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The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools¹

*The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*²

Pierce v. Society of Sisters (1925)

I. INTRODUCTION

In America today, as many as one million school-aged children are being educated at home.³ The number of children enrolled in home schools in North Carolina reached 11,222 during the 1994-95 school year;⁴ this number represented an eighty percent increase over the previous year.⁵ The expansion of home education in North Carolina is consistent with the increasing popularity of home education throughout the country.⁶ The growth in the home school population

1. This Comment uses "home schooling," "home education," and "home instruction" interchangeably. Additionally, this Comment focuses upon North Carolina law in its footnotes to demonstrate the influence of state law upon the relationship between home and public education.

2. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

3. CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION* xiv (1995); see also David S. Adams, *Home Schooling in Kansas: Friend or Foe*, 63 J. KAN. B. ASS'N. 30, 30 (1994) (observing that "the estimates range from 300,000 to as many as one million children being schooled at home"). It has been predicted that "by the turn of the century approximately 2% of the school-aged population in the United States" could be taught at home. MARALEE MAYBERRY ET AL., *HOME SCHOOLING: PARENTS AS EDUCATORS* xiii (1995).

These estimates quantifying the number of students educated in home schools are complicated by a high turnover rate. Alfie Kohn, *Home Schooling*, *THE ATLANTIC*, Apr. 1988, at 21, reprinted in MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 61 (3d ed. 1992). For example, Kohn notes that "[a] private survey conducted in Washington state found that two thirds of all home-schooled children had been in that situation for two years or less, while a Florida survey found that only 30 percent of the students learning at home had done so during the previous year." *Id.*

4. ROD HELDER, *DIVISION OF NON-PUBLIC EDUCATION, OFFICE OF THE GOVERNOR, 1995 NORTH CAROLINA HOME SCHOOL STATISTICAL SUMMARY 2* (1995).

5. *Id.* at 4.

6. See MAYBERRY ET AL., *supra* note 3, at 7 (tracking the growth of home-based instruction from the 1980s, when 60,000 to 125,000 children were in home schools, to 1994, when 450,000 to 800,000 children were educated at home); see also Adams, *supra* note 3, at 30 (estimating that the number of children home schooled in the past decade has increased tenfold). Not only has the number of *children* attending home schools increased nationwide, but the number of home *schools* has grown by approximately 15% per year. MAYBERRY ET AL., *supra* note 3, at 7.

is unlikely to dwindle in the near future.⁷ In fact, in a December 1993 front-page article, *USA Today* recognized home schooling as one of the major "trends" of the 1990s, the effects of which will be felt into the twenty-first century.⁸

In addition to growing popular support for home schooling, the recent political atmosphere also lends support to home schooling. The contemporary tendency to support politically conservative parties (including the "religious right"), demonstrated during the 1994 congressional elections, which brought Republican majorities to both the national⁹ and state¹⁰ legislatures, suggests that lawmakers will listen closely to lobbyists for the home-schooling movement.¹¹ One study found that "more than three quarters of the home-educating parents are affiliated with the Republican party,"¹² and a striking majority of them are highly religious individuals.¹³ Conservative politicians, particularly politicians with ties to the "religious right," are likely to continue to urge legislative support for home schooling in order to

7. See MAYBERRY ET AL., *supra* note 3, at 9-10.

8. Anita Manning, *Life In '94 Will Offer Glimpse into Next Century*, USA TODAY, Dec. 22, 1993, at 01D.

9. Helen Dewar, *Quick Action Planned for Ambitious Hill Agenda*, WASH. POST, Jan. 3, 1995, at A4; Bob Minzesheimer & Judi Hassen, *Pomp, Circumstance, then Down to Work*, USA TODAY, Jan. 4, 1995, at 03A.

10. Joseph Neff & Joe Dew, *Legislators Draw Battle Lines*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 26, 1995, at 1A (recognizing that although Democrats hold a slim majority in the state senate, Republicans have taken overwhelming control of the state house of representatives).

11. In fact, home educators were politically effective even before the Republican majority took over the legislatures. In 1994, home-schooling supporters "overwhelmed the capitol's phone system for days" voicing their opposition to a teacher certification provision in a bill reauthorizing the Elementary and Secondary Education Act. Phil Kuntz, *Home-Schooling Movement Gives House a Lesson*, 52 CONG. Q. WEEKLY REP. 479, 479 (1994). In the end, the objectionable provision was defeated in the House of Representatives by a vote of 424 to 1, and an amendment specifically protecting home education was approved by a vote of 374 to 53. *Id.* at 480.

12. MAYBERRY ET AL., *supra* note 3, at 39 (reporting the results of a study conducted upon home-schooling parents in Washington, Utah, and Nevada). In addition to the fact that most home educators are Republican, the "majority of home school parents label their political views as 'conservative' or 'extremely conservative' (77%)." *Id.* Conversely, "only 7% [of the home school parents surveyed] indicate any tie to the Democratic party," and very few home educators consider themselves to be either politically "moderate" (7%) or politically "liberal" (6%). *Id.* at 39-40. On the other hand, 64% of the general population "label themselves either politically moderate or liberal." *Id.* at 40.

13. *Id.* at 34. One study found that 78% of the home school educators from Washington, Utah, and Nevada attended church at least once a week, whereas less than one-third of the national population attends church that often. *Id.* at 35. Approximately 85 to 90% of the parents who choose to educate their children at home do so for religious reasons. KLIČKA, *supra* note 3, at 3. For example over 74% of the home schools in North Carolina are classified specifically as "religious schools." HELDER, *supra* note 4, at 3.

maintain favor for the Republican party with the growing number of voters in the home school movement.¹⁴

With an increasing number of individuals participating in home education and with continuing political support for "conservative" political actors, home-schooling issues are unlikely to disappear in the near future. Instead, as home schools become responsible for the education of increasing numbers of the nation's children, new questions will arise regarding the relationship between home schools and public schools and the responsibilities of each toward the nation's youth. On many issues, the desires of home-schooling parents will likely conflict with those of public school administrators. Eighty-one percent of home educators feel that they need or want to enroll their children in extracurricular events at public schools,¹⁵ and seventy-six percent of home educators would also like to enroll their children "part-time" in academic courses in public or private schools.¹⁶ On the other hand, public school administrators are unlikely to desire responsibility for the heightened administrative burdens of a school system in which children may come and go throughout the day.¹⁷

14. See Edward Knox Proctor V, Note, *Delconte v. State: Some Thoughts on Home Education*, 64 N.C. L. REV. 1302, 1326 (1986) (stating that although "most educators 'desire legislation to prohibit home instruction altogether as a substitute for public school attendance,' . . . the 'far right' could 'make such legislation difficult to pass' " (quoting Peek, *Home Instruction and the Compulsory Attendance Act*, SCHOOL MANAGEMENT ADVISOR, Series 3, at 3 (1986) (available from the North Carolina Dep't of Pub. Instruction, Educ. Bldg., Raleigh, N.C., 27603-1712))).

15. MAYBERRY ET AL., *supra* note 3, at 73. In addition, according to one study, 64% of home educators want use of public school libraries and materials; 33% of home educators want help and resources from a school district certified teacher; and 60% of home educators want guidance on effective teaching methods. *Id.*

16. *Id.*

17. See Proctor, *supra* note 14, at 1326 ("The North Carolina Department of Public Instruction is already arguing for the enactment of serious restraints on parents who educate their children at home. . . . [M]ost educators desire 'legislation to prohibit home instruction altogether as a substitute for public school attendance.' " (quoting Peek, *supra* note 14, at 3)). This reluctance to permit home schools and public schools to integrate is reflected in both the North Carolina Constitution and the North Carolina General Statutes. Article IX of the North Carolina Constitution establishes two types of education as mutually exclusive education options: public school and education "by other means." N.C. CONST. art. IX, § 3. In *Delconte v. State*, 313 N.C. 384, 329 S.E.2d 636 (1985), the North Carolina Supreme Court supported the dichotomy between public and home schools by establishing that home schools satisfy the state's compulsory attendance laws and relieving the public schools of their obligation to educate home-schooled students under § 115C-378 of the North Carolina General Statutes. *Id.* at 402-03, 329 S.E.2d at 648. In addition, under § 115C-565 of the North Carolina General Statutes, home schools are not subject to any of the statutes governing public schools or private schools; instead, they remain legally independent from those institutions. N.C. GEN. STAT. § 115C-565 (1994).

Consider a typical home education situation. A young husband and wife,¹⁸ neither of whom have a college education,¹⁹ choose to educate their children at home for religious reasons.²⁰ As the children advance in their studies, they reach a point at which they are both eager and ready to engage in an advanced and sophisticated course, such as chemistry. Neither parent feels competent to instruct the children on that subject, or the home school does not have the laboratory equipment necessary to provide thorough training in chemistry.²¹ Should the public schools have an obligation to accept those children for one class (chemistry) per day, while permitting them to continue receiving the rest of their education at home? Should the parents be required to discontinue teaching their children at home when their children surpass their learning base in one aspect of the children's studies? Should there be an interplay between home schools and public schools? Who should determine when public schools have a responsibility to accept home-schooled children into their classrooms?²²

This Comment addresses the relationship between home schools and public schools and the conflict over the possible integration of home and public school educations. More specifically, this Comment will (1) examine the history of home schooling in America and the antagonistic relationship between home and public educations;²³ (2) identify the legal rights and interests involved when home-schooling

18. See MAYBERRY ET AL., *supra* note 3, at 30 (stating that a majority (60%) of parents who home educate their children are in their thirties).

19. See KLICKA, *supra* note 3, at 1 (stating that "at least 50% of the parents [who teach in home schools] have only a high school diploma"); MAYBERRY ET AL., *supra* note 3, at 30-31 (stating that only one-third of the parents included in the survey conducted by the authors "graduated from college with an undergraduate degree").

20. See KLICKA, *supra* note 3, at 2; MAYBERRY ET AL., *supra* note 3, at 34-36.

21. The number of hypothetical situations in which home-schooling parents might desire that their children attend partial days in public schools or in which public schools might desire to "take" a child from a home school environment into the public school seem infinite. Unlike the hypothetical discussed in the text of this Comment, not all situations in which home-schooling parents might seek partial integration with public schools are motivated by educational objectives. If permitted to send a child to public school for a select number of classes, a home-schooling parent may choose to send their child to public school for a few classes merely to give the parent a break from their children, or to permit the parent to complete grocery shopping for the week, or for any of a number of other reasons.

22. This series of questions is not meant to be exhaustive of the issues that arise out of the hypothetical situation described in the text. Additional issues regarding the implications of integration of home and public schooling on the rights and interests of parents, children, and the state are addressed below. See *infra* notes 288-381 and accompanying text. In addition, administrative issues that would arise if it were determined that public schools must accept home-schooled students for one or two classes per day are discussed in section V. See *infra* notes 348-51 and accompanying text.

