence of fundamental right of parents to direct their children's education and concluding right at issue is merely liberty interest subject to reasonable state regulation), aff'd, 975 F.2d 1399 (7th Cir. 1992); Clonlara, Inc. v. Runkel, 722 F. Supp. 1442, 1458 (E.D. Mich. 1989) (concluding that parental interest in directing chil-
Michigan Supreme Court rejected such a claim in *People v. Bennett*. In *Bennett*, parents who were instructing their children in a home school were convicted under Michigan's compulsory education laws. The parents challenged the convictions arguing that the Michigan law, that requires all teachers to be state certified, unconstitutionally infringed upon their fundamental right as parents to direct the education of their children. The court, however, refused to classify the parental interest as a fundamental right, instead upholding the certification requirement under the "minimal scrutiny" test.

Children's education is not fundamental and therefore subject to reasonable state regulation; *Hanson v. Cushman*, 490 F. Supp. 109, 112-15 (W.D. Mich. 1980) (same); *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452, 461 (N.D. Ill. 1974) (holding that home schoolsers had established no fundamental right abridged by state compulsory attendance law); *In re Sawyer*, 672 P.2d 1093, 1097-98 (Kan. 1983) (finding that parents have no fundamental right to direct children's education); *Care & Protection of Charles*, 504 N.E.2d 592, 599 (Mass. 1987) (finding that although parents possess basic right in directing education of their children, "such a right is not absolute [and] must be reconciled with substantial State interest in the education of its citizenry"); *People v. Bennett*, 501 N.W.2d 106, 111-15 (Mich. 1993) (finding no cases recognizing existence of fundamental right of parents to direct children's education and concluding that parental interest therefore not subject to strict scrutiny standard but subject to reasonable regulation by state); *State v. DeLaBruere*, 577 A.2d 254, 274 (Vt. 1990) (concluding that parental right to direct children's education is not absolute and is subject to reasonable state regulation). *But see* *State v. Whisner*, 351 N.E.2d 750, 768-69 (Ohio 1976) ("[i]t has long been recognized that the right of a parent to guide the education ... of his or her children is indeed a 'fundamental right' guaranteed by the Due process clause [sic] of the Fourteenth Amendment.")


67. *Id.* at 108. Michigan's compulsory attendance law requires that "every parent ... having control and charge of a child from the age of 6 to the child's sixteenth birthday, shall send that child to the public schools during the entire school year." *Mich. Comp. Laws Ann.* § 380.1561(1) (West 1992). An exception is provided for any child "who is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade." *Id.* § 380.1561(3)(a). The Act further provides that "[n]o person shall teach or give instruction ... in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state." *Id.* § 388.553.

68. *Bennett*, 501 N.W.2d at 111. Because the parents' decision to educate their children at home was motivated by dissatisfaction with the public school system, and was not based on any religious belief, the parents did not raise any religious objections to the statute. *Id.* at 108.

69. *Id.* at 115-16. The minimal scrutiny test requires only that the statute in question be reasonably related to a legitimate state interest. *Id.* at 116. The court found that Michigan had a legitimate state interest in "ensuring the minimum competence of those entrusted to teach." *Id.* The court then found that the statute's teacher certification requirement was reasonably related to this interest. *Id.* at 116-17.

As noted by Justice Riley, the court's analysis is flawed because it misidentifies the "legitimate state interest" at issue. *Id.* at 124-26 (Riley, J., concurring in part and dissenting in part). If Michigan's interest is viewed simply as an interest in ensuring the education of all children, the state teacher certification requirement
In reaching its decision, the court first addressed the parents' contention that *Pierce* and *Meyer* recognized a parent's interest in their children's education as a fundamental right under the Fourteenth Amendment.\(^7\)

The court interpreted *Pierce* on two levels.\(^7\) In a broad sense, the court found *Pierce* to provide parents with the right to choose either public or private schools for their children.\(^7\) In a narrow sense, the court viewed *Pierce* "as providing parents the right to direct the religious education of their children."\(^7\) The court found "[i]n no sense, however, has *Pierce* been interpreted to mean that parents have a fundamental right to direct all of their children's education decisions."\(^7\) The court then dismissed *Meyer* as a case that "may have made one general statement concerning parental rights to control their children's education," but did not grant parents freedom from reasonable state regulation.\(^7\)

The Michigan court, while not alone in its explicit rejection of the parental fundamental right,\(^7\) does distinguish itself from other courts does not bear even a reasonable relationship with the state's interest. See id. at 125 (Riley, J., concurring in part and dissenting in part) ("Michigan's teacher certification requirement is not reasonably related to educational achievement, but is merely an attempt to standardize its children by forcing students to accept instruction only from state-approved teachers."). Justice Riley noted that this is particularly true where, as in *Bennett*, the state failed to produce any evidence that the children were receiving an inadequate education at home or that there was "a correlation between the teacher certification requirement and [the] educational achievement" of the children. Id. at 125-26 (Riley, J., concurring in part and dissenting in part).

\(^70\) Id. at 112-15. The parents also argued that the language of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), supported their claim to possession of a fundamental right to direct their children's education. Id. at 112-13. The court quickly rejected this claim, interpreting *Yoder* as purely a First Amendment case and as such, unrelated to the issue of fundamental rights under the Fourteenth Amendment. Id. at 113. For a brief discussion of the facts of *Yoder*, see supra note 32. For further discussion of the relationship between *Yoder*, *Meyer* and *Pierce*, see supra note 63.

The United States Supreme Court's decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), superseded by statute as stated in *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994), also cited by the parents as reaffirming the parental fundamental right to direct their children's education, was similarly dismissed by the Michigan Supreme Court as primarily a First Amendment case. *Bennett*, 501 N.W.2d at 114. For a further discussion of *Smith*, see infra notes 102-06 and accompanying text.

\(^71\) *Bennett*, 501 N.W.2d at 112.

\(^72\) Id.

\(^73\) Id. The court, noting that the discussion in *Pierce* of parental rights is essentially dicta, conceded that *Pierce* is better known for its discussion of parental rights than for its actual holding that was based upon property rights. Id. at 112 n.17. For a further discussion of *Pierce*, see supra notes 27-28, 53-58 and accompanying text.

\(^74\) Id. at 112.

\(^75\) Id. at 113. The court also noted that because the defendant in *Meyer* was a teacher, not a parent, any discussion of parental rights was "dicta at best." Id. at 113 n.23.

\(^76\) See, e.g., *Scoma v. Chicago Bd. of Educ.*, 391 F.Supp. 452, 461 (N.D. Ill. 1974) (finding that parents challenging Illinois compulsory attendance statute,
with the clarity of its analysis. Several courts have avoided concrete analysis of the issue of whether parents possess a fundamental right to direct their children's education; instead they merely parrot the United States Supreme Court's language. For example, the Alabama Court of Criminal Appeals did this in *State v. Jernigan*.

In *Jernigan*, the parents instructing their children in a home school violated Alabama's compulsory attendance law because the wife did not possess a state teacher's license, violating the statutory definition of a private tutor. The parents claimed, among other grounds, that the law violated their fundamental parental liberty. The court, rather than expressly ruling on the existence of such a fundamental right, simply quoted the language of *Meyer*, *Pierce* and *Yoder* and held that a state may impose such reasonable regulations upon education. The court made no attempt either to flesh out the relative weight of the competing interests or to define the limits of what is reasonable. For this reason, *Jernigan* and cases like it offer limited guidance to parents who wish to home school.

Given the judiciary's often harsh and occasionally muddled treatment of the parental right to teach their children at home, parents can have little confidence that their interest in directing their children's education will overcome compulsory attendance statutes. The viability of parental right claims may well increase in the future, but for the moment, their effectiveness is limited to the realm of religious instruction.

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that effectively barred home schools, had not established that a fundamental right had been abridged by statute). For other decisions also explicitly rejecting the parental fundamental right, see *supra* note 65.


79. *Id.* at 1246.

80. *Id.* at 1246. The parents also contended that the law violated their freedom of religion and was overbroad. *Id.* at 1244, 1247. The parents claimed that the law violated their freedom of religion because it compelled them to send their children to a public school, in violation of their religious beliefs. *Id.* at 1242.

81. *Id.* at 1246-47.

82. See *id.* at 1246 (stating broadly that "[a] state's power to require basic education of its citizens in order to promote legitimate state interests is undisputedly recognized").