23. See *infra* notes 28-47 and accompanying text.

issues arise;²⁴ (3) discuss the approach courts have taken when confronted with a challenge requiring the resolution of conflicting rights and interests in the home school context;²⁵ (4) examine one of the recent home-schooling challenges, the relationship between home schools and public schools, and apply the "rights and interests" analysis to this new issue;²⁶ and (5) propose a solution to the conflict that arises over the possible integration between home and public educations.²⁷

II. HISTORY OF HOME SCHOOLING IN AMERICA

Parent-directed education has deep roots in American history. In fact, our nation began without public schools or compulsory attendance laws.²⁸ When laws regarding education existed in America's early history, they focused upon the responsibility of parents and "masters" to teach children, but did not provide for schools or teachers.²⁹ Because of this early reliance on home education, many of America's early leaders and intellectuals, including George Washington³⁰ and Mark Twain,³¹ were schooled at home.³²

24. See *infra* notes 48-259 and accompanying text.

25. See *infra* notes 260-87 and accompanying text.

26. See *infra* notes 288-358 and accompanying text.

27. See *infra* notes 359-81 and accompanying text.

28. JOHN W. WHITEHEAD & WENDELL R. BIRD, *HOME EDUCATION AND CONSTITUTIONAL LIBERTIES* 23 (1986). There was an exception to this general statement—a few local common schools existed in New England in 1776. *Id.*

29. Gerald B. Lotzer, Comment, *Texas Homeschooling: An Unresolved Conflict Between Parents and Educators*, 39 BAYLOR L. REV. 469, 470 (1987). Parents and masters were to provide education, including reading and religious instruction, for the children. *Id.* (citing GEORGE R. CRESSMAN & HAROLD W. BENDA, *PUBLIC EDUCATION IN AMERICA* 21-23 (1956)). Similarly, English Poor Laws of the sixteenth and seventeenth centuries were designed to make children "productive citizens by teaching them a trade or profession under the guidance of a master." *Id.* (citing CRESSMAN & BENDA, *supra*, at 21-23).

30. JOHN C. FITZPATRICK, *GEORGE WASHINGTON HIMSELF* 19 (1933). In fact, nine presidents were educated "wholly or substantially through home education." WHITEHEAD & BIRD, *supra* note 28, at 24. Other home-educated presidents include James Madison, Franklin D. Roosevelt, John Quincy Adams, Abraham Lincoln, and Woodrow Wilson. *Id.* at 24-25.

31. DELANCEY FERGUSON, *MARK TWAIN: MAN AND LEGEND* 21, 24, 29 (1943). Many other intellectuals and leaders were home schooled, including Phillis Wheatley, G. HERBERT RENFRO, *LIFE AND WORKS OF PHILLIS WHEATLEY* 11, 12 (1969), General George Patton, HARRY H. SEMMES, *PORTRAIT OF PATTON* 14-15 (Paperback ed. 1964); Agatha Christie, *AGATHA CHRISTIE, AN AUTOBIOGRAPHY* 13, 14 (1977); Pearl Buck, PAUL A. DOYLE, *PEARL S. BUCK* 24 (1965), George Bernard Shaw, HESKETH PEARSON, *GEORGE BERNARD SHAW: A FULL LENGTH PORTRAIT* 11 (1942), and Andrew Carnegie, BURTON J. HENDRICK, *1 THE LIFE OF ANDREW CARNEGIE* 21 (1932).

32. WHITEHEAD & BIRD, *supra* note 28, at 24-25.

During this era of home-schooling dominance, “[h]ome education was successful.”³³ In 1765, John Adams commented that “‘a native in America, especially of New England, who cannot read and write is as rare a Phenomenon as a Comet.’”³⁴ This observation was supported by the Dupont study in 1800 which also concluded that early America enjoyed universal literacy.³⁵

Despite the success of home schooling, laws governing education began to change after the American Revolution. Massachusetts initiated a wave of state legislation governing public education. Shortly after the revolution, it enacted a law requiring towns to support and operate schools outside the home.³⁶ In 1852, Massachusetts passed America’s first compulsory attendance statute.³⁷ The new law “required that children between the ages of eight and fourteen attend school for twelve weeks a year.”³⁸ As other states began to view schools as an important means to socialize children and to assure that children acquired basic skills, they also began to expand public educa-

33. *Id.* at 24. Studies conducted on home-schooled children today suggest that home schooling works in our contemporary environment as well as it did before the American Revolution. In 1990, a national study of over 2,163 home-educating families found that the average scores of home school students “were at or above the 80th percentile in all categories,” including reading, language, math, science, and social studies. KLIČKA, *supra* note 3, at 10 (citing BRIAN RAY, NATIONAL HOME EDUCATION RESEARCH INSTITUTE, A NATION-WIDE STUDY OF HOME EDUCATION: FAMILY CHARACTERISTICS, LEGAL MATTERS, AND STUDENT ACHIEVEMENT 53-54 (1990)). In addition, when home school students are compared to public school students, the home school students generally outperform their public school counterparts on standardized tests. *Id.* at 8, 12. In North Carolina, the Division of Non-Public Education compiled test results of a number of home school students in grades K-12 on the California Achievement Test and found that they scored, on average, “at the 73rd percentile on the total battery of tests: 80th percentile in reading, 72nd percentile in language, and the 71st percentile in math.” *Id.* at 13. In South Carolina, home school students scored 30 percentage points higher than their public school counterparts on a Comprehensive Test of Basic Skills. *Id.* at 8. Similarly, the State Department of Education in Alaska found that home-schooled children scored on average 16 percentage points higher on standardized tests than children of the same grades in conventional schools. *Id.* at 12. Many state departments of education have found similar results. In Tennessee, Oregon, Arkansas, Arizona, and Nebraska, state departments of education have recognized that home school students outperform their public school counterparts on standardized tests. *Id.* at 12-14.

34. WHITEHEAD & BIRD, *supra* note 28, at 24 (quoting 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 257 (L.H. Butterfield ed., 1961)).

35. *Id.* Although the subject pool of this study is not clearly identified, this author suggests that this statement regarding universal literacy only applies to a particular class of individuals in nineteenth century America.

36. Lotzer, *supra* note 29, at 470 (citing LAWRENCE KOTIN & WILLIAM F. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY ATTENDANCE 24 (1980)).

37. *Id.* (citing KOTIN & AIKMAN, *supra* note 36, at 25).

38. *Id.*; see KOTIN & AIKMAN, *supra* note 36, at 25 (citing 1852 Mass. Acts 170, ch. 240, §§ 1, 2, 4).

tion and require attendance in schools.³⁹ By 1918, every state in the nation had a compulsory school attendance law.⁴⁰ These laws placed the burden of assuring attendance on the parents and imposed penalties on parents whose children did not comply with the statute.⁴¹

With the universal adoption of compulsory attendance statutes throughout the nation, home educators began to lose their "right" to educate children in the home. Essentially, the compulsory attendance laws "eroded the common law parental right to educate one's own children."⁴² Under these statutes, parents were criminally sanctioned if they kept their children at home and did not send them to school.⁴³

39. Lotzer, *supra* note 29, at 471 (citing FRANK R. KEMERER, *THE EDUCATOR'S GUIDE TO TEXAS SCHOOL LAW* 1 (1986)).

40. *Id.* (citing KEMERER, *supra* note 39, at 1). After 1918, compulsory school attendance laws changed very little until 1954, when the landmark decision of *Brown v. Board of Education* required racial integration of the public schools. In order to circumvent integration, several states began to repeal their compulsory attendance statutes, but by 1983 every state had re-enacted its compulsory attendance law.

Id. (citing KOTIN & AIKMAN, *supra* note 36, at 34).

41. See, e.g., CAL. EDUC. CODE § 48200 (West 1993) (providing that parents "shall" be responsible for their children's compliance with the compulsory attendance statutes of the state); GA. CODE ANN. § 20-2-690.1(b) (1992) (providing that parents whose children violate the compulsory education statute of the state "shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine . . . or imprisonment . . . or both"); MO. ANN. STAT. § 167.031.1 (Vernon Supp. 1996) (providing that if a child does not attend school in compliance with the compulsory attendance statute, that child's parents shall be "in violation of the provisions of section 167.061"); N.Y. EDUC. LAW § 3212 (McKinney 1995) (providing that parents "shall" be responsible for their children's compliance with the compulsory attendance statutes of the state); N.C. GEN. STAT. § 115C-378 (1994) (stating that a parent "may be in violation of the Compulsory Attendance Law and may be prosecuted if the [student's] absences cannot be justified under the established attendance policies of the State and local boards of education"); VA. CODE ANN. § 22.1-254 (Michie 1993) (providing that parents "shall" be responsible for their children's compliance with the compulsory attendance statutes of the state).

42. Donald D. Dorman, Note, *Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REF. 733, 735 (1990).

43. See, e.g., ALA. CODE § 12-15-13(c) (1995) (imposing fines or hard labor for the county upon parents whose children violate compulsory attendance laws); GA. CODE ANN. § 20-2-690.1(b) (1992) (imposing fines or imprisonment upon parents whose children violate compulsory attendance laws); KY. REV. STAT. ANN. § 159.990(3) (Baldwin 1992) (imposing criminal sanctions upon parents whose children violate compulsory attendance laws); N.C. GEN. STAT. § 115C-378 (1994) (same); S.C. CODE ANN. § 59-65-20 (Law. Coop. 1990) (same).

It is important to recognize the distinction between compulsory education and compulsory attendance:

In common usage, it has become customary to employ the terms "compulsory attendance" and "compulsory education" interchangeably. This practice does not reflect the reality of the law. The term "compulsory education" rarely appears in the education laws of states. It is merely "attendance"—at some facility or program which purports to be educational—which is generally required, and not "education". . . . [Only] California really uses [the term "compulsory education" in its

Naturally, as states' responsibility for education expanded, ideas about parental roles in education changed. Inevitably, parents' obligations to provide education for their children were relegated to "secondary" status.⁴⁴

The shift in educational responsibility from parents to the states created an antagonistic relationship between parents who wished to continue to home school their children and public school administrations that sought to enforce their authority to educate via compulsory attendance laws. This conflict in interests led to a number of lawsuits beginning in the 1920s and continuing through recent times.⁴⁵ In these cases, courts clarified the rights and interests involved in the home-schooling debate.⁴⁶ Interestingly, the rights and interests in educational control claimed by parents, children, and the states today closely resemble the interests claimed by those parties decades ago.⁴⁷

III. LEGAL INTERESTS IN EDUCATION: INTERESTS AT ODDS IN HOME-SCHOOLING DEBATES

Although the United States Constitution contains no language that expressly deals with the education of children, and the United States Supreme Court has never ruled on home schooling per se, Supreme Court decisions on related constitutional issues, lower court decisions in home-schooling cases, and definitions of educational interests by state constitutions and state courts have delineated the rights and interests relevant to the home-schooling debate. The pertinent rights and interests are divided into three groups: (1) parents' rights;⁴⁸ (2) states' interests;⁴⁹ and (3) children's rights.⁵⁰ The nature and extent of the rights or interests claimed by each group are discussed below.

education statutes] in a way that appears to require something called "education" to occur after the more easily compelled process called "attendance" has occurred.

KOTIN & AIKMAN, *supra* note 36, at 71.

44. Dorman, *supra* note 42, at 735. In fact, now, if parents wish to forgo public education to educate their children at home, they may face an uphill battle. *Id.*

45. *See infra* notes 48-249 and accompanying text.

46. *See infra* notes 48-104 and accompanying text.

47. *Compare* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing that parents have a right to direct their children's educations and that states have interests in reasonably regulating education) *with* Jeffery v. O'Donnell, 702 F. Supp. 513, 515 (M.D. Pa. 1987) (mem.) (recognizing that parents have a "substantial constitutional right" to direct their children's educations and acknowledging the states' interests in education as well).

48. *See infra* notes 51-187 and accompanying text.

49. *See infra* notes 188-237 and accompanying text.

50. *See infra* notes 238-49 and accompanying text.

Parent's Rights

Advocates of the home-schooling movement have identified four primary sources of authority in the United States Constitution from which parents derive the right to home school their children: (1) the Fourteenth Amendment's Due Process Clause;⁵¹ (2) the First Amendment;⁵² (3) the implied constitutional right to privacy and an express right to privacy under the Fourth Amendment;⁵³ and (4) the Ninth Amendment.⁵⁴ Each of these areas of constitutional protection for home educators will be discussed in turn below.

The Fourteenth Amendment⁵⁵

The Due Process Clause of the Fourteenth Amendment has been applied in three different manners to assist parent educators in constitutionalizing their "right" to home school their children. First, the Due Process Clause has been interpreted to protect a parent's power to "control the education of their own children."⁵⁶ Second, the Due Process Clause prohibits laws or regulations that are impermissibly vague⁵⁷ and has important implications for compulsory attendance

51. The Fourteenth Amendment states in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

52. The First Amendment states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

53. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; *see Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (holding that individuals possess a privacy right with which laws may not interfere under the First and Fourteenth Amendments and making it unconstitutional to prohibit the mere private possession of obscene material).

54. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

55. *See supra* note 51.

56. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that a statute prohibiting schools from teaching any language other than English was unconstitutional in part because the means adopted by the statute conflicted with "the power of parents to control the education of their own children"); *see infra* notes 60-104 and accompanying text.

57. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *see infra* notes 105-12 and accompanying text.

statutes which have been used to prevent home schooling.⁵⁸ Finally, the Due Process Clause prohibits laws or regulations that involve impermissible administrative discretion and may provide a due process claim to home educators if they must seek permission from a public school official before they begin home schooling.⁵⁹

During the 1920s, three significant Supreme Court decisions recognized a parental liberty to select the means and manner of their children's education in the Due Process Clause of the Fourteenth Amendment.⁶⁰ In the first of these cases, *Meyer v. Nebraska*, the Supreme Court struck down a Nebraska statute that imposed criminal penalties on public or private schoolteachers who taught any language other than English, or who taught in any language except English, to children who had not completed the eighth grade.⁶¹ The legislation at issue in *Meyer* was born of the animosity against foreigners aroused by World War I.⁶² In *Nebraska*, the target of the anti-foreign-language legislation was the German language.⁶³ The state claimed that such⁶⁴ Although the Supreme Court noted that the "desire of the legislature to foster a homogeneous people with American ideals" was understandable,⁶⁵ the Court rejected the state's claim and upheld the parents' right to engage a teacher to teach their son to read German.⁶⁶

58. See *infra* notes 105-12 and accompanying text.

59. See WHITEHEAD & BIRD, *supra* note 28, at 57-58; *infra* notes 113-20 and accompanying text.

60. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (noting that the "parent has the right to direct the education of his own child without unreasonable restrictions"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that an act that "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" was unconstitutional); *Meyer*, 262 U.S. at 401 (holding that a statute that interfered with the "power of parents to control the education of their own" was unconstitutional). Long before the 1920s, Sir William Blackstone stated that parents had total authority over their children's education under common law. 1 WILLIAM BLACKSTONE, COMMENTARIES *450-53.

61. *Meyer*, 262 U.S. at 403.

62. David M. Smolin, Comment, *State Regulation of Private Education: Ohio Law in the Shadow of the United States Supreme Court Decisions*, 54 U. CIN. L. REV. 1003, 1004-05 (1986). Animosity against alien groups also inspired the legislation at issue in *Farrington*. 273 U.S. at 298 (noting that the act in question was part of a "deliberate plan" against foreign language schools with "no adequate reason"); see *infra* note 82.

63. See generally MORRIS JANOWITZ, *THE RECONSTRUCTION OF PATRIOTISM: EDUCATION FOR CIVIC CONSCIOUSNESS* (1983) (discussing generally the anti-foreign nature of education legislation and recognizing specifically that the legislation in *Meyer* was anti-German).

64. *Meyer*, 262 U.S. at 401-03.

65. *Id.* at 402.

66. *Id.* at 403. Although the *Meyer* Court ruled for the parents, it did recognize that the state possessed some power to regulate education. *Id.* at 402 ("The 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.")

The Court essentially determined that the instructor's right to engage in the profession of teaching *and* the parents' right to encourage and control the education of their children were fundamental rights contained in the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.⁶⁷ The Court concluded that the legislation in *Meyer* interfered with both of those rights.⁶⁸ Since the rights at issue were fundamental liberties protected under the Fourteenth Amendment, the state's interests were subject to strict scrutiny.⁶⁹ In the end, the state's interests had to yield to the individual's right in order to prevent a deprivation of liberty without due process of law.⁷⁰

Only two years after the Supreme Court recognized that parents possess a constitutional right to control the education of their children with regard to foreign language training, a new challenge to that right confronted the Court. In *Pierce v. Society of Sisters*,⁷¹ two private schools, one a religious school and one a non-religious military school,⁷² challenged Oregon's Compulsory Education Act.⁷³ This statute required "every parent, guardian, or other person having control or charge or custody of a child between eight and sixteen years to send [that child] to a public school . . . and [notified every parent that] failure to so do [was] declared a misdemeanor."⁷⁴ Attempting to defend the statute, "Oregon's argument to the Supreme Court in *Pierce* was a mixture of concern with social integration and blunt xenophobia."⁷⁵ The Court applied the doctrine of *Meyer*⁷⁶ and held the statute

But, in this particular case, the Court determined that the Nebraska statute was arbitrary and without a reasonable relation to a legitimate state end. *Id.* at 403; *see infra* notes 188-237 and accompanying text (discussing states' abilities to regulate education).

67. *Meyer*, 262 U.S. at 399-401.

68. *Id.* at 401.

69. *See infra* notes 260-76 and accompanying text (discussing the balancing test used by the courts to determine whether the home educators' rights or the states' interests must yield when they conflict with one another).

70. *Meyer*, 262 U.S. at 403.

71. 268 U.S. 510 (1925).

72. *Id.* at 531-33. The fact that one of the challengers in *Pierce* was a non-religious institution is significant, because a majority of the cases establishing a parental right to direct the education of their children are also protecting a parental right to control the religious upbringing of their children. *See, e.g., Delconte v. State*, 313 N.C. 384, 386, 329 S.E.2d 636, 638 (1985) (holding that parents satisfy the state compulsory attendance statute by educating their children at home in their religious "Hallelujah school"). The holding in *Pierce*, however, is not inherently tied to religion and may be applied to individuals who choose to home school without a religious motive. *Pierce*, 268 U.S. at 532-33 (recognizing that one appellee in the case was a military academy without the benefit of First Amendment protection of religion).

73. *Pierce*, 268 U.S. at 530.

74. *Id.*

75. Smolin, *supra* note 62, at 1008. The state "argued that its voters might have passed the statute as a response to religious suspicion generated by the separation of children

unconstitutional because it plainly "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁷⁷ The Court reasoned that a liberty protected by the Constitution under the Due Process Clause, such as the right of parents to control the education of their children, may not be abridged by legislation "which has no reasonable relation to some purpose within the competency of the State."⁷⁸ The Court explained that a state could not claim as a legitimate purpose the mission to "standardize its children by forcing them to accept instruction from public teachers only."⁷⁹ Such a purpose could not supersede the constitutional right of parents to direct the education of their children.

Not long after the *Pierce* Court affirmed *Meyer*⁸⁰ and further established that the Constitution protected the right to choose an educational alternative outside the public schools,⁸¹ the Supreme Court decided the third significant education case of the 1920s, *Farrington v. Tokushige*.⁸² *Farrington* expanded the principles of *Meyer* and *Pierce* by holding that once parents choose to educate their children outside the public schools, the state may not diminish the effect of that choice by establishing regulations that affirmatively direct the "intimate and

which accompanies sectarian schooling. The mingling of children of different sects might lessen religious suspicion and thereby contribute to the unity of the community." *Id.* (citing *Pierce*, 268 U.S. at 525). Essentially, Oregon argued that the statute was reasonable because it would Americanize immigrants. *Id.* (citing *Pierce*, 268 U.S. at 526).

76. See *Pierce*, 268 U.S. at 534 (citing *Meyer v. Nebraska*, 262 U.S. 390, 410 (1923)).

77. *Id.* at 534-35. The Court not only identified a parental right to direct the education of children under the parents' control, but also imposed a *duty* on parents to accept responsibility for that task. *Id.* at 535. The Court stated that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* The Court also recognized that private schools as businesses have a right to protection against "arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property." *Id.* at 535-36.

78. *Id.* at 535.

79. *Id.* The *Pierce* Court did, however, recognize that the state could reasonably regulate education in some contexts. *Id.* at 534; see *infra* notes 188-237 and accompanying text (discussing states' abilities to regulate education).

80. *Pierce*, 268 U.S. at 534 (affirming *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

81. *Id.* at 535.

82. 273 U.S. 284 (1927). *Farrington* involved a challenge to Hawaii's Foreign Language Act which required foreign language teachers to get a permit from the Department of Public Instruction and prove that they were pro-democracy and knowledgeable about America before they could teach. *Id.* at 290-98. Like the statute in *Meyer*, this statute was prompted by animosity against an alien group, but unlike the statute in *Meyer*, the statute in *Farrington* was directed against the Japanese. *Id.* at 298. The Court noted that "[t]here [were] one hundred and sixty-three foreign language schools in the Territory. Nine [were] conducted in the Korean language, seven in the Chinese and the remainder in Japanese." *Id.* at 290-91. Therefore, the legislation had a disproportionate impact on the Japanese.

essential details” of the alternative school’s operations.⁸³ More specifically, the Court determined that the state may not retain “affirmative direction” over details of privately supported schools that would “deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books.”⁸⁴ The Court stated that the state may not “deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful” by effectively eliminating selection of teachers and curricula in privately supported schools.⁸⁵ Like *Meyer* and *Pierce*, *Farrington* relied upon the “general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendance upon schools.”⁸⁶

As one observer has noted, “[v]iewed broadly, *Meyer*, *Pierce* [and *Farrington*] create a private realm of decision-making into which states cannot easily intrude, [and a] parent’s right to shape his child’s education falls within that realm.”⁸⁷ Under this broad interpretation, these three cases from the 1920s may be understood to protect a parent’s decision to teach her child at home. However, none of the holdings applied directly to home education; therefore, they do not assure a constitutional right to such education. In sum, although these cases do not expressly create a right to home education, they do lay the foundation for later decisions.⁸⁸

In 1972, the Supreme Court accepted the opportunity to apply the 1920s trilogy to what was arguably a home-schooling context. In *Wisconsin v. Yoder*,⁸⁹ the state charged, tried, and convicted two Amish parents for violating “Wisconsin’s compulsory school-attendance law [which] required [parents] to cause their children to attend

83. *Id.* at 298.

84. *Id.*

85. *Id.*

86. *Id.*

87. Alma C. Henderson, *The Home Schooling Movement: Parents Take Control of Educating Their Children*, 1991 ANN. SURV. AM. L. 985, 992.

88. See *Farrington*, 273 U.S. at 298-99 (holding unconstitutional a statute that applied to privately supported schools, not home schools); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-36 (1925) (holding unconstitutional a statute as applied to a private religious school and a private military school, not as applied to a home school); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding unconstitutional a statute that applied only to private schools, religious schools and public schools, not home schools); see also James C. Easterly, Comment, “Parent v. State”: *The Challenge to Compulsory School Attendance Laws*, 11 HAMLIN J. PUB. L. & POL’Y 83, 88 (1990) (arguing that even though these cases are frequently cited in cases regarding parents’ rights to educate their own children, none of them directly address the issue of parents educating their children at home).

89. 406 U.S. 205 (1972).

public or private school until reaching age 16."⁹⁰ The respondents declined to send their children, ages fourteen and fifteen, to public school, and they did not enroll their children in any private school recognized under the compulsory attendance law.⁹¹ Instead, respondents chose to act "in accordance with the tenets of the Old Order Amish communities"⁹² and provide vocational home-instruction in the Amish community during the "crucial and formative adolescent period of life."⁹³ The respondents conceded that they were subject to the Wisconsin statute,⁹⁴ but they challenged the constitutionality of the statute as it applied to them.⁹⁵

The *Yoder* Court held Wisconsin's compulsory attendance statute unconstitutional as applied to the Amish families because (1) it abridged the free exercise of religion of the Amish parents and children;⁹⁶ and (2) it violated the Amish parents' liberty to direct the education of their children.⁹⁷ The Court expressly held that

this case involve[d] the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurtur[ing] and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most enduring statements of the court in this area are found in *Pierce v. Society of Sisters*.⁹⁸

Thus, the *Yoder* Court affirmed the holding of *Pierce* and applied the due process fundamental liberty analysis in the home school context.⁹⁹

90. *Id.* at 207.