83. See *People v. Bennett*, 501 N.W.2d 106, 114-15 (Mich. 1993) (stating that case law "recognize[s] the choice of a home school as protected under a parent's fundamental right, but only under the fundamental right to direct a child's religious education"). For a further discussion of the role of parental rights claims in the free exercise of religion, see *infra* notes 84-127 and accompanying text.
2. Free Exercise of Religion

The Free Exercise Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”  

The Free Exercise Clause protects parents whose religious beliefs are burdened by state compulsory school attendance laws. In *Sherbert v. Verner*, the Supreme Court established a test for determining whether a state law impermissibly burdens an individual’s free exercise of his or her religious beliefs. Under the *Sherbert* test, a state law that burdens an individual’s ability to exercise sincerely-held religious beliefs is unconstitutional unless it furthers a compelling state interest and no less restrictive alternative form of regulation exists that would further the state’s interest.

Building on *Sherbert*, the Court in *Wisconsin v. Yoder* applied a Free Exercise Clause analysis to the Wisconsin compulsory attendance law. In *Yoder*, Amish parents sought relief from a law that would require them to send their children to formal schools beyond the eighth grade, in violation of Amish religious beliefs. The Court focused on the sincerity of

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84. U.S. CONST. amend. I. The First Amendment is made applicable to the states by the Fourteenth Amendment. *See*, e.g., Fiske v. Kansas, 274 U.S. 380 (1927) (finding Kansas statute punishing advocacy of “criminal syndicalism” unconstitutional).

85. *See* Smith & Klicka, *supra* note 4, at 311 (observing that religiously motivated parents may assert free exercise of religion defense).


87. *Id.* at 403-09. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturdays, the Sabbath Day of her faith. *Id.* at 399. When she was unable to obtain other employment due to her refusal to work on Saturdays, she filed a claim for state unemployment benefits under the South Carolina Unemployment Compensation Act. *Id.* at 399-400. The Act provided that a claimant is ineligible for benefits if the claimant has failed, without good cause, to accept available suitable work when offered. *Id.* at 400. The state Employment Security Commission denied the applicant’s claim on the ground that she would not accept suitable work when offered. *Id.* at 401. Its action was sustained by the South Carolina Supreme Court. *Id.* The United States Supreme Court reversed, holding that the South Carolina statute, as applied, violated the applicant’s First Amendment right to the free exercise of her religion, made applicable to the states by the Fourteenth Amendment. *Id.* at 401-10.

88. *Id.* at 406-09.

89. *Yoder*, 406 U.S. 205, 213-36. The Wisconsin compulsory attendance law provided, in pertinent part: “Unless the child has a legal excuse or has graduated from high school, any person having under his [or her] control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session . . . .” *Id.* at 207 (quoting *Wis. Stat.* § 118.15(1)(a) (1969)). Exceptions were granted for children who were physically or mentally unable to attend school and for children receiving instruction elsewhere that was approved by the state superintendent as substantially equivalent to the instruction available in the local public or private schools. *Id.* (quoting *Wis. Stat.* § 118.15(3), (4) (1969)).

90. *Yoder*, 406 U.S. at 207-09. The Amish believed that, by sending their children to high school, “they would not only expose themselves to the danger of the
the Amish beliefs, the significant burden the state law placed on these beliefs, the particular characteristics of the Amish culture and the lack of a compelling state interest held that the law, as applied to the Amish, was unconstitutional.

A four point test for evaluating free exercise claims emerged from Yoder and its progeny. First, the individual must have a sincere religious belief. Second, this belief must be burdened by a state regulation. Third, the state must have a compelling interest in maintaining the law. Fourth, the state must have chosen the least restrictive means of achieving its goal. Thus, under the Yoder test, even if the first two elements are

censure of the church community, but... also [would] endanger their own salvation and that of their children.” Id. at 209.

91. Id. at 216-17. The Court found that the record in the case “abundantly support[ed]” the claim that the Amish way of life was not merely a matter of personal preference based upon philosophical beliefs, but rather was a matter of deep religious conviction. Id. at 216. The Court noted the intimate, if not dominant, role of religion in Amish daily life, as well as the unchanging nature of this lifestyle in a period of “unparalleled progress” in the outside world, as evidence of the sincerity of the Amish beliefs. Id. at 216-17. In fact, the state stipulated that the religious beliefs of the Amish were sincere. Id. at 209.

92. Id. at 217-19. The Court concluded by stating that: [S]econdary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child. Id. at 218.

93. Id. at 221-29. The Court stressed the continued success and self-sufficiency of the Amish community, and the tendency for nearly all Amish children to remain in the community throughout their lives. Id. at 222-24. In view of these characteristics, the Court determined that an additional one or two years of formal education would do little to serve the state’s interests in preparing its citizens to participate effectively in a democratic political system and in ensuring a self-reliant and self-sufficient populace. Id. at 221-22.

94. Id. at 235-36.

95. See Lines, supra note 36, at 200-01 (summarizing test for evaluating free exercise claims under Yoder and its progeny).

96. Yoder, 406 U.S. at 215-17. The Court emphasized that, to warrant the protection of the Religion Clauses, a claim must be rooted in religious belief. Id. at 215. Purely secular considerations are not protected by the Religion Clauses. Id. at 215-16.

97. Id. at 217-19. In Yoder, the state compulsory attendance law severely burdened the Amish religious beliefs, forcing the Amish to choose between complying with the law and abandoning their religious beliefs, not complying with the law and facing possible criminal sanctions, or migrating to a more tolerant region. Id. at 218-19. The Court found that the law “would gravely endanger if not destroy” the Amish right to free exercise of their religious beliefs. Id. at 219.

98. See Sherbert v. Verner, 374 U.S. 398, 406-07 (1963) (stating that Court “must next consider whether some compelling state interest... justifies the substantial infringement of appellant’s First Amendment right”).

99. Id. at 407-09 (stating that “it [is] incumbent upon [the state] to demonstrate that no alternative forms of regulation would [meet the state’s goal] without infringing First Amendment rights”).
present, the law does not unconstitutionally infringe on an individual's religious freedom if both the third and fourth elements are satisfied. Generally, courts applying the test merely weigh the individual's interest in the free exercise of religion against the state's interest in ensuring an educated citizenry.

The United States Supreme Court's recent decision in Rule 10.2(c) Employment Division, Department of Human Resources of Oregon v. Smith, however, modifies the use of the Sherbert and Yoder tests. Under Smith, a law that only incidentally infringes on the free exercise of religion is fully enforceable, regardless of the burden it may place on an individual's religious beliefs. Therefore, any generally applicable, neutral state law will survive a free exercise claim, unless the claim is offered "in conjunction with other constitutional protections, such as... the right of parents... to direct the education of their children."

100. See Kathleen P. Kelly, Abandoning the Compelling Interest Test in Free Exercise Cases: Employment Division, Dep't of Human Resources v. Smith, 40 CATH. U. L. REV. 929, 930 (1991) (stating that "[o]nce the plaintiffs demonstrate that they hold a sincere religious belief, the Court will exempt them from the legislation unless the government can prove both that the law is necessary to achieve a compelling state interest and that the law is the 'least restrictive means' available to achieve that objective"); Lines, supra note 36, at 200-01 (stating that if court finds significant burden placed on sincerely held religious belief, court next must consider whether state has compelling justification for its law and whether it has chosen least restrictive means of achieving its goals); Smith and Klicka, supra note 4, at 311-13 (stating that once parents meet burden under first two prongs of test, law is deemed unconstitutional unless state meets its burden under final two prongs of test).

101. See Lines, supra note 36, at 201 (concluding that, in analysis of free exercise claims, courts generally balance interest of individual in free exercise of religion against interest of state in educated citizenry).


103. Id. at 876-82. In Smith, two employees of a private drug rehabilitation organization were fired because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. Id. at 874. Their applications for unemployment compensation were denied by the State of Oregon under a state law disqualifying employees discharged for work-related misconduct. Id. The Oregon Court of Appeals reversed, holding that the denial of benefits violated the applicants' free exercise rights. Id. The Oregon Supreme Court affirmed. Id. The United States Supreme Court vacated the judgment and remanded for a determination whether sacramental peyote use is proscribed by the state's controlled substance law. Id. at 875-76. On remand, the Oregon Supreme Court held that sacramental peyote use was prohibited by the state statute, but concluded that the prohibition was invalid under the Free Exercise Clause. Id. at 876. The United States Supreme Court again reversed, holding that the Free Exercise Clause permits a state to proscribe sacramental peyote use and thus to deny unemployment benefits to persons discharged for its use. Id. at 876-90.

104. Id. at 876-82.

105. Id. at 881 (citations omitted).
Given the language of Smith, commentators agree that free exercise arguments remain available to religiously motivated home schoolers, even in the face of neutral, generally applicable state compulsory attendance laws. Because all home school cases involve the right of parents to direct the education of their children, free exercise issues necessarily arise. Therefore, courts must apply strict scrutiny even if the challenged law only indirectly affects the parents' religious freedom.

The recent Michigan Supreme Court decision in People v. DeJonge demonstrates the treatment of free exercise claims by home schoolers after Smith. In DeJonge, parents who taught their children at home without complying with a state certification requirement were convicted under Michigan's compulsory attendance law. The parents contended that the certification requirement violated their First Amendment right of free exercise of religion. Citing Smith, the court ruled that the parents' free exercise claim, in conjunction with the parental right to direct their children's education, demanded the application of strict scrutiny. Following the Yoder test, the court initially found that the parents possessed a sincere religious belief and that the state regulation imposed a burden on this belief. The court then attempted to determine whether a com-

106. See Dorman, supra note 3, at 743 (stating that "[i]t... remains clear that where the free exercise of religion - accompanied by another "constitutional protection[ ]" - is infringed directly or indirectly, courts must apply strict scrutiny"); Murphy, supra note 2, at 467-68 (suggesting four approaches for use of free exercise claim after Smith: alleging statute is not generally applicable, alleging statute is not religiously neutral, combining free exercise claim with another constitutionally based claim or seeking religious exemptions through political process).


108. Id. at 134-43.
109. Id. at 129-30. For the text of the Michigan compulsory attendance statute, see supra note 67.
110. DeJonge, 501 N.W.2d at 131. The parents also maintained that the certification requirement infringed upon their Fourteenth Amendment right to direct the education of their children. Id. at 150 n.5. However, the court did not reach that issue in the case. Id.
111. Id. at 134-35.
112. Id. at 135. The court accepted the findings of the trial judge that the certification requirement conflicted with the honest and sincere religious beliefs of the parents. Id. at 130.
113. Id. at 136-37. According to the court, "[a] burden may be shown if the affected individuals [would] be coerced by the Government's action into violating their religious beliefs [or whether] government action [would] penalize religious activity by denying any person an equal share of the rights, benefits, and privileges
pelling state interest justified this burden. Because the state failed to show that the certification requirement was essential to promote the state's interest in universal education, the court found that the state's interest in the certification requirement was not compelling. Furthermore, the court found that less restrictive alternatives to the certification requirement were available. Because the state failed to meet the final two elements of the test, the court held that the teacher certification requirement was an unconstitutional violation of the Free Exercise Clause, as applied to parents whose religious convictions prohibited the use of certified teachers.

A key distinction exists between Dejonge and cases in which free exercise challenges by home schoolers have failed: the court's characterization of the state's interest. When the court views the interest pursued by the state as being in the method or manner of education as in Dejonge, the court is unlikely to find this state interest to be compelling. However, when the court characterizes the state's interest as ensuring that all children receive an adequate education, the court will almost certainly consider this interest compelling. The Dejonge analysis appears to be the better of the two approaches because it recognizes that the state, in most cases, is not contending that a

114. Id. at 136 (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988)). The court then concluded that the Michigan law, that forced the parents to choose between violating the law of God or the law of man, represented a burden on the exercise of the parents' religious freedom. Id. at 137.

115. Id. at 137-41. The court found that the "nearly universal consensus" of the other states is not to demand teacher certification, and that this fact "provides irrefutable evidence that the certification requirement is not an interest worthy of being deemed 'compelling.'" Id. at 141.

116. Id. at 140-43. The court emphasized that the appellate court had erroneously placed the burden of proof upon the parents. Id. at 149. The burden is not upon citizens to propose a less obtrusive alternative, it is upon the state to show that no such alternatives exist. Id. at 143-44. The court noted, however, that individualized, standardized achievement tests represented one possible alternative for monitoring the education of home school students. Id. at 141 n.52; see also State ex rel. Nagel v. Olin, 415 N.E.2d 279, 286-88 (Ohio 1980) (holding that state board of education standards were not least restrictive alternative and therefore unconstitutionally burdened parent's free exercise right to send daughter to Amish school).

117. DeJonge, 501 N.W.2d at 144.

118. Id. at 139.

particular home school is not providing an adequate education. If a home school is competently educating the children, the state interest in the education of children is satisfied. Therefore, the actual state interest in such a situation is in controlling the manner of education, such as demanding that all teachers be certified. This interest should be deemed compelling, only if it is essential to meeting the overall goal of ensuring that all children within the state receive an adequate education.

Apart from the court's characterization of the state's interest, home schoolers may also encounter problems when challenging provisions of compulsory attendance laws that courts view as too minor to significantly infringe upon the free exercise of religion. For example, courts have summarily dismissed free exercise challenges to state statutes requiring that home schoolers obtain pre-approval of any home instruction program, reasoning that approval requirements represent the least restrictive means of fulfilling the state's compelling interest. When the government interference is more significant, however, free exercise claims may prove to be an effective defense for religiously motivated parents.

It should be noted that recent legislation may render any Smith analysis moot. The Religious Freedom Restoration Act of 1994 purports to restore the compelling interest test as it existed before Smith. The Act re-establishes the requirement that government must have a compelling interest to substantially interfere with the free exercise of religion. Because Smith does not adversely affect the ability of home schoolers to make

120. See DeJonge, 501 N.W.2d at 130 (noting that "the prosecution never questioned the adequacy of the [parents'] instruction or the education the children received"). For a discussion of the level of educational achievement of home school students, see supra note 12.

121. See id. at 139. In describing the state's interest in a teacher certification requirement, the Michigan Supreme Court stated that "the state's interest is simply the certification requirement ... not the general objectives of compulsory education. The interest the state pursues is in the manner of education, not its goals." Id.; see also Care & Protection of Charles, 504 N.E.2d 592, 600 (Mass. 1987) (determining that state's interest cannot lie in ensuring "that the educational process be dictated in its minutest detail"); People v. Bennett, 501 N.W.2d 106, 124 (Mich. 1993) (Riley, J., concurring in part and dissenting in part) (finding that "a careful examination of the state interest in the instant case reveals that it is not compulsory education per se, but the manner of education").

122. See DeJonge, 501 N.W.2d at 140 (stating that "[t]he state ... must establish that enforcing the certification requirement ... is essential to ensure the education required by the compulsory education law").

123. See, e.g., New Life Baptist Church, 885 F.2d at 944-51 (finding that state has compelling interest in pre-approval of private religious schools and that such approval constitutes least restrictive means of fulfilling this interest); Blount, 551 A.2d at 1379-85 (same).


free exercise arguments, however, the enactment of such legislation should have little impact on home schoolers.\textsuperscript{127}

3. Vagueness

A third challenge a parent may raise against a compulsory attendance law is that the law is impermissibly vague. In \textit{Connally v. General Construction Company},\textsuperscript{128} the United States Supreme Court held that a statute is void due to vagueness if the conduct forbidden by the statute is so vaguely or unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."\textsuperscript{129} The danger of vague laws is that such laws do not allow ordinary citizens to determine which acts are lawful and which are prohibited.\textsuperscript{130} Furthermore, vague laws give unwarranted discretion to enforcing officials and may inhibit the exercise of protected civil rights.\textsuperscript{131} The vagueness objection is available to all home schoolers, whether religiously or secularly motivated, and has proven to be an effective means of challenging many state statutes.\textsuperscript{132}

Statutes that are vulnerable to vagueness challenges characteristically employ broad, undefined language that is neither clarified elsewhere in the statute nor, in any government guidelines or regulations.\textsuperscript{133} One example of allegedly vague statutory language, often used in state compulsory attendance laws, is language that grants an exemption from public school attendance to children receiving substantially equivalent instruction outside of the public schools.\textsuperscript{134} If the statute elsewhere contains re-

\textsuperscript{127} For a discussion of the proposition that \textit{Smith} has little impact on home schoolers, see \textit{supra} note 106 and accompanying text.

\textsuperscript{128} 269 U.S. 385 (1926).

\textsuperscript{129} \textit{Id.} at 391.

\textsuperscript{130} See Lines, \textit{supra} note 36, at 211 (citing 	extit{Grayned v. City of Rockford}, 408 U.S. 104, 108-10 (1972)).