91. *Id.*

92. *Id.* at 209.

93. *Id.* at 211; see also WHITEHEAD & BIRD, *supra* note 28, at 30 (classifying the parents' educational choice in *Yoder* as "home instruction").

94. *Yoder*, 406 U.S. at 207.

95. *Id.* at 208-09.

96. *Id.* at 207, 219, 234; see *infra* notes 124-58 and accompanying text (offering a more detailed analysis of the applicability of the First Amendment to home-schooling debates).

97. *Yoder*, 406 U.S. at 232.

98. *Id.* at 232. The Court also explained that there was "no doubt" as to the power of the State to impose reasonable regulations upon educational choices, but determined that in this case, the regulations were not sufficiently important to outweigh the interest in protecting the fundamental constitutional liberties at stake. *Id.* at 234; see *infra* notes 188-237 and accompanying text (discussing state interests sufficient to overcome a constitutional challenge to statutes infringing on fundamental liberties such as the right of parents to direct the education of their children).

99. *Yoder* emphasized that the parental liberty to direct the education of their children is not just an ordinary constitutional right, but is recognized as a "fundamental" constitu-

"Without question, the *Pierce* decision is 'generally accepted as currently effective' constitutional precedent,"¹⁰⁰ and a number of recent federal and state cases have affirmed the 1920s cases and *Yoder* in a home-schooling context.¹⁰¹ The parental right to direct the edu-

tional right. *Yoder*, 406 U.S. at 213-14. This distinction is significant because once a right is classified as fundamental, any regulation of the right is subject to heightened or strict scrutiny. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) (recognizing that when a home educator demonstrates that a state regulation burdens her fundamental rights, the government must then establish that a compelling governmental interest warrants that burden), *cert. denied*, 484 U.S. 1066 (1988); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 914 (W.D. Wash. 1994) (stating that "[s]trict scrutiny is [] required when laws impinge upon constitutionally protected 'fundamental' rights" (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985))); *WHITEHEAD & BIRD*, *supra* note 28, at 32.

At least one author has argued that *Yoder*, like *Meyer*, *Pierce*, and *Farrington*, may address the issue of the rights of parents to educate their own children, but "neither its facts nor its conclusions go to the heart of the home schooling problem." Easterly, *supra* note 88, at 88. Easterly believes that the inapplicability of the 1920s cases and *Yoder* to home schooling is particularly apparent when "the parents' claimed right is secularly, rather than religiously, rooted." *Id.* Other authors and cases cite the 1920s decisions and *Yoder* as definitive affirmations of the constitutional right of parents to educate their children at home. See, e.g., *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 933 (6th Cir. 1991) (affirming the "right of parents to direct the education and upbringing of their children, as recognized in [] *Yoder*, . . . and *Pierce*[]" in a home education context); *WHITEHEAD & BIRD*, *supra* note 28, at 28-32.

100. *WHITEHEAD & BIRD*, *supra* note 28, at 31 (quoting THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 600 (1970)); see also *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 899 F. Supp. 1443, 1450 (M.D.N.C. 1995) (recognizing that the liberty protected by the Fourteenth Amendment includes the right of parents to direct the upbringing and education of their children and stating that "[t]he importance of [that] right . . . is well established"); *Klicka*, *supra* note 3, at 39 (stating that "it is clear [that] the constitutional right of a parent to direct the upbringing and education of his child is firmly entrenched in the U.S. Supreme Court case history").

101. See, e.g., *Jeffery v. O'Donnell*, 702 F. Supp. 513, 515 (M.D. Pa. 1987) (mem.) (stating that "[p]arents have a substantial constitutional right to direct and control the upbringing and development of their minor children"); *Mazanec v. North Judson-San Pierre Sch. Corp.*, 614 F. Supp. 1152, 1160 (N.D. Ind. 1985) (holding that parents have a "constitutional right to educate [their] children in an educationally proper home environment"), *aff'd*, 798 F.2d 230 (7th Cir. 1986); *In re Charles*, 504 N.E.2d 592, 598, 600 (Mass. 1987) (stating that home education is a "right protected by the Fourteenth Amendment" and that the object of compulsory attendance laws is "that all children shall be educated, not that they shall be educated in any particular way" (quoting *Commonwealth v. Roberts*, 34 N.E. 402, 403 (Mass. 1893))); *Delconte v. State*, 313 N.C. 384, 400, 329 S.E.2d 636, 646 (1986) (recognizing that "if [the court] interpreted [North Carolina's] present school attendance statutes to preclude home instruction, serious constitutional questions would arise").

In addition, the Supreme Court affirmed the principles of *Pierce* and *Yoder* outside the home school context as recently as 1990. *Employment Div. of Oregon v. Smith*, 494 U.S. 872, 881 (1990). In *Smith*, two American Indians who ingested peyote as part of their religious beliefs were fired from a private drug rehabilitation organization. *Id.* at 874. When they sought unemployment compensation, they were denied because they had been discharged for "misconduct." *Id.* Although the holding in this case relied upon the fact

cation of children remains a fundamental right protected under the Due Process Clause of the Fourteenth Amendment.¹⁰² In fact, as recently as 1990, in *Employment Division of Oregon v. Smith*,¹⁰³ the Supreme Court affirmed the principles of *Yoder* and *Pierce*, stating that "the right of parents . . . to direct the education of their children" continues to enjoy protection as a fundamental right under the Constitution.¹⁰⁴

In addition to protecting individuals' fundamental rights from being abrogated by state regulations, the Due Process Clause prohibits impermissibly vague laws or regulations.¹⁰⁵ Therefore, Due Process protects home educators against vague statutes, and the state may not constitutionally penalize them for violating a statute that is impermissibly unclear.¹⁰⁶ This has important implications for compulsory attendance statutes which are often used to attack home-schooling families:

In home schooling matters . . . [i]n states with vague compulsory attendance laws, a family is in compliance with the compulsory attendance law only if what they are doing is satisfactory to the local superintendent. If they are doing something which the local superintendent deems unsatisfactory, then they are in violation of the law. Violation of these compulsory attendance statutes is a criminal offense. As a result, in these states with vague laws, a home schooler is guilty of a

that the First Amendment did not protect drug use, the Court went out of its way to emphasize that the "compelling interest test" is still applicable to the "Free Exercise Clause in conjunction with other constitutional protections, such as . . . the *right of parents*, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to *direct the education of their children*, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." *Id.* at 881 (emphasis added). *But see* *Null v. Board of Educ.*, 815 F. Supp. 937, 939-40 (S.D. W. Va. 1993) (mem.) (finding that parents do not possess a fundamental right to direct their children's education, but rather only a general liberty interest subject to reasonable regulation); *Hinrichs v. Whitburn*, 772 F. Supp. 423, 432 (W.D. Wis. 1991) (finding no cases recognizing existence of fundamental right in parents to direct their children's education and concluding that the right at issue was merely a liberty interest subject to reasonable state regulation), *aff'd*, 975 F.2d 1329 (7th Cir. 1992).

102. KLIKA, *supra* note 3, at 39. *But see* *State v. Edgington*, 663 P.2d 374, 378 (N.M. App.) (rejecting an argument that the New Mexico court should apply a "strict scrutiny" standard to determine whether the exclusion of home education from the state's attendance statute violated the Equal Protection Clause), *cert denied*, 464 U.S. 940 (1983).

103. 494 U.S. 872, 872 (1990).

104. *Id.* at 881.

105. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (stating that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined").

106. *See* *State v. Popanz*, 332 N.W.2d 750, 755-56 (Wis. 1983) (holding Wisconsin's compulsory education statute void for vagueness and dismissing criminal actions against home-schooling parents).

crime for the sole reason that they have failed to satisfy a particular public school official who may create whatever standards he chooses. . . . Therefore, home schoolers could and are criminally charged for violating standards that exist only in the mind of a local superintendent.¹⁰⁷

When this situation arises, courts recognize that the compulsory attendance law in question is unconstitutionally vague if (1) the law does not provide enough guidance to permit a person of "ordinary intelligence" to know what is prohibited, thus resulting in a "trap" for the innocent without fair warning,¹⁰⁸ and (2) the law permits arbitrary and discriminatory enforcement because no explicit standards are available for those who apply the law.¹⁰⁹

Recently, advocates of home schooling have successfully challenged the compulsory attendance laws of six states on vagueness grounds.¹¹⁰ Essentially, courts recognize that "when interpretation of the law is left up to local school districts, variances, and thus unconstitutional vagueness, is the result."¹¹¹ Therefore, the Fourteenth Amendment's constitutional protection against the enforcement of vague statutes continues to provide significant protection for home-schooling families, especially those who live in states without home

107. KLIČKA, *supra* note 3, at 86-87.

108. Fellowship Baptist Church v. Benton, 620 F. Supp. 308, 318 (S.D. Iowa 1985) (stating that the term "equivalent instruction" in Iowa's compulsory attendance statute "fails to give adequate notice to the ordinary man of what is prohibited by the statute"), *aff'd in part, rev'd in part*, 815 F.2d 485 (8th Cir. 1987) (reversed only as to the district court's decision concerning attorney's fees); *see also Grayned*, 408 U.S. at 108-09 (providing the original statement of the reasons for which a court may find a statute unconstitutionally vague).

109. Jeffery v. O'Donnell, 702 F. Supp. 516, 518 (M.D. Pa. 1988) (mem.) (holding Pennsylvania's compulsory attendance statute unconstitutionally vague); Ellis v. O'Hara, 612 F. Supp. 379, 381 (E.D. Mo. 1985) (holding compulsory attendance law of Missouri unconstitutionally vague because "th[e] statute represents a prime example of legislation which yields an unacceptable amount of discretion to officials charged with its enforcement"), *rev'd*, 802 F.2d 462 (8th Cir. 1986) (reversing without opinion).

110. *See Jeffery*, 702 F. Supp. at 518 (holding Pennsylvania's compulsory attendance statute unconstitutionally vague); *Ellis*, 612 F. Supp. at 381 (holding Missouri's compulsory attendance statute unconstitutionally vague); Roemhild v. State, 308 S.E.2d 154, 159 (Ga. 1983) (holding Georgia's compulsory attendance law "unconstitutionally vague"); Iowa v. Trucke, 410 N.W.2d 242, 244 (Iowa 1987) (recognizing that unclear language in the compulsory attendance law precluded conviction of home-educating parents); *People v. Pebler*, No. 91-0848-SM (Mich. 3-B Dist. Ct., St. Joseph County, July 2, 1991) (order dismissing a case against a home-schooling mother who had been arrested, finger printed, had mug shots taken and charged with criminal truancy after oral arguments because the Michigan compulsory attendance law was "vague and unclear as to what specifically constitutes a violation of that act"); *State v. Newstrom*, 371 N.W.2d 525, 533 (Minn. 1985) (holding Minnesota's compulsory attendance law unconstitutionally vague).