\textsuperscript{131} \textit{Id.}


\textsuperscript{133} See \textit{Lachman}, \textit{supra} note 64, at 744 (citing examples of impermissibly vague language). For a discussion of specific compulsory attendance statutes found to be unconstitutionally vague, see \textit{infra} notes 137-39 and 142-44 and accompanying text.

requirements governing instruction and teacher qualifications for the public schools, courts have concluded that the average person could make sense of the statute and have upheld the statute against vagueness challenges. Similarly, if the state has promulgated regulations defining the meaning of the terms and their requirements, courts have held that the average person could understand the statute, through examination of the regulations, and have upheld the statute. Where, however, a statute containing equivalency language is not illuminated by either statutory provisions or state regulations, courts in Iowa, Minnesota and Missouri have declared the statutes unconstitutionally vague.

Another example of common statutory language vulnerable to a vagueness challenge is where a compulsory attendance statute allows an

135. See, e.g., Clonlara, Inc. v. Runkel, 722 F. Supp. 1442, 1460 (E.D. Mich. 1989) (upholding Michigan compulsory attendance law against vagueness claim on ground that legislature had provided adequate statutory guidance); Care & Protection of Charles, 504 N.E.2d 592, 596-98 (Mass. 1987) (upholding state compulsory attendance law against vagueness claim on ground that adequate standards for approval of home schools, although not explicitly listed in statute, could be gathered from related statutes dealing with education).


137. Fellowship Baptist Church v. Benton, 620 F. Supp. 308, 318 (S.D. Iowa 1985), aff'd in part, rev'd in part, 815 F.2d 485, 495-96 (8th Cir. 1987). The Eighth Circuit affirmed the finding of the district court that the term "equivalent instruction" in the Iowa statute was unconstitutionally vague, but remanded for further consideration in light of newly adopted standards by the state. Id.

138. State v. Newstrom, 371 N.W.2d 525, 533 (Minn. 1985). The requirement of the Minnesota statute that home school teachers have qualifications "essentially equivalent" to public school teachers was struck down as unconstitutionally vague. Id.

139. Ellis v. O'Hara, 612 F. Supp. 379, 380-82 (E.D. Mo. 1985), rev'd on other grounds, 802 F.2d 462 (8th Cir. 1986). Because the term "substantially equivalent" was not defined in the statute or clarified by regulations, the district court struck down the Missouri compulsory attendance statute as unconstitutionally vague. 612 F. Supp. at 380-82. The Eighth Circuit reversed on the ground of mootness after Missouri amended the statute. 802 F.2d at 463.
exemption for "private schools" or for students instructed by a "qualified" or "competent" private tutor. Again, unless the state clarifies the meaning of this language through statutory definition or regulation, courts may strike down the statute for vagueness, as they have done in Georgia, Pennsylvania and Wisconsin. Generally, if the state has provided no standards or definitions, either by statute or by regulation, the parent has an excellent chance of defeating the statutory requirements on vagueness grounds.

4. Lack of Neutral, Detached Magistrate

A fourth defense available to home schoolers is a Fourteenth Amendment procedural due process argument that decisions affecting fundamental rights must be made by a neutral and detached magistrate. Decisions impacting the fundamental rights of citizens cannot be made by


142. Roemhild v. State, 308 S.E.2d 154, 156-59 (Ga. 1983). The lack of any statutory language or administrative rules or regulations defining the term "private school" rendered the Georgia statute unconstitutionally vague. Id.

143. Jeffery v. O'Donnell, 702 F. Supp. 516, 520-21 (M.D. Pa. 1988). The court struck down the Pennsylvania statute as unconstitutionally vague because the court could find "no standards for determining who is a qualified tutor or what is a satisfactory curriculum in any [school] district." Id. at 521. There was wide disagreement among the school districts themselves as to the meaning of the statute; among the 501 districts there were as many as 36 different interpretations of the statute. Id. at 520.

144. State v. Popanz, 392 N.W.2d 750, 756 (Wis. 1983). The court held the term "private school" to be unconstitutionally vague where it was undefined by the statute or regulations. Id.

145. See, e.g., id. But see Burrow v. State, 669 S.W.2d 441, 443 (Ark. 1984) (finding term "private school" not unconstitutionally vague on ground that average person would derive instruction from common meaning of words); State v. Buckner, 472 So. 2d 1228, 1229-30 (Fla. Dist. Ct. App. 1985) (same).

persons or entities that have an interest in the matter.\textsuperscript{147} For example, school boards and school superintendents may have a financial incentive to rule against home schoolers because public schools are generally partially funded on the basis of their average daily attendance.\textsuperscript{148}

Although at least one court has considered the possibility of a due process violation when a school board or superintendent has the discretion to approve or disapprove requests to establish home schools,\textsuperscript{149} the majority of courts have rejected this argument.\textsuperscript{150} These courts have consistently rejected the need for a completely neutral, detached magistrate by construing the school board's function as ministerial rather than discretionary,\textsuperscript{151} labeling the superintendent's decision-making authority as "not unbridled,"\textsuperscript{152} or finding that the probability of actual bias on the part of school officials is not high enough to be unconstitutionally intolerable.\textsuperscript{153}

In any case, the objection is of questionable value to home schoolers in light of the majority of courts' reluctance to accept the argument that parents have a fundamental right to direct their children's education.\textsuperscript{154} If the courts do not recognize this interest as fundamental, any invalidity claim based on the lack of a neutral, detached magistrate is seriously undermined.\textsuperscript{155} Furthermore, any statute that grants broad decision-making authority to officials may be subject to a vagueness challenge.\textsuperscript{156} Although religiously motivated parents, whose free exercise of religion is affected by

\textsuperscript{147.} See id. at 514-16.
\textsuperscript{148.} See Fellowship Baptist Church v. Benton, 620 F. Supp. 308, 318 (S.D. Iowa 1985) (reversed with regard to payment of attorney's fees), \textit{aff'd in part, rev'd in part}, 815 F.2d 485 (8th Cir. 1987). In \textit{Benton}, the district court recognized that "local school boards have an inherent conflict of interest since each student in a private school is potentially a source of additional state aid." \textit{Id}. at 318.
\textsuperscript{149.} \textit{Id}.
\textsuperscript{150.} See \textit{Care & Protection of Charles}, 504 N.E.2d 592, 597-98 (Mass. 1987) (holding that statute delegating power to approve home schools to school boards was constitutional); \textit{State v. Brewer}, 444 N.W.2d 923, 924-25 (N.D. 1989) (holding that statute granting school boards power to determine whether students are entitled to exemptions from compulsory school attendance was constitutional); \textit{State v. Anderson}, 427 N.W.2d 316, 320 (N.D.), \textit{cert. denied}, 488 U.S. 965 (1988) (holding that statute granting school boards power to monitor attendance of home school children was constitutional).
\textsuperscript{151.} \textit{Anderson}, 427 N.W.2d at 320.
\textsuperscript{152.} \textit{Charles}, 504 N.E.2d at 598.
\textsuperscript{153.} \textit{Brewer}, 444 N.W.2d at 924-25; see also \textit{Crites v. Smith}, 826 S.W.2d 459, 464-66 (Tenn. Ct. App. 1991) (holding that commissioner of department of education was acting within his discretion in interpreting baccalaureate degree exemption clause in state home schooling statute so as to grant zero exemptions over span of six years).
\textsuperscript{154.} For a discussion of the proposition that parents have a fundamental right to direct their children's education, see \textit{supra} notes 46-83 and accompanying text.
\textsuperscript{156.} See \textit{Charles}, 504 N.E.2d at 596 (noting that claims for vagueness and claims for unlawful delegation of legislative authority are closely related).
a school board's or superintendent's decision, may have a procedural due process claim, such an objection is more easily advanced through a free exercise claim.\footnote{157}

5. Establishment Clause

Another possible defense available to religiously motivated home schoolers is that the statute in question violates the Establishment Clause of the First Amendment.\footnote{158} In \textit{Lemon v. Kurtzman},\footnote{159} the United States Supreme Court set forth a three prong test for determining whether a statute can survive an Establishment Clause challenge: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[;] . . . finally, the statute must not foster 'an excessive government entanglement with religion.' "\footnote{160} Although the Court has not overruled \textit{Lemon}, more recent decisions have focused upon the single issue of whether the state has endorsed or coerced participation in a particular religion.\footnote{161}

The Establishment Clause could conceivably apply to home education by prohibiting excessive government supervision of religious home schools.\footnote{162} The few higher courts that have considered the matter, however, have rejected this defense.\footnote{163} These courts have found that require-

\footnote{157. For a discussion of free exercise challenges, see \textit{supra} notes 84-127 and accompanying text.}


\footnote{159. 403 U.S. 602 (1971).