111. KLIČKA, *supra* note 3, at 92.

school laws and who continue to be subject to criminal sanctions under compulsory attendance statutes.¹¹²

In addition to protecting against intrusion into the exercise of fundamental liberties and against the enforcement of vague laws, the Due Process Clause of the Fourteenth Amendment requires that decisions affecting fundamental rights be made by a "neutral and detached judge in the *first instance*."¹¹³ Of course, "[e]very state has a compulsory attendance law and in every state the local public school officials have the exclusive authority to enforce this law. Many states give the superintendents discretion, in some way, over whether or not a home school will be able to operate."¹¹⁴ However, school officials and superintendents are not neutral decision-makers for two reasons. First, many school superintendents believe that public schools are far superior to home schools in nearly every category of educational concern.¹¹⁵ Second, they have a "financial incentive to disapprove a home school" because if a child is not home schooled, the probability that the child will attend public school increases.¹¹⁶ Public school officials want as many children as possible to attend their schools because each local school district receives \$2000 to \$4000 per student in state and federal tax dollars.¹¹⁷ Since the public school officials who determine in the "first instance" whether a home school may operate are not neutral, home schools should be able to successfully challenge a denial of permission to operate by challenging the impartiality of the decision-maker.

Several courts have recognized the constitutional guarantee of a neutral decision-maker for decisions bearing upon fundamental rights in the home-schooling context.¹¹⁸ However, no cases or literature indicate that a person or group seeking to establish a home school has

112. *Id.* at 94-95.

113. *Ward v. Monroeville*, 409 U.S. 57, 62 (1972) (emphasis added).

114. *Klicka*, *supra* note 3, at 109.

115. *MAYBERRY ET AL.*, *supra* note 3, at 94. Contrary to the understandings of many school superintendents, most research suggests that home school students outperform their public school counterparts on standardized academic tests. *Id.*; see *supra* note 33.

116. *Klicka*, *supra* note 3, at 111. The Supreme Court has held that a decision-maker with a partisan bias (or a financial incentive that is not personal to the decision-maker) is inconsistent with the Due Process Clause. *Ward*, 409 U.S. at 61-62.

117. *Klicka*, *supra* note 3, at 111. In Florida, the director of finance for one school system was alarmed that the district had lost \$398,000 in 1987 for the students who were receiving home education. *Id.* According to the Supreme Court, a decision-maker with a financial incentive is not a "neutral magistrate" and therefore is disqualified under the Due Process Clause of the Fourteenth Amendment. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

118. See, e.g., *Fellowship Baptist Church v. Benton*, 620 F. Supp. 308, 318 (S.D. Iowa 1985) (recognizing 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," but resting its

ever successfully reversed a truancy conviction on the grounds that the individual who denied the home school permission to operate was not neutral.¹¹⁹ The due process guarantee of an impartial decision-maker for rulings that affect a fundamental liberty, such as a parent's right to control the education of her children, should be available to assist home-schooling parents who are denied an opportunity to operate their home schools by a biased public school official. In reality, however, this form of constitutional challenge has not been a widely used or even mildly successful protection for home-schooling parents.¹²⁰

To summarize, home-schooling parents enjoy three types of protections under the Due Process Clause of the Fourteenth Amendment. Due process protects the parents' fundamental liberty to direct the education of their children;¹²¹ it shields parents from punishment under unconstitutionally vague compulsory attendance statutes;¹²² and the Due Process Clause protects parents from losing their "right" to choose home education for their children at the hands of a biased decision-maker.¹²³

The First Amendment¹²⁴

In addition to rights enjoyed under the Fourteenth Amendment, home-schooling parents often exercise rights that are protected under the First Amendment.¹²⁵ Two aspects of the First Amendment, the

holding on a different principle), *aff'd in part, rev'd in part*, 815 F.2d 485 (8th Cir. 1987) (reversed only as to the district court's decision concerning attorney's fees).

119. Only two cases in the home-schooling context have ruled on the issue of whether allowing a superintendent to be a decision-maker in this context (with both a financial interest in the decision and a partisan bias) violates due process. The due process claim failed in both cases. In *State v. Toman*, 436 N.W.2d 10 (N.D. 1989), a due process challenge arguing that a biased school official should not have power to deny the parents an opportunity to home educate their children was not made in a timely fashion and the court did not consider it fully. *Id.* at 11. In *State v. Anderson*, 427 N.W.2d 316 (N.D.), *cert. denied*, 488 U.S. 965 (1988), the North Dakota Supreme Court agreed with the home-schooling parents that the Due Process Clause "entitles a litigant to an impartial, neutral, and disinterested tribunal," but the court disagreed that the school board decision-maker had an opportunity to exercise bias under the laws of that state, so the parents' claim failed. *Id.* at 320.

120. *See, e.g., Blackwelder v. Safnauer*, 689 F. Supp. 106, 147 (N.D.N.Y. 1988) (holding that a public school superintendent's role in assessing parents' home instruction programs to determine whether home-schooling programs were substantially equivalent to the quality of education offered in public schools did not violate parents' procedural due process right to an impartial decision-maker), *appeal dismissed*, 866 F.2d 548 (2nd Cir. 1989).

121. *See supra* notes 60-104 and accompanying text.

122. *See supra* notes 105-12 and accompanying text.

123. *See supra* notes 113-20 and accompanying text.

124. For the pertinent text of the amendment see *supra* note 52.

125. KLIČKA, *supra* note 3, at 49.

Free Exercise Clause and the Free Speech Clause, protect parents who choose home education for their children.

A majority of parents who teach their children at home choose home education for religious purposes,¹²⁶ electing the option "because they hold a religious belief that education must be Bible-centered."¹²⁷ Consequently, if the state attempts to prevent these parents from educating their children at home, the state prevents the parents from exercising their religious beliefs.¹²⁸ This means that a home school family who is prosecuted for failing to comply with a local restriction governing home education "can use the First Amendment as a defense as long as they prove the particular restriction violates their religious belief."¹²⁹

The leading decision on the free exercise of religion in the context of home education is *Wisconsin v. Yoder*.¹³⁰ In that case, the state argued that it had a compelling interest in education which should override the regulation's burden on religious freedom.¹³¹ The Court disagreed and declared:

The conclusion is inescapable that secondary 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 to the parent and the child.¹³²

126. *Id.*; MAYBERRY ET AL., *supra* note 3, at 35; *see supra* note 13 (providing a statistical analysis of the religious character of home educators).

127. WHITEHEAD & BIRD, *supra* note 28, at 37. Many parents who home educate their children believe that "parents are given the responsibility by the Bible of carefully instructing their children." *Id.* at 38. Several Bible verses are consistently cited as the biblical foundation directing that all teaching be by parents and from a Christian standpoint: (1) "And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up." *Deuteronomy* 6:6, 7; (2) "Train up a child in the way he should go . . ." *Proverbs* 22:6; (3) "And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." *Ephesians* 6:4; (4) "For I know him, that he will command his children and his household after him, and they shall keep the way of the Lord to do justice and judgment." *Genesis* 18:19.

128. *See* KLIČKA, *supra* note 3, at 49.

129. *Id.*

130. 406 U.S. 205 (1972); *see supra* notes 89-95 and accompanying text (discussing the facts of *Yoder*).

131. *Yoder*, 406 U.S. at 217.

132. *Id.* at 217-18.

Consequently, the Court held that despite the state's strong interest in "universal education," the fundamental rights of Amish parents to direct the educational and religious upbringing of their children must be recognized and respected.¹³³ In *Yoder*, the parents' First Amendment right to freely exercise their religion prevailed, and the compulsory attendance statute that threatened the Amish families whose children did not attend public schools was held unconstitutional as applied to them.¹³⁴

Recently, the Michigan Supreme Court used the First Amendment to protect home schools in *Michigan v. DeJonge*.¹³⁵ In that case, the state criminally prosecuted and convicted home educators for teaching their children at home without teacher certification as required by law.¹³⁶ The Michigan Court of Appeals affirmed the conviction, but the Michigan Supreme Court reversed, stating that

the DeJonges believe that the word of God commands them to educate their children without state certification. Any regulation interfering with that commandment is state regulation of religion. The certification requirement imposes upon the DeJonges a loathsome dilemma: they must either violate the law of God to abide by the law of man, or commit a crime under the law of man to remain faithful to God. The requirement presents an "irreconcilable conflict between the mandates of law and religious duty."¹³⁷

The court further stated that "[t]o entertain the notion that either this Court or the State has the insight to interpret the DeJonges' religion more correctly than they is simply 'an arrogant pretension.'"¹³⁸ Therefore, the court decided that "the teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified instructors. Such families, therefore,

133. *Id.* at 214. The *Yoder* Court stated:

A State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those 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.

Id.

134. *Id.* at 236.

135. 501 N.W.2d 127 (Mich. 1993).

136. *Id.* at 129-30.

137. *Id.* at 137 (quoting Michigan Dep't of Social Servs. v. Emmanuel Baptist Bible Church, 455 N.W.2d 1, 5 (1990) (Cavanagh, J., concurring)).

138. *Id.* at 139 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 67 (1947) (Rutledge, J., dissenting) (Appendix)).

are exempt from the dictates of the teacher certification requirements."¹³⁹

Although this First Amendment right provides some protection for parents who home educate for sincere religious purposes,¹⁴⁰ not all First Amendment defenses for home-schooling families are successful.¹⁴¹ The courts often reject claims that the First Amendment protects a choice to educate children at home.¹⁴² In response to this reality, Christopher Klicka argues that the courts' reasoning contains a "major constitutional flaw" in nearly every case in which home educators have *not* succeeded in invoking the First Amendment to protect their decisions to become home educators.¹⁴³ He contends that the First Amendment *should* protect home educators from state regulation in *every* case in which home educators choose home schooling for

139. *Id.* at 144.

140. A few recent cases have affirmed the *Yoder* decision and recognized that the First Amendment protects home education. One commentator observed that a Michigan district court sustained the religious exercise right to home education when it stated that " 'this court won't and no Court should interfere with the free exercise of a religious belief on the facts of this case.' " WHITEHEAD & BIRD, *supra* note 28, at 46 (quoting *State v. Nobel*, No. S791-0114-A, slip op. at 12 (Mich. Dist. Ct., Allegan County, Jan. 9, 1980)). In North Carolina, in a case in which home educators challenged the constitutionality of the state's compulsory attendance statute on First Amendment grounds (as a defense to a charge under that statute), the trial court stated that because the home educators were sincere in their religious motivation for home schooling their children, the home school received First Amendment protections. *See Delconte v. State*, 313 N.C. 384, 388, 329 S.E.2d 636, 640 (1985).

141. Often, the First Amendment issue in home-schooling cases arises after parent educators are charged with a violation of either a state compulsory attendance statute or a local regulation governing home schools and, in response to the charges, raise a defense under the First Amendment. *See, e.g., Delconte*, 313 N.C. at 387-88, 329 S.E.2d at 639 (recognizing that home educators were charged under the state compulsory attendance statute and that home educators defended that charge using the First Amendment).

142. *See, e.g., Fellowship Baptist Church v. Benton*, 678 F. Supp. 213, 214 (S.D. Iowa 1988) (upholding "equivalent instruction" requirements which burdened religious beliefs), *on remand from* 815 F.2d 486 (8th Cir. 1986) (remanding in part due to promulgation of new standards for "equivalent instruction"), *appealed from* 620 F. Supp. 308 (S.D. Iowa 1985) (finding "equivalent instruction" requirements unconstitutionally vague); *Nebraska v. Faith Baptist Church*, 301 N.W.2d 571, 579-80 (Neb.) (upholding a teacher certification requirement against a Christian school and parents who had demonstrated that the certification burdened their religious beliefs), *cert. denied*, 454 U.S. 803 (1981); *State v. Patzer*, 382 N.W.2d 631, 639 (N.D.) (upholding teacher certification requirements against the established religious beliefs of home educators), *cert. denied*, 479 U.S. 825 (1986); *North Dakota v. Shaver*, 294 N.W.2d 883, 900 (N.D. 1980) (upholding teacher certification requirements in the face of a First Amendment challenge); *Ohio v. Schmidt*, 505 N.E.2d 627, 629-30 (Ohio) (upholding requirement that home educators seek approval of local superintendent for home education program in face of First Amendment challenge by home educators), *cert. denied*, 484 U.S. 942 (1987); *see also infra* notes 219-23 and accompanying text (discussing states' interests in regulating education).

143. KLICKA, *supra* note 3, at 71.

religious reasons.¹⁴⁴ Further, he maintains that in each case in which the courts have denied First Amendment protection to home educators, these courts have made errors in their interpretations or applications of the constitutional principles governing First Amendment claims.¹⁴⁵ Regardless of how one interprets these cases, the First Amendment does not thoroughly protect home educators who choose home education for sincere religious reasons. State interests in regulating education have overcome First Amendment concerns in a number of contexts.¹⁴⁶

Since not all home educators choose home schooling for religious purposes, and since the Free Exercise Clause has not proven to be a consistent source of protection for home educators, some home-schooling families also have turned to a second aspect of the First Amendment, the Free Speech Clause, for protection against excessive regulations and even prohibitions of home education.¹⁴⁷ The First Amendment protection of speech includes protection of beliefs and thoughts,¹⁴⁸ and in many cases, parents home school their children to integrate their family's beliefs and values with their children's education.¹⁴⁹ As one commentator has stated:

While in the past parents frequently based their decision on religious considerations, this increasingly is no longer the case. In support of the parental right to educate children at home is the argument that conscientious and informed parents are the most aware of the children's needs and are best qualified to integrate learning materials with their family's own philosophy and values.¹⁵⁰

144. *Id.*

145. *Id.*

146. See, e.g., *Fellowship Baptist Church*, 678 F. Supp. at 214 (upholding "equivalent instructions" requirements which burdened religious beliefs); *Faith Baptist Church*, 301 N.W.2d at 579-80 (upholding a teacher certification requirement against a Christian school and parents who had demonstrated that the certification burdened their religious beliefs); *Patzer*, 382 N.W.2d at 639 (upholding teacher certification requirements against the established religious beliefs of home educators); *Shaver*, 294 N.W.2d at 900 (upholding teacher certification requirements against a First Amendment challenge); *Schmidt*, 505 N.E.2d at 629-30 (upholding requirement that home educators seek approval of local superintendent for home education program in face of First Amendment challenge by home educators); see also *infra* notes 218-23 and accompanying text (discussing states' interests in regulating education).

147. WHITEHEAD & BIRD, *supra* note 28, at 51.

148. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

149. WHITEHEAD & BIRD, *supra* note 28, at 51-52.

150. E. Alice Law Beshoner, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. REV. 191, 193 (1981).

Recognizing that parents may choose to home educate because they wish to impart familial beliefs to their children as opposed to subjecting their children to the "powerful impact of [public] education on students' ideologies and values,"¹⁵¹ at least one court has concluded that a nonreligious First Amendment freedom of speech and belief is sufficient to uphold home education in the face of a challenge.¹⁵² In that case, *In re Falk*, parents chose home education because they held a *philosophical* opposition to the group learning experience common in modern public schools.¹⁵³ Absent a religious motivation to home educate, the court upheld the home school's legitimacy.¹⁵⁴

Despite this success, no state supreme court (nor the United States Supreme Court) has decided a case based on the protection claimed by home educators under the Free Speech Clause. However, the legal foundation for protection certainly exists, and more families may choose to rely on this nonreligious First Amendment protection in the future.¹⁵⁵

In summary, under the First Amendment, home educators who elect home schooling for religious purposes may find constitutional protection for their right to educate their children at home under the Free Exercise Clause.¹⁵⁶ However, courts have not consistently upheld this right in the face of state regulation.¹⁵⁷ Similarly, individuals who elect to home school for philosophical or nonreligious reasons may find constitutional protection under the Free Speech Clause, but the right to home school for philosophical or nonreligious reasons has not been "tested" in any high courts and may not provide consistent protection.¹⁵⁸ Although home educators may have a "right" to home school under the First Amendment, that right has not been viewed consistently in the various courts hearing cases on that issue.

151. WHITEHEAD & BIRD, *supra* note 28, at 52.

152. See *In re Falk*, 441 N.Y.S.2d 785, 786-87, 791 (N.Y. Fam. Ct. 1981) (mem.).

153. *Id.* at 786-87.

154. *Id.* at 791.

155. If courts begin to uphold rights to home school on freedom of speech and belief grounds, then nonreligious parents as well as religious parents will be able to choose from the full range of educational alternatives for their children. If they do not uphold the right to home school on nonreligious grounds, but they do continue to uphold home schools on religious grounds, then parents who form "religious home schools" will enjoy greater rights than nonreligious parents who wish to home school.

156. See *supra* notes 126-39 and accompanying text.

157. See *supra* notes 140-46 and accompanying text.

158. See *supra* notes 147-55 and accompanying text.

The Right to Privacy¹⁵⁹

In addition to the support home-schooling families find under the First and Fourteenth Amendments, home educators, because they educate in their homes, may claim a right to privacy in their home schools that is unparalleled in public institutions. In *Stanley v. Georgia*,¹⁶⁰ the United States Supreme Court recognized an individual right to be free from unwarranted governmental intrusion into one's privacy, particularly privacy in the home.¹⁶¹ According to some authors, this constitutional right to privacy in the home extends to decisions to educate children at home.¹⁶² These authors rely on *Perchemlides v. Frizzle*, a Massachusetts Superior Court decision, to support that theory.¹⁶³ In *Perchemlides*, the court stated:

There will remain little privacy in the "right to privacy" if the state is permitted to inquire into the motives behind parents' decisions regarding the education of their children. As plaintiffs here point out, the plaintiffs in [the landmark case regarding the right of parents to direct their children's education¹⁶⁴] included a secular military academy, and the holding in that case did not mention religious beliefs or the Free Exercise clause of the First Amendment.¹⁶⁵

Following the logic enumerated in *Perchemlides*, home educators could argue that all home schools deserve equal protection under the implied constitutional right to privacy regardless of the religious or secular nature of the home school. However, the *Perchemlides* deci-

159. See *supra* note 53 and accompanying text.

160. 394 U.S. 557 (1969).

161. *Id.* at 567-68 (holding that the First and Fourteenth Amendments prohibit criminalizing mere private possession of obscene materials in a home). While no "right of privacy" has been found in any specific guarantee of the Constitution, a right of privacy is an "implied right" created under the penumbra of rights enumerated in the Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (reasoning that "the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees" that imply that individuals enjoy a "zone of privacy" protected by "several fundamental constitutional guarantees"). This "implied right" is significant because protection for non-religious home schools under the First Amendment has not been fully tested in the courts, and the First Amendment may not protect nonreligious home schools to the same extent that it protects religious home schools. The implied right of privacy, however, does not depend upon whether the home school has a religious component, and therefore, it should provide protection equally to all types of home schools.

162. See, e.g., *WHITEHEAD & BIRD*, *supra* note 28, at 54.

163. *Id.* (citing *Perchemlides v. Frizzle*, No. 16641, slip op. at 9, 27 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978)).

164. This landmark case is *Pierce v. Society of Sisters*, 268 U.S. 530 (1925); see *supra* notes 71-79 and accompanying text (discussing *Pierce* in greater detail).

165. *Perchemlides v. Frizzle*, No. 16641, slip op. at 9, 27 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978)).

sion has no precedential effect for courts outside Massachusetts,¹⁶⁶ and the United States Court of Appeals for the Eighth Circuit has come to a contrary conclusion in *Murphy v. Arkansas*.¹⁶⁷ In *Murphy*, parents challenged the constitutionality of the Arkansas Home School Act on a number of grounds, including a claim that the Act violated their right to privacy.¹⁶⁸ The Murphys argued that "the right of privacy should be extended to protect parental decisions concerning the direction of a child's education from state interference."¹⁶⁹ In rejecting that argument, the court of appeals quoted the Supreme Court and stated:

"A person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because the government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education."¹⁷⁰

Ultimately, the *Murphy* court clearly "decline[d] to extend the right of privacy to this situation."¹⁷¹

Considering *Perchemlides* and *Murphy* together, one must recognize that the implied right to privacy is not a certain protection for home educators. Although an implied right to privacy *may* protect parents from disclosing their motivations for home educating their children and entitle all home schools (regardless of religious affiliation) to equal constitutional protection,¹⁷² the proposition is certainly debatable.

166. In fact, because *Perchemlides* is only a superior court decision, it does not have much precedential effect within Massachusetts either.

167. See *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988).

168. *Id.* at 1041; see ARK. CODE ANN. §§ 6-15-501 to -507 (Michie 1993 & Supp. 1995) (Arkansas Home School Act).

169. *Murphy*, 852 F.2d at 1044.

170. *Id.* (quoting *Runyon v. McCrary*, 427 U.S. 160, 178 (1976)).

171. *Id.*

172. Various courts have denied claims by home educators made specifically under the Equal Protection Clause, and therefore, the Equal Protection Clause has not been a direct source of protection for home educators. See, e.g., *id.* (upholding the Arkansas Home School Act in the face of an Equal Protection Clause challenge by parents home schooling their children); *Null v. Board of Educ.*, 815 F. Supp. 937, 940 (S.D. W. Va. 1993) (mem.) (holding that a statute that makes children ineligible for home schooling if their standardized test scores fall below the fortieth percentile and do not improve does not violate the equal protection rights of home-educating parents or their children); *Hinrichs v. Whitburn*, 772 F. Supp. 423, 434 (W.D. Wis. 1991) (holding that a decision not to treat home schooling as work activity for purposes of an exemption from mandatory participation in an AFDC

More recently, supporters of the home education movement have begun to argue that a different sort of privacy right protects home schools from government intrusion. This alternative "right to privacy" theory is grounded in the Fourth Amendment's protection of an individual's right to be free from warrantless searches and seizures.¹⁷³ This Fourth Amendment right to privacy applies in the home-schooling context when compulsory attendance statutes or specific home school statutes allow state officials to visit home schools to enforce the state's statutory regulations on home education.¹⁷⁴ As one commentator has suggested:

It is a fundamental principle of due process that if a government official comes into one's home for the purpose of making a determination whether or not a criminal law is being complied with, then such an intrusion into the home is a search within the meaning of the Fourth Amendment. Since violation of the compulsory attendance law is a crime, a home visit by a public school official to determine compliance with the law is a violation of the home schooler's Fourth Amendment rights.¹⁷⁵

Concurring with this principle, the Rhode Island Commissioner of Education stated that the "Fourth Amendment and also the constitutionally derived right to privacy and autonomy which the United States Supreme Court has recognized protect individuals from unwanted and warrantless visits to the home by agents of the State."¹⁷⁶

In *Blackwelder v. Safnauer*,¹⁷⁷ however, a New York court held that although home educators have a right to privacy in their homes protected by the Fourth Amendment, the on-site home visits required under New York law for the purpose of approving a particular home-schooling program do not violate that right.¹⁷⁸ The court recognized that "an individual's home 'traditionally has been regarded as the center of [that] person's private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment.'" ¹⁷⁹ However, the court also explained that "because [the state

work program did not deny the home educator equal protection), *aff'd*, 975 F.2d 1329 (7th Cir. 1992).

173. See *supra* note 53.

174. See KLICKA, *supra* note 3, at 122 (citing *Kindstedt v. East Greenwich Sch. Comm.*, Op. Rhode Island Comm'r of Educ., at 5 n.12 (Aug. 7, 1986)).

175. *Id.* at 123.

176. *Kindstedt*, at 5 n.12.

177. 689 F. Supp. 106 (N.D.N.Y. 1988), *appeal dismissed*, 866 F.2d 548 (2nd Cir. 1989).