\footnote{160. \textit{Id.} at 612-13 (citations omitted).


\footnote{162. \textit{Lines, supra} note 36, at 209-10 (finding that certain compulsory attendance laws may be subject to Establishment Clause attack based upon excessive entanglement of church and state).


http://digitalcommons.law.villanova.edu/vlr/vol39/iss5/5
ments of government approval and teacher certification represent an example of the inevitable and necessary relationship between church and state and do not constitute a violation of any of the three elements of the Lemon test. In light of the relatively minor entanglement of church and state resulting from government monitoring of home education programs, it is doubtful that either the Lemon or more recent tests will provide relief to home schoolers under the Establishment Clause.

6. **Equal Protection**

Home schoolers have also invoked the Equal Protection Clause of the Fourteenth Amendment as a challenge to state compulsory attendance statutes. Generally, courts have not found that home schoolers represent a suspect class or that the laws impair a fundamental right, and thus have refused to apply strict scrutiny to the statutes. In most instances, home schoolers have failed to demonstrate that the statutes have a discriminatory purpose. As a result, the courts have declined to find a suspect classification.

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164. See Sheridan, 396 N.W.2d at 383 (discussing Lemon three prong test for determining whether statute violates Establishment Clause); Anderson, 427 N.W.2d at 320-21 (same).


166. See, e.g., Murphy, 852 F.2d at 1043-44 (stating that "[w]hile home school families impelled by deep-seated religious convictions might be the type of 'discrete and insular minority' to which Justice Stone referred in footnote four of United States v. Carolene Prod. Co. [citations omitted], the broad secular category of individuals who prefer to school their children at home is not"); Null, 815 F. Supp. at 940 (noting that complaint referred to no suspect class and applying rational basis test); Scoma, 391 F. Supp. at 461-62 (same).


168. See Murphy, 852 F.2d at 1043-44 (refusing to apply strict scrutiny because of lack of showing of discriminatory intent); Clonlara, 722 F. Supp. at 1457 (same).
In Texas Education Agency v. Leeper, however, home schoolers successfully challenged a compulsory attendance policy on the ground that the classification did not bear even a rational relationship to a valid state objective. In Leeper, a Texas court held that the Texas Education Agency's interpretation of a state compulsory attendance law granting an exemption to children attending private or parochial schools violated home educators' equal protection rights. The Agency had refused to designate home schools as a member of this exempt class, based solely on the fact that such schools were located in private homes. Because the distinction in classification bore no "fair and substantial relation" to the state's objective of educating all children, the court found that the parents had been deprived of equal protection under the law.

Home schoolers will need to employ challenges, including those based on the Free Exercise Clause; the parental liberty interest under the Fourteenth Amendment; vagueness; lack of a neutral, detached magistrate; the Establishment Clause; or the Equal Protection Clause only if they live in a state that places burdensome restrictions upon home education. The states differ widely in their treatment of home schooling, and prospective home schoolers should examine the compulsory education laws of their state to determine what requirements exist. In part IV, this Comment analyzes the requirements found in the compulsory education statutes of the fifty states and the District of Columbia.

IV. Statutory Analysis

Compulsory school attendance laws exist in every state and the District of Columbia. As recently as 1983, only about half of these states

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170. Id. at 50-51. Leeper was a class action suit brought by home school parents and home school providers seeking a declaratory judgment that home schools meeting certain criteria are exempt from the Texas compulsory attendance law under the statute's private or parochial school exemption. Id. at 43-44.

171. Id. at 50-51.

172. Id. at 46-47.

173. Id. at 50-51. According to the court:
[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.

Id. at 50.

permitted home instruction by a parent. As a result of rapid gains accomplished by home schoolers through the state legislatures, however, all of the states and the District of Columbia now allow home schooling under certain conditions. Still, there remains great disparity among the states in the extent that home schools are regulated. The following sections will serve to roughly categorize the various state approaches to home schooling and to analyze their impact on home schoolers, as well as to note briefly the possible objections to the regulations available to home schoolers. Section A will examine those states that exempt home instruction that is substantially equivalent to the instruction provided in the public schools. Section B will look at those states that treat home schools as private or church schools. Finally, Section C will examine those states that explicitly exempt home instruction, and will further analyze the different notification and approval requirements, time and curricular requirements. 


175. See Lines, supra note 36, at 197 (stating that, in 1983, about one-half of states permitted home instruction). Those states that did allow home instruction by an uncertified parent in 1983 are Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Pennsylvania, Tennessee, Texas, Washington and Wyoming. Id. at 227-34.

176. See Devins, supra note 9, at 819 (noting that 34 states have adopted home schooling statutes or regulations since 1982).

177. See Smith and Klicka, supra note 4, at 306 (finding that all states permit home schooling under certain conditions).

178. For a general discussion of the objections to state regulations available to home schoolers, see supra notes 39-173 and accompanying text.

179. For a further discussion of equivalent instruction states, see infra notes 182-86 and accompanying text.

180. For a further discussion of states that treat home schools as private or church schools, see infra notes 187-98 and accompanying text.
ulum requirements, teacher qualification requirements and assessment requirements provided in the various statutes.\textsuperscript{181}

A. Equivalent Instruction

Thirteen states make no explicit provision for home schools but do allow as an exemption to compulsory school attendance instruction that is substantially equivalent to that provided in the public schools.\textsuperscript{182} These states excuse children from attending public schools if, for example, the child "is otherwise provided with alternate instruction for an equivalent period of time, as in the public schools, in the basic skills of language arts and mathematics."\textsuperscript{183} Residents of these states who wish to educate their children at home should consult with their state board of education to determine by which home school regulations they must abide.

The most common problem confronting home schoolers in equivalent instruction jurisdictions is when a regulation exists with which a home schooler, for any number of reasons, refuses to comply.\textsuperscript{184} Often, the regulation infringes upon the home schooler's religious beliefs.\textsuperscript{185}

\textsuperscript{181} For a further discussion of states that explicitly exempt home instruction, see infra notes 199-228 and accompanying text.

\textsuperscript{182} See, e.g., CONN. GEN. STAT. ANN. § 10-184 (West 1986) (exempting child from compulsory attendance if "parent or person having control of such child is able to show that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools"); IDAHO CODE § 33-202 (Supp. 1994) (exempting child from compulsory attendance if child "is otherwise comparably instructed in subjects commonly taught in state public schools"); IND. CODE ANN. § 20-8.1-3-34 (West 1995) (exempting child from compulsory attendance if child "is being provided with instruction equivalent to that given in the public schools"). The remaining states that grant an exemption to compulsory attendance for instruction that is substantially equivalent to that provided in the public schools include: ALASKA STAT. § 14.30.010(b)(11) (1992); DEL. CODE ANN. tit. 14, § 2703 (1993); ME. REV. STAT. ANN. tit. 20-A, § 5001-A(3) (West 1993); MD. CODE ANN., EDUC. § 7-301(a) (1991); MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1982 & Supp. 1994); NEV. REV. STAT. ANN. § 392.070 (Michie 1991); N.J. STAT. ANN. § 18A:38-25 (West 1989); N.Y. EDUC. LAW § 3204(2) (McKinney 1995); OKLA. STAT. ANN. tit. 70, § 10-105 (West Supp. 1995); S.D. CODIFIED LAWS ANN. § 13-27-3 (Supp. 1994).


\textsuperscript{184} See Blackwelder v. Safnauer, 866 F.2d 548, 549 (2d Cir. 1989) (parents challenging regulation requiring home educators to provide school district with detailed course and teacher information and to allow home visits by school officials); New Life Baptist Church Academy v. Town of E. Longmeadow, 885 F.2d 940, 941 (1st Cir. 1989) (parents challenging state approval regulation); cert. denied, 494 U.S. 1066 (1990); Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377, 1378 (Me. 1988) (parents challenging state prior approval regulation); State v. McDonough, 468 A.2d 977, 978 (Me. 1983) (parents refusing to submit home instruction plan or to obtain pre-approval required by state regulation).

\textsuperscript{185} New Life Baptist Church, 885 F.2d at 944 (state approval burdens religious beliefs of home school); see Blount, 551 A.2d at 1379-80 (state pre-approval requirement infringing on parents' sincerely held religious belief).
For the most part, however, equivalent instruction states have seen considerably less home school litigation than states taking other approaches. 186

B. Private and Church Schools

Eight states that do not explicitly recognize home schooling as an exemption to compulsory school attendance instead include home schools under private or church school exemptions. 187 These jurisdictions treat home schools as private or church schools, 188 and demand that a home school meet all of the requirements for either a private or church school. 189

Alabama, Kansas, Michigan and Nebraska are among the most demanding states in their treatment of home schools. 190 Alabama requires home schools operated as private schools to have a state certification, and also requires that all private school teachers be certified. 191 The only way

186. But see Jane E. Bahls, The HSLDA Gives a Legal Boost to Parents Who Have Turned Their Living Rooms into Classrooms, STUDENT LAWYER, Dec. 1993, at 38 (noting that in Massachusetts one-third of state's Home School Legal Defense Association members have called Association with legal problems in past year).

187. See, e.g., ALA. CODE §§ 16-28-1, -3, -5 (1987). The Alabama Code provides that "[e]very child between the ages of seven and 16 years shall be required to attend a public school, private school, church school, or be instructed by a competent private tutor for the entire length of the school term." Id. § 16-28-3. Also, all private schools must hold a state certificate and "[t]he instruction in such schools ... shall be by persons holding certificates issued by the state superintendent of education." Id. § 16-28-1. The statute defines church schools as schools "operated as a ministry of a local church, group of churches, denomination, and/or association of churches on a nonprofit basis which do not receive any state or federal funding." Id. Moreover, "[i]nstruction by a private tutor means and includes only instruction by a person who holds a certificate issued by the state superintendent of education." Id. § 16-28-5.

188. See, e.g., CAL. EDUC. CODE §§ 48222, 48224 (West 1993) (providing that all "[c]hildren who are being instructed in a private full-time day school by persons capable of teaching shall be exempted" from public school attendance and, alternatively, children may be instructed at home by a private tutor holding "a valid state credential for the grade taught"); ILL. ANN. STAT. ch. 105, para. 5/ 26-1(1) (Smith-Hurd 1993) (exempting from compulsory attendance "[a]ny child attending a private or parochial school where children are taught the branches of education taught to children of corresponding age and grade in the public schools").

189. See, e.g., KY. REV. STAT. ANN. § 159.030(b) (Michie/Bobbs-Merrill 1992) (exempting from compulsory attendance only children "[w]ho [are] enrolled and in regular attendance in a private, parochial, or church regular day school"). Kentucky is unique in that section five of the Kentucky Constitution provides that no person shall "be compelled to send his child to any school to which he may be conscientiously opposed." KY. CONST., § 5.

190. See, e.g., KAN. STAT. ANN. § 72-1111 (a) (1992) (exempting child from compulsory attendance if child attends "a private, denominational or parochial school taught by a competent instructor"); NEB. REV. STAT. § 79-1701 (1994) (granting alternative of attending private, denominational or parochial school, which may elect "not to meet state accreditation and approval requirements" if certain conditions are met, including condition that parents certify that state accreditation and approval requirements "violate sincerely held religious beliefs").

to escape the certification requirements is for home schools to operate as church schools, meaning that they must be "operated as a ministry of a local church, group of churches, denomination, and/or association of churches." 192 This clearly presents a dilemma to the home schooler who is not religiously motivated.

A similar dilemma faces home schoolers in Nebraska and Kansas. Under Nebraska state law, all private schools must be approved and accredited, processes that require teacher certification, unless parents certify that the approval and accreditation requirements violate their sincerely held religious beliefs. 193 In Kansas, the state supreme court has ruled that home schools do not qualify under the state's private school exemption from compulsory attendance. 194 Only children attending home schools that are sponsored by a church or religious denomination are exempted. 195

Michigan currently stands as the only state that demands teacher certification for home schoolers under all circumstances. 196 The Michigan Supreme Court upheld this statutory requirement as applied to secularly motivated home schoolers, 197 but found it unconstitutional as applied to those with a sincere religious motivation. 198

192. Id. § 16-28-1(2).
194. See In re Anna Sawyer, 672 P.2d 1093, 1097 (Kan. 1983) (finding that home school does not constitute private school under state statute).
When a recognized church or religious denomination that objects to a regular public high school provides, offers and teaches, either individually or in cooperation with another recognized church or religious denomination, a regularly supervised program of instruction, which is approved by the state board of education, for children of compulsory school attendance age who have successfully completed the eighth grade, participation in such a program by any such children whose parents or persons acting as parents are members of the sponsoring church or religious denomination shall be regarded as acceptable school attendance within the meaning of this act.

Id.

196. Mich. Comp. Laws Ann. § 380.1561(3) (a) (West 1988) (exempting from compulsory attendance any child "who is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade").
197. People v. Bennett, 501 N.W.2d 106 (Mich. 1993) (holding that parents do not have fundamental right to direct their children's secular education free from reasonable regulation).
198. People v. DeJonge, 501 N.W.2d 127 (Mich. 1993) (holding that state failed to show that certification was least restrictive means of achieving state interest under Free Exercise Clause analysis).
C. Statutes Explicitly Recognizing Home Instruction

The remaining thirty jurisdictions expressly exempt home schools or private instruction from their compulsory attendance laws. Generally, the exemption is granted only if the home education program meets several statutory requirements. These requirements typically fall within four categories. First, most states demand that home schoolers notify state or local education authorities of their intentions, and many require pre-approval of any home education program. Second, the great majority of states set minimum time and curriculum requirements for home schools. Third, many states establish minimum qualifications for home school instructors. Finally, states often take steps to assess the academic progress of children enrolled in home schools. Each of these categories is examined below.

1. Notification and Approval

State notification requirements generally demand that home schoolers provide the state with notice of their intent to home school, and often require information regarding the children, teachers and home school itself. These regulations are rarely objectionable to home

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200. For a discussion of state notice and approval requirements, see infra notes 204-08 and accompanying text.

201. For a discussion of state time and curriculum requirements, see infra notes 209-16 and accompanying text.

202. For a discussion of state qualification requirements for home school instructors, see infra notes 217-28 and accompanying text.

203. For a discussion of state academic assessment requirements, see infra notes 229-35 and accompanying text.

204. See Ariz. Rev. Stat. Ann. § 15-802(B)(2) (Supp. 1994) (requiring submission to superintendent of affidavit stating parent's intent to instruct child at home); Ark. Code Ann. § 6-15-503(1)(A) (Michie 1993) (requiring written notice to superintendent of name, date of birth and grade level of each student; name and address of prior school attended by each student; location of home school;
core curriculum; proposed schedule of instruction; and qualifications of teachers); COLO. REV. STAT. ANN. § 22-33-104.5(3)(e) (West Supp. 1994) (requiring annual written notice to school district of name, age and place of residence of each student and hours of attendance); D.C. CODE ANN. § 31-405 (1995) (requiring each teacher who gives private instruction to report to school board of name, address, sex and date of birth of each student); FLA. STAT. ANN. § 232.02(4)(b)(1) (West Supp. 1995) (requiring notice to superintendent within 30 days of establishment of home school program, including name, date of birth and address of each student); GA. CODE ANN. § 20-2-690(c)(1) - (2) (1992) (requiring annual notice to superintendent of intent to home school, name and age of each student, address of home school, and statement of which months will be deemed to constitute school year); HAW. REV. STAT. § 298-9(5) (Supp. 1992) (requiring notice to principal of local public school of intent to home school); IOWA CODE ANN. §§ 299A.3, 299.4 (West Supp. 1994) (requiring filing of form with school district listing name and age of each student, period of instruction, curriculum outline and textbooks, and name and address of instructor); LA. REV. STAT. ANN. § 17:236.1(A)-(C) (West Supp. 1995) (requiring annual filing of application with board of education including birth certificate of each child and certification that curriculum will equal that of public schools, as demonstrated through evidence such as course outlines, textbooks and copies of students' work); MINN. STAT. ANN. § 120.102 (Subd. 1) (West Supp. 1995) (requiring annual notice to superintendent of name, age and address of each student; name of instructor evidence of instructor's competence; and submission of instruction calendar showing instruction for equal to at least 170 days); MISS. CODE ANN. § 37-13-91(3) (Supp. 1994) (requiring filing of certificate of enrollment with board of education, including name, address and date of birth of each student; name and address of parents; signatures of parents; name and address of home school; and description of education to be received); MONT. CODE ANN. § 20-5-109(5) (1993) (requiring annual notice to superintendent of child's attendance at home school); N.H. REV. STAT. ANN. § 193A:5(I)-(II) (Supp. 1994) (requiring annual notice to commissioner, superintendent or principal of intent to home school; name, address and date of birth of each child; and description of subjects to be taught and textbooks to be used); N.M. STAT. ANN. § 22-1-2.1(A) (Michie 1993) (requiring annual notice to superintendent of intent to home school); N.D. CENT. CODE § 15-34.1-06 (1993) (requiring annual notice to superintendent of intent to home school; name, address and date of birth of each student; name and address of parents; intent and qualifications of instructor; curriculum; and submission of oath that will comply with statute); OHIO REV. CODE ANN. § 3321.04(A)(2) (Anderson 1994) (requiring that parents obtain excuse from superintendent to home school); OR. REV. STAT. § 339.035(2) (Supp. 1994) (requiring written notification to superintendent of intent to home school); PA. STAT. ANN. tit. 24, § 13-1827.1(b)(1) (1992) (requiring annual notarized affidavit from parents including name and age of each student, name of teacher, address and telephone number of home school, outlines of required subjects, immunization records and certification that instructor has not been convicted of criminal offense); R.I. GEN. LAWS § 16-19-1 to -2 (Supp. 1994) (requiring approval of school committee); S.C. CODE ANN. § 59-65-40(B) (LAW. CO-op. 1990) (requiring notice to district board of trustees of description of program, textbooks, methods of evaluation and place of instruction); TENN. CODE ANN. § 49-6-3050(b)(1) (Supp. 1994) (requiring annual notice to superintendent of name, telephone number, age and grade level of each student; location of home school; curriculum; and qualifications of instructor); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (1994) (requiring annual release from board of education); VT. STAT. ANN. tit. 16, § 166b(a) (1989) (requiring name and age of child; names, addresses and telephone numbers of parents and instructors; school district in which home study program is located; and course outlines); VA. CODE ANN. § 22.1-254.1(B),(C) (Michie Supp. 1994) (requiring annual notice to superintendent of intent to home school, curriculum and scores on achievement tests); W. VA. CODE § 18-8-1 (Exemption
schoolers, and the courts have recognized the state's interest in verifying that its compulsory attendance laws are indeed being satisfied. 205