178. *Id.* at 138, 142.

179. *Id.* at 138 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 883 (1987) (Blackmun, J., dissenting)).

does] not attempt on-site visits without the permission of the families involved, and because it cannot be fairly said that some right or privilege is conditioned upon consent to such visits, the court finds that [the state is] entitled to summary judgment on plaintiffs' fourth amendment claims."¹⁸⁰

Considering both the opinion of the Commissioner of Education in Rhode Island and the decision of the New York district court in *Blackwelder*, the right to privacy under the Fourth Amendment, like the implied right to privacy under the Constitution, provides only uncertain support for home educators. However, the few courts that have considered the issue have recognized that a Fourth Amendment right to privacy does apply to home educators and the schools in their homes.¹⁸¹

The Ninth Amendment¹⁸²

The final constitutional provision to which home educators turn to shield their choice to home school their children from attack by state regulations is the Ninth Amendment. The Ninth Amendment states that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁸³ Supporters of the home-schooling movement contend that a trend exists in the courts to "recognize more and more rights within the protection of the Ninth Amendment."¹⁸⁴ Home-schooling advocates further argue that a parent's right to home educate her child should be the newest right identified under the Ninth Amendment.¹⁸⁵ Despite these arguments by supporters of the home education movement, the Ninth Amendment has not become a significant factor in home education debates. In fact, parents have rarely in-

180. *Id.* at 142.

181. *Id.* at 138.

182. *See supra* note 54.

183. U.S. CONST. amend. IX.

184. WHITEHEAD & BIRD, *supra* note 28, at 55 (arguing that "courts have upheld parental rights over the care, custody, and nurture of their children; the right to privacy; the right to travel and abide in any state; and parents' liberty toward their children" under the Ninth Amendment and that more rights are likely to be identified under that amendment (citations omitted)). The belief that new rights, including a right to educate a child at home, will be recognized under the Ninth Amendment is not universally held. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 900 (2d ed. 1991) (stating that "although the Court has continued to enforce 'fundamental' interest analysis in the areas of procreation, voting, access to the courts, and travel, it has essentially frozen the list of 'fundamental' interests").

185. *See* WHITEHEAD & BIRD, *supra* note 28, at 55 (citing *Perchemlides v. Frizzle*, No. 16641, slip op. at 27 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978), as having recognized the Ninth Amendment's significance in the home school context).

voked it in their efforts to establish the constitutional protection of their decisions to home educate their children.¹⁸⁶

In conclusion, home educators claim constitutional protection of their choice to home school their children under four areas of the Constitution: (1) the Fourteenth Amendment's Due Process Clause; (2) the First Amendment; (3) an "implied right" to privacy and a Fourth Amendment right to privacy; and (4) the Ninth Amendment. Although various courts have recognized constitutional protection under each of these four provisions of the Constitution, home educators have not always succeeded when invoking these protections. Even when the Constitution clearly protects the parents' choice to educate their children at home, "[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."¹⁸⁷

State's Interests

Although parents who educate their children at home may claim extensive protection for that choice under the Constitution, the states maintain competing interests in the education of the children within their boundaries.¹⁸⁸ States rely on three primary sources of authority when they claim an interest in regulating the education of children within their borders: (1) the Tenth Amendment;¹⁸⁹ (2) the police power of the states;¹⁹⁰ and (3) the *parens patriae* power of the states.¹⁹¹ This section addresses in turn each of these justifications for and origins of state regulations governing education.

The Tenth Amendment provides that any powers not delegated to the federal government, nor prohibited to the states, under the Constitution are reserved in the states or people.¹⁹² Since the United States Constitution does not mention education, authority over educa-

186. Authors advocating the home education movement rely upon *Perchemlides*, slip op. at 27, to support their contention that a right to home education should be identified under the Ninth Amendment; see *supra* notes 163-66 and accompanying text (discussing *Perchemlides* in greater detail).

187. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

188. See generally Henderson, *supra* note 87, at 985-86 (discussing various competing interests in home-schooling debates); Easterly, *supra* note 88, at 89-91 (discussing specifically states' interests in educating children).

189. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X; see *infra* notes 192-201 and accompanying text.

190. See Easterly, *supra* note 88, at 89; *infra* notes 202-05 and accompanying text.

191. See Easterly, *supra* note 88, at 89; *infra* notes 206-12 and accompanying text.

192. U.S. CONST. amend. X.

tion is reserved to the states or the people under the Tenth Amendment.¹⁹³ Further, since educational control is not delegated or prohibited under the Constitution, if education is not a right left to the people, then the states have power over education. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that there is no constitutionally implied right to an education reserved in "the people."¹⁹⁴ Therefore, the states have reserved power to control education under the Tenth Amendment.

In *Brown v. Board of Education*,¹⁹⁵ the Supreme Court made two germane observations.¹⁹⁶ The Court recognized that education is a legitimate area of interest for state and local government and that compulsory attendance laws are a reflection of that legitimate interest.¹⁹⁷ In doing so, the Court stated:

Today, education is perhaps the most important function of the 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. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹⁹⁸

It is therefore clear that, although parents may claim constitutional protection for their decisions governing the education of their children,¹⁹⁹ parents have no fundamental right to educate their children at home *free from governmental regulation*.²⁰⁰ This recognition

193. *See id.*

194. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (stating that there is no fundamental right to public education). Although individuals do not enjoy a fundamental right to an education, the Court has recognized other rights that give parents, "the people," power to make certain educational decisions. *See supra* notes 51-187 and accompanying text. Therefore, the struggle for control of childhood education may exist between parents and the state. *See* Mark Murphy, Comment, *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, 459 (1992).

195. 347 U.S. 483 (1954).

196. *Id.* at 493.

197. *Id.*

198. *Id.*

199. *See supra* notes 60-104 and accompanying text.

200. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education."); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the state reasonably to regulate all schools."); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1455-56 (E.D. Mich. 1989) (recognizing that although parents may have constitutional protection for at least some aspects of their decision to home school their child, any "right" to home education is not a right that is free from governmental regulation); *People v. Bennett*, 501 N.W.2d 106, 106 (Mich. 1993) (holding that

of authority in the states to regulate education underlies all justifications for state intervention in education.²⁰¹

In addition to the states' retention of power over education under the Tenth Amendment, states assume responsibility for the public welfare through their "police power."²⁰² Under the police power, states have an obligation to protect the communities within the state. Typically, when a state bases its statutory action on its police power, courts allow a presumption that the state has a "legitimate interest in the area of regulation that the statute addresses."²⁰³ However, "if the regulation adversely . . . abridges a fundamental right protected by the Constitution (typically a First or Fourteenth Amendment right [such as the fundamental rights claimed by home educators]), then the Court will scrutinize the statute in question and shift the burden of proof to the state."²⁰⁴ Despite this strict scrutiny, home education is not free from state regulation, and state regulations implemented under the state's police power may override the home educator's fundamental rights.²⁰⁵

In addition to the states' power to regulate education under their police power, states also enjoy "authority for overriding parents' management of their children's education [under their] *parens patriae* power."²⁰⁶ The *parens patriae* power refers "traditionally to the role of the state as sovereign and guardian of persons under a legal disability," including juveniles.²⁰⁷ In *Prince v. Massachusetts*,²⁰⁸ the Supreme

Pierce does not "mean that parents have a fundamental right to direct *all* of their children's education decisions" (emphasis added)).

201. See Easterly, *supra* note 88, at 89 (recognizing that the Tenth Amendment permits states to regulate education in the first instance, but also acknowledging that beyond the certainty of the enabling power under the Tenth Amendment, "commentators differ on whether the states find their authority [to regulate] . . . through their police power . . . [or] through their *parens patriae* power").

202. *Id.*

203. *Id.* at 90.

204. *Id.* at 90-91.

205. Donald H. Henderson et al., *Legal Conflicts Involving Home Instruction of School-Aged Children*, 64 ED. LAW REP. (West) 999, 1003 (1991) (citing *In re Kilroy*, 467 N.Y.S.2d 318 (N.Y. Fam. Ct. 1983)).

206. Easterly, *supra* note 88, at 90.

207. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2nd Cir.), *cert. denied*, 404 U.S. 871 (1971). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the state asserted *parens patriae* power to justify a conviction of Amish parents for withholding their children from school in violation of the state compulsory attendance law. *Id.* at 229. The Supreme Court held that the state failed to sustain its burden of proving that the parents had harmed their children by forbidding them to attend public school after the eighth grade. *Id.* at 230. However, the Court did recognize that in some instances that burden would be satisfied, permitting the state to regulate education under its *parens patriae* power. *Id.* at 236.

208. 321 U.S. 158 (1944).

Court upheld a conviction of a mother who permitted her child to sell religious magazines on the street and asserted the power of the court to penalize the mother for failing to send her child to school.²⁰⁹ In doing so, the Court affirmed a state's authority to limit parental rights specifically regarding a child's education and recognized that a state acting as *parens patriae* may restrict a parent's right of control by compelling attendance in a school.²¹⁰

Since both the *parens patriae* power and the police power of the states enable states to regulate education, it can be difficult to determine which power the state is relying upon for authority to impose any particular regulation. Any regulation regarding education for school-age children arguably involves the *parens patriae* power, because education regulations govern children, who are legally incompetent. Similarly, any education regulation is arguably imposed to protect the welfare of the state's communities, because educated citizens are more likely than non-educated individuals to contribute positively to the community.²¹¹ Since it is difficult to distinguish the two sources of power in this context, commentators suggest that "the authority of the state to oversee the child's education is founded upon both" the *parens patriae* power and the police power of the states.²¹²

Although states enjoy a police power and a *parens patriae* power through which they may justify regulations of education to protect the welfare of the state and its vulnerable citizens, any regulation that abridges a home educator's First or Fourteenth Amendment rights will be strictly scrutinized by a court if challenged by the home educator.²¹³ In this context, heightened scrutiny of a state education regula-

209. *Id.* at 141.

210. *Id.* at 166. Similarly, in *In re McMillan*, 30 N.C. App. 235, 226 S.E.2d 693 (1976), the North Carolina Court of Appeals upheld a finding that children were neglected because they did not attend school. *Id.* at 238, 226 S.E.2d at 695. However, the court noted that there was no conclusive showing that the children received any alternative education. *Id.*

Some commentators argue that the source of *parens patriae* in the state is limited by the Supreme Court's ruling in *In re Gault*, 387 U.S. 1 (1967), because it is now "generally held to be improper for the state to invoke *parens patriae* unless the state produces evidence of parental or guardian neglect that warrants intervention by the state to protect the child." Easterly, *supra* note 88, at 90. However, since failure to provide adequate education may be deemed to be neglect, this limitation may not be a significant one on the state's use of the *parens patriae* power to regulate education for the benefit of the children in the state. See *In re McMillan*, 30 N.C. App. at 238, 226 S.E.2d at 695 (holding that failure to assure that children attend school constituted neglect).

211. See *supra* notes 202-05 and accompanying text (discussing states' interests in regulating education to protect the welfare of the community).