Some states require approval as well as notification, and these state approval requirements have proven more difficult for home schoolers to accept. 206 Parents who otherwise may have no complaint about simple notification may strongly object to submitting their plans for state approval, most commonly on religious grounds. 207 Free exercise challenges to approval requirements, however, have generally failed because courts have found state approval to be the least restrictive means of furthering a state's compelling interest in ensuring the education of its children. 208

2. Time and Curriculum Requirements

A state’s time requirements refer to the number of hours or days children must spend receiving instruction in the classroom. Many states require that children attending home schools spend, at a minimum, an equal amount of time in the classroom as do their public and private...
school counterparts. Other states provide specific time requirements within their home school exemptions. Georgia, for example, insists that parents provide a minimum of four-and-one-half hours of instruction per day for at least 180 days. To date, there are no reported challenges to such regulations.

Curriculum requirements are also common in home school provisions. As with time requirements, state statutes generally either refer home schoolers to the standards for public schools or include specific requirements within the provision. Pennsylvania’s home education

209. See, e.g., D.C. CODE ANN. § 81-402(d) (1993) (requiring instruction time equal to that of public schools); N.C. GEN. STAT. § 115C-564 (1994) (same); OR. REV. STAT. § 399.090(3) (Supp. 1994) (same); R.I. GEN. LAWS § 16-19-2 (Supp. 1994) (requiring instruction time “substantially equal” to that of public schools); TENN. CODE ANN. § 49-6-3050(b)(3) (Supp. 1994) (requiring number of school days to be equal to that of public schools); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (1994) (requiring instruction time equal to that of public schools); VA. CODE ANN. § 22.1-254(A) (Michie 1999) (requiring number of school days and hours of instruction per day to equal that of public schools); WASH. REV. CODE ANN. § 28A.225.010 (4) (West Supp. 1995) (requiring hours of instruction to equal that established for private schools); W. VA. CODE § 18-8-1 (Exemption B)(a) (Supp. 1994) (requiring instruction time equal to that of public schools).

210. See, e.g., ARIZ. REV. STAT. ANN. § 15-802(B)(1) (Supp. 1994) (requiring 175 school days or equivalent); COLO. REV. STAT. ANN. § 22-33-104.5(3)(c) (West 1988) (requiring 172 days, averaging four hours per day); GA. CODE ANN. § 20-2-690(b)(3) (1992) (mandating 180 days and at least four-and-a-half hours per day); IOWA CODE ANN. § 299A.1 (West Supp. 1994) (requiring at least 148 days); LA. REV. STAT. ANN. § 17:236 (West 1982) (defining minimum school session as at least 180 days); MINN. STAT. ANN. §§ 120.101 (Subd. 5b)(1)-(9) (West Supp. 1995) (requiring at least 170 days of instruction through 1995-96 school years with increasing hour requirements in subsequent school years); MO. ANN. STAT. § 167.051(2)(b) (Vernon Supp. 1995) (requiring at least 1000 hours of instruction); MONT. CODE ANN. § 20-5-109(2) (1993) (mandating at least 180 days of pupil instruction); N.D. CENT. CODE § 15-34.1-06 (1993) (requiring at least 175 days, four hours per day); OHIO REV. CODE ANN. § 3321.04 (Anderson 1994) (requiring at least 92 weeks per year); PA. STAT. ANN. tit. 24, § 13-1327.1(c) (1992) (requiring minimum of 180 days of instruction or 900 hours per year for elementary levels, 990 hours per year for secondary levels); S.C. CODE ANN. § 59-65-40(A)(2) (Law. Co-op. 1990) (requiring 180 days, four-and-a-half hours per day excluding lunch and recesses); WIS. STAT. ANN. § 118.165(1)(c) (West 1991) (requiring at least 875 hours per year).


213. See, e.g., ARIZ. REV. STAT. ANN. § 15-802(A) (Supp. 1994) (requiring reading, grammar, mathematics, social studies and science); COLO. REV. STAT. ANN. § 22-33-104(2)(b) (West 1988) (requiring reading, writing, speaking, mathematics,
statute contains extensive curriculum requirements for both elementary and secondary school levels.\textsuperscript{214} For grades nine through twelve, a home school must provide a child with four years of English; three years of mathematics, science and social studies; and two years of arts and humanities.\textsuperscript{215} Specifically, these categories must include courses in English, including language, literature, speech and composition; science; geography; social studies, including civics, world history, United States history and Pennsylvania history; mathematics, including general mathematics, algebra and geometry; physical education; health; music; art; and safety education.\textsuperscript{216}

3. \textit{Teacher Qualifications}

Teacher qualifications can be the most burdensome of the state requirements regulating home schools. States that require the certification of home school instructors force uncertified parents to expend considerable time and expense to achieve state certification.\textsuperscript{217} The mere prospect

\textsuperscript{215} \textit{Id.} § 13-1327.1(d).
\textsuperscript{216} \textit{Id.} § 13-1327.1(c)(2).

\textsuperscript{217} \textit{See} Dorman, \textit{supra} note 3, at 756-58 (noting substantial barrier state certification requirements present to home schoolers).
of having to obtain certification can be a major deterrent to home schooling.\footnote{218}

The only three states in which at least certain groups of home schoolers must obtain certification — Alabama, Michigan and Nebraska — all treat home schools no differently than private schools.\footnote{219} States with explicit home school provisions in their compulsory attendance laws generally provide for optional teacher certification.\footnote{220} Florida, for example, allows a parent to teach at a home school if the parent either holds a valid state certificate or meets a short list of requirements.\footnote{221} These requirements include maintaining a portfolio of the children’s work and providing for annual outside evaluations of the children’s work.\footnote{222}

Besides certification, states utilize several other methods in evaluating the qualifications of home school instructors. Typical methods of evaluation include the submission of course outlines,\footnote{223} maintenance of minimum education levels for teachers\footnote{224} and teacher examination.

\footnote{218. Id.}


\footnote{220. See, e.g., Colo. Rev. Stat. Ann. § 22-33-104(2)(i)(I)-(II) (West 1988) (granting option of obtaining certification or meeting notification and evaluation requirements); Fla. Stat. Ann. 232.02(4)(a)-(b) (West Supp. 1995) (granting option of obtaining certification or meeting notification, recordkeeping and evaluation requirements); Iowa Code Ann. §§ 299A.2 to -3 (West Supp. 1994) (granting option of obtaining state certification or meeting notification, evaluation and reporting requirements); Minn. Stat. Ann. § 120.101 (Subd. 7) (West 1993) (granting numerous options: certification, supervision by certified person, successful completion of teacher competency examination, achievement of baccalaureate degree or, if teacher is also parent of child, submission of child to annual achievement testing); N.D. Cent. Code § 15-34.1-06 (1993) (granting option of certification, successful completion of national teacher examination or, if home school teacher possesses a high school degree or its equivalent, supervision by certified teacher).}


\footnote{222. Id.}


\footnote{224. See, e.g., Ga. Code Ann. § 20-2-690(c)(3) (1992) (requiring that parent have high school diploma or its equivalent and that non-parent have baccalaureate college degree); Minn. Stat. Ann. § 120.101 (subd. 7) (5) (West 1993) (holding baccalaureate degree as one option for qualification); N.M. Stat. Ann. § 22-121.1(C) (Michie 1993) (requiring high school diploma or its equivalent for qualification); N.C. Gen. Stat. § 115C-564 (1994) (same); N.D. Cent. Code § 15-34.1-06 (1993) (requiring that parent have high school diploma or its equivalent plus supervision by certified teacher as one option); S.C. Code Ann. § 59-65-40(A)(1) (Law. Co-op. 1990) (requiring that teacher have high school diploma, or its equivalent, plus passing score on basic skills examination; or baccalaureate degree); Tenn. Code Ann. § 49-6-3050(b)(4), (7) (Supp. 1994) (requiring that}
It is not unusual for statutes to grant discretion to school boards and superintendents, without further guidance, to determine whether an instructor is qualified. Occasionally, instructors are given numerous options to prove their qualifications. For example, Washington allows home school teachers to meet state qualification requirements by either accumulating forty-five quarter-hours of undergraduate credit, completing a home school instruction course, agreeing to supervision by a certified teacher, or otherwise demonstrating sufficient qualifications to the satisfaction of the school superintendent. Much less effort is needed in Minnesota, however, where one option for fulfilling the home school teacher qualification is merely that the instructor be the parent of a child whose performance is assessed using a nationally standardized achievement examination.

4. Assessment

Most states require some method of assessing the academic progress of children enrolled in home schools. Many states require that home school students take a state or national standardized test administered by a state official at certain times in their home school educations. If a teacher have high school diploma or its equivalent for kindergarten through grade eight, baccalaureate degree for grades nine through twelve but can request exemption; Va. Code Ann. § 22.1-254.1(A)(i) (Michie Supp. 1995) (requiring baccalaureate degree as one option for qualification); Wash. Rev. Code Ann. § 28A.225.010(c)(2) (Supp. 1999) (requiring high school diploma or its equivalent plus passing score on basic skills examination).
child’s test scores indicate that the child has failed to perform at his or her peers’ grade level, states generally provide some time for remedial measures. If these are ineffective and the child continues to perform at a level below his or her peers, school boards have the authority to require the child to enroll in a public, private or church school.


230. See, e.g., ARK. CODE ANN. § 6-15-505(a)(4) (Michie 1993) (providing that if score is eight months or more behind expected grade level, students are granted one year to remediate); COLO. REV. STAT. ANN. § 22-33-104.5(5)(a)(I) (West Supp. 1994) (providing that if score below thirteenth percentile, student has opportunity to re-test); FLA. STAT. ANN. § 292.02(4)(b)(3) (West Supp. 1995) (granting sub-par students one year of remedial instruction); IOWA CODE ANN. § 299A.6 to .7 (West Supp. 1994) (providing one year to remediate if student scores below thirtieth percentile); MINN. STAT. ANN. § 120.101(Subd. 8) (West 1993) (providing that if score is below thirtieth percentile or score is one grade level below expected, parents must obtain additional evaluation of student); N.H. REV. STAT. ANN. § 193-A:6(III) (Supp. 1994) (providing that if score does not indicate educational progress, students are granted one year of remedial instruction); N.D. CENT. CODE § 15-34.1-07(2) (1993) (providing that if students score below thirtieth percentile, parents can continue home schooling program if file statement from professional that child is making reasonable academic progress); TENN. CODE ANN. § 49-6-3050(b)(6) (Supp. 1994) (granting unsatisfactory scores time for remedial instruction); VA. CODE ANN. § 22.1-254.1(C) (Michie Supp. 1994) (providing that if score shows inadequate progress, parents must file remediation plan and board of education may place program on one year probation); W. VA. CODE § 18-8-1 (Exemption B)(b)(4) (Supp. 1994) (providing that if student scores below fortieth percentile, parents must institute remedial program).

231. See, e.g., FLA. STAT. ANN. § 232.302(4)(b)(3) (West Supp. 1995) ("Continuing in a home education program shall be contingent upon the pupil demonstrating educational progress commensurate with his [or her] ability . . . "); N.H. REV. STAT. ANN. § 193-A:6(III) (Supp. 1994) (providing continuation in home education program as contingent upon child demonstrating progress commensurate with his or her age and ability); N.D. CENT. CODE § 15-34.1-07(2) (1993) (providing if parent does not file statement from licensed professional that child is making reasonable academic progress, parent is not entitled to exemption from compulsory attendance); OR. REV. STAT. § 339.035(3)(d) (Supp. 1994) (providing that superintendent may order child to attend school if child is not showing satisfactory educational progress); S.C. CODE ANN. § 59-65-40(D) (Law. Co-op. 1990) (providing district board of trustees the option of placing student in public school, special services or home schooling with instructional support system if student scores below promotion standard); TENN. CODE ANN. § 49-6-3050(b)(6)(C)(i) (Supp. 1994) (providing local superintendent of schools to require parents to enroll child in public, private or church-related school if child falls behind grade level); VA. CODE ANN. § 22.1-254.1(C) (Michie Supp. 1994) (requiring home instruction to cease if remedial plan ineffective and requiring parent to make other
Another method of assessing a child's education is by requiring home school teachers to maintain portfolios of their children's work, which are in turn submitted to certified teachers for an evaluation of the children's progress. In Pennsylvania, a poor evaluation can eventually lead to the termination of the home school program. Several states provide parents with the option of standardized testing or portfolio evaluation, and others grant additional choices. New Hampshire, for example, allows children alternatively to be evaluated by "any other valid measurement tool mutually agreed upon by the parent and commissioner of education."

V. CONCLUSION

Home schoolers have made significant gains throughout the country over the last fifteen years. Currently, every state permits parents to educate their children at home if they are willing to meet certain requirements set forth in state statutes or promulgated by state agencies. Parents arrangements for child's education in compliance with state statute; W. VA. CODE § 18-8-1 (Exemption B)(b)(4)(i) (Supp. 1994) ("if, after two calendar years, the mean of the child's test results fall below the fortieth percentile level, home instruction shall no longer satisfy the compulsory school attendance requirement exemption.")


234. See, e.g., FLA. STAT. ANN. § 232.02(4)(b)(3)(a)-(e) (West Supp. 1995) (granting additional options of evaluation by certified teacher, standardized testing or any other agreed upon evaluative tool); LA. REV. STAT. ANN. § 17:236.1(C)(1)(a)-(e) (West Supp. 1995) (granting additional option of offering satisfactory evidence of quality of school program, including such documents as course outlines, book list, copies of student's work, copies of standardized tests and statements by third parties who have observed student's progress); N.H. REV. STAT. ANN. § 193-A:6(II)(a)-(d) (Supp. 1994) (granting options of evaluation by standardized testing, certified teacher or any other agreed upon measurement tool); VT. STAT. ANN. tit. 16, § 166b(d)(1)-(6) (1989 & Supp. 1994) (granting options of evaluation by certified teacher, standardized testing, or submission of reports); VA. CODE ANN. § 22.1-254.1(C) (Michie Supp. 1994) (granting additional option of any other evaluation or assessment that, in judgment of superintendent, indicates that child is making adequate educational progress).

fortunate enough to live in a state with relatively few restrictions on home schooling should face no significant obstacles in establishing a program of home instruction. Parents who are not so fortunate, however, must decide whether to abandon the idea of home schooling, comply with stringent state requirements or challenge these restrictions in a court of law.

The legal battle, although winnable, is a difficult one. The various challenges available to home schoolers against state restrictions on home schooling include claims based on the Free Exercise Clause; the parental liberty interest under the Fourteenth Amendment; vagueness; lack of a neutral, detached magistrate; the Establishment Clause; and the Equal Protection Clause. These claims, however, have enjoyed only limited success. Given the reluctance of the courts to rule in favor of home schoolers on such claims, the best hope of success for parents who wish to home school their children remains where it has rested for over a decade — in the state legislatures. Only through a combination of politicking and well-planned legal challenges can home schoolers maintain some hope of overcoming the more onerous state statutes and regulations restricting home schooling.

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