212. Easterly, *supra* note 88, at 89.

213. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (recognizing that, although states have "paramount responsibility" to regulate education in the interests of

tion does not mean the regulation *must* yield to the constitutional right.²¹⁴ Instead, when a home educator challenges a state education regulation, the state has the burden of demonstrating either (1) “the statute does not, in fact, abridge the right as alleged,”²¹⁵ or (2) “even though the statute does abridge a fundamental right as alleged, the abridgment is justified by a compelling state interest”²¹⁶ and that this interest is met by the least burdensome means possible.²¹⁷

Because states do not often defend the challenges of home educators on the former ground, challenges to school regulations by home educators have essentially forced states to articulate the “compelling state interests” motivating particular education laws.²¹⁸ States have

their citizens, such regulations are “not totally free from a balancing process when [they] impinge[] on fundamental rights and interests, such as those 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”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing that there is “[n]o question” that the state has power “reasonably to regulate all schools,” but also holding that the regulations are unconstitutional where they “unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of [their] children” without any “reasonable relation to some purpose within the competency of the State”); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing that the state does have power to “promote civic development,” but holding the legislation in question unconstitutional after a strict examination of the regulation in the face of a constitutional challenge); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1077 (6th Cir. 1987) (Boggs, J., concurring) (recognizing that when a state regulation burdens a home-schooled student’s fundamental rights, “the test for a compelling interest is quite strict . . . [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation” (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (alteration in original))), *cert. denied*, 484 U.S. 1066 (1988); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1455-56 (E.D. Mich. 1989) (stating that “certain rights are so essential to guaranteeing individual liberty in our society that any government conduct regulating such conduct will be subject to a strict standard of review”).

214. Although strict scrutiny has often been considered to be the “kiss of death” for government regulations, *see McIntyre v. Ohio Elections Comm’n*, 115 S. Ct. 1511, 1535 (1995) (Scalia, J., dissenting), such is not the case with regulations that burden home educators and their claimed rights. *See In re Charles*, 504 N.E.2d 592, 602 (Mass. 1987) (upholding a state regulation against challenge by home educators that it violated their fundamental rights). In addition, in a recent Supreme Court decision, Justice O’Connor, writing for a majority of the Court, stated that the Court “wish[ed] to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

215. Easterly, *supra* note 88, at 91 (citing *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1167 (1980)).

216. *Id.*

217. WHITEHEAD & BIRD, *supra* note 28, at 83 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972)); *see also* Easterly, *supra* note 88, at 91 (stating that a state regulation can survive a constitutional challenge that the regulation abridges a fundamental right if the regulation is “justified by a compelling state interest”).

218. *See, e.g., Yoder*, 406 U.S. at 221 (recognizing that when Amish parents challenged the state compulsory attendance statute, the state could have claimed an “interest in its

articulated three primary interests justifying education regulation.²¹⁹ States claim that they must regulate education to assure that schools are effective in (1) preparing citizens to participate effectively and intelligently in our political system;²²⁰ (2) preparing citizens to be "self-reliant" and "self-sufficient" members of society;²²¹ and (3) preparing citizens to be "culturally viable"²²² and providing them with an "option other than the life they have led in the past."²²³ Each one of these interests was originally identified in *Yoder*.²²⁴ In that case, the interests articulated by the state were held insufficient to override the First and Fourteenth Amendment rights of parents to control the religious and educational upbringing of their children.²²⁵ However, the *Yoder* Court also recognized in dicta 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."²²⁶

Recently, several courts have affirmed the importance of the state interests originally articulated in *Yoder* in decisions in which the states' regulations have prevailed over the fundamental rights allegedly abridged by these regulations. For example, in *Vandiver v. Hardin County Board of Education*,²²⁷ the Sixth Circuit upheld a Kentucky regulation requiring that home-schooled students participate in equivalency testing in the face of First Amendment and Equal Protection challenges by the home educators.²²⁸

system of compulsory education [] so compelling that even the established religious practices of the Amish must give way"); *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) (holding that the compelling interests articulated by the state in response to a challenge by home educators withstood the constitutional challenge); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1061 (6th Cir. 1987) (responding to a constitutional challenge by home educators, the state of Tennessee argued that its interest in the education of its young was sufficient to override the home educators' First Amendment rights).

219. Easterly, *supra* note 88, at 91.

220. *Yoder*, 406 U.S. at 221. This interest has been expressly identified in some state constitutions. See, e.g., N.C. CONST. art. IX, § 1 (stating that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged").

221. *Yoder*, 406 U.S. at 221.

222. Easterly, *supra* note 88, at 91.

223. *Yoder*, 406 U.S. at 240 (White, J., concurring).

224. *Id.* at 221; *id.* at 240 (White, J., concurring); see *supra* notes 89-99 and accompanying text (discussing the *Yoder* decision).

225. *Yoder*, 406 U.S. at 234.

226. *Id.* at 213.

227. 925 F.2d 927 (6th Cir. 1991).

228. *Id.* at 935.

In a similar case, *In re Charles*,²²⁹ the Supreme Judicial Court of Massachusetts upheld a state regulation that required parents who wished to home school their children to obtain advance approval for their decision by submitting a curriculum and an outline of classroom materials and by proving their qualifications.²³⁰ The state defended the regulation against the constitutional challenge by articulating a "compelling state interest" that all Massachusetts children be properly educated in an environment which provided an education that was at least comparable to a public education.²³¹ The court held that the state regulation was constitutional because it properly promoted the state's compelling interests despite its burden on the home educators' constitutional rights.²³²

Similarly, in *State v. Moorhead*,²³³ the Iowa Supreme Court held that a conviction of home-schooling parents for failing to submit proof of instruction by a certified teacher in their home school did not violate the Constitution.²³⁴ There, the state's interest in education survived a challenge by home educators that the state's regulation infringed upon their fundamental rights.²³⁵

As these cases demonstrate, the state's compelling interests in education can overcome a challenge by home educators despite rigorous scrutiny. Home education is not a right free from all state regulation or control.²³⁶ "The bottom line is that a state does have a protected interest in ensuring that all of its children are educated," and consequently states may regulate education under their police power or their *parens patriae* power to satisfy that interest.²³⁷

229. 504 N.E.2d 592 (Mass. 1987).

230. *Id.* at 602.

231. *Id.* at 599-600.

232. *Id.* at 600.

233. 308 N.W.2d 60, 63 (Iowa 1981).

234. *Id.* at 64-65.

235. *Id.*

236. Henderson et al., *supra* note 205, at 1003 (citing *In re Kilroy*, 467 N.Y.S.2d 318 (N.Y. Fam. Ct. 1983)).

237. J. Bart McMahon, *An Examination of the Non-Custodial Parent's Right to Influence and Direct the Child's Education: What Happens When the Custodial Parent Wants to Home Educate the Child*, 33 U. LOUISVILLE J. FAM. L. 723, 735 (1994). In some states, state constitutions provide an additional source of authority upon which state legislatures may base their education regulations. For example, article I, § 15 of the North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15 (emphasis added). Additionally, article IX, § 3 of the North Carolina Constitution requires that "[t]he General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means." N.C. CONST. art. IX, § 3. Essentially, under the state constitution, the state has the authority to "guard and maintain" the educational institutions in the state. N.C.

Children's Rights

While parents and the state compete for the right to direct the education of children, the "interests and rights of the child are often overlooked."²³⁸ Typically, courts discuss the rights and interests of the parties to a lawsuit, and the parties in home-schooling lawsuits are usually the parents of a home-schooled child and the state. Therefore, the rights and interests of children are not at issue, and courts do not have an opportunity to discuss children's stakes in the home-schooling debate. Additionally, when the United States Supreme Court did address children's rights to education, the Court expressly held that a child does *not* have a fundamental right to a public school education.²³⁹ Nevertheless, children do have a property interest in education that is protected under the Fourteenth Amendment.²⁴⁰ In *Goss*

CONST. art. I, § 15. Further, the state maintains an obligation to assure that every child in the state receives an education by some means, and if a child is not receiving an education, then the state "shall" compel that child to attend the public schools. N.C. CONST. art. IX, § 3.

238. Lotzer, *supra* note 29, at 477; see also Murphy, *supra* note 194, at 459-60 (acknowledging that to date, courts generally have not recognized the interests of the child in their analyses of educational issues).

239. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

240. Goss v. Lopez, 419 U.S. 565, 576 (1975); see also Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (stating that "the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms").

In addition to Fourteenth Amendment protection of educational rights, children may have additional educational entitlements under some state constitutions. Under the North Carolina Constitution, for example, "[t]he people have a right to the privilege of education." N.C. CONST. art. I, § 15. Under this state constitutional provision, children are *not* granted a right to public education, but they are assured that they have a right to education in some form. However, when Article I, § 15 is combined with Article IX, § 3, the North Carolina Constitution provides that if a child is not educated by some means outside the public schools, that child "shall" attend the public schools. N.C. CONST. art. IX, § 3 ("[E]very child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means."). Essentially, Article IX, § 3 provides a right to public schools for those children who are not educated elsewhere. In addition to the state constitutional right to education, some state statutes provide a statutory right to education as well. North Carolina's public school laws, for example, provide that [a]ll students under the age of 21 years who are domiciled in a school administrative unit who have not been removed from school for cause or who have not obtained a high school diploma, are entitled to all the privileges and advantages of the public schools to which they are assigned by the local boards of education.

N.C. GEN. STAT. § 115C-366(a) (1992) (emphasis added). When one combines the general state constitutional right to education with both the particular constitutional right to public education when a child is left without a proper education "by other means" and the state statutory right to public education, it is clear that under North Carolina state law, children are entitled to public education at least when they are not educated "by other means." In this regard, North Carolina law has expanded children's rights beyond those articulated

v. Lopez, the Supreme Court held that once a state decides to provide public education, an important benefit has been conferred which cannot be taken away from students without due process of law.²⁴¹ Essentially, the Fourteenth Amendment Due Process Clause provides a backdoor into constitutional protection for children in educational (or legal) debates who have no fundamental right to public school education.²⁴²

In addition to a Fourteenth Amendment property right to public education, children may also have a right to be "masters of their own destiny" with regard to educational choices.²⁴³ Justice Douglas, in his dissent in *Yoder*, argued that although the majority in *Yoder* assumed that the only interests at stake in the case were those of the Amish parents seeking the right to home educate their children and those of the state seeking to compel the children to attend public schools, the parents actually were "seeking to vindicate not only their own free

under the United States Constitution. *But see infra* notes 337-44 (discussing the situations in which children may not be entitled to public education).

241. *Goss*, 419 U.S. at 574 (holding that children cannot be suspended from public school without a hearing and stating that once a state has "chosen to extend the right to an education to [students], [the state] may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred").

242. Parents' rights focus upon the right to control in a broad context where children are educated. By contrast, the rights possessed by children are concentrated in a right to be educated in a particular place. The rights of parents and children differ because parents enjoy the right to control the education of their children in a theoretical context; children simply possess a right of access to the public schools (in some circumstances at least). *See, e.g., N.C. GEN. STAT. § 115C-366(a)* (1992) (providing that children are entitled to "the privileges and advantages of the public schools" only). Unlike the rights of parents and children, the states' interests in education emphasize a need to regulate education to assure that children are, in fact, educated, despite the location. *See supra* notes 218-26 and accompanying text. However, the states' interests are based on the inherent assumption that if a child attends a public school, that child will, in fact, be educated, and therefore states require attendance in public schools or schools that satisfy the standards of public school officials. *See, e.g., N.C. GEN. STAT. § 115C-378* (1992). Unfortunately, the presumption that children will be "educated" in public schools has not proved to be accurate. *See EMILY SACHAR, SHUT UP AND LET THE LADY TEACH 246-49* (1991) (discussing some of the educational failures of public schools). In the end, by preferring public education, the states' interests may boil down to a rule of preference similar to the parents' and children's rights in education. These state interests emphasize that an education in a particular location, the public schools, should satisfy the state's goals. *See, e.g., N.C. GEN. STAT. § 115C-378* (1992) (providing that children "shall" attend the public schools unless certain requirements are met by an alternative school and assuming that public schooling will satisfy the state's interests in children's educations).

243. *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting in part) ("It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.").

exercise claims, but also those of their high-school age children."²⁴⁴ Justice Douglas suggested that the "inevitable effect" of permitting parents to determine the status of their children as home-schooled students, while litigating their own rights to exercise religion or to control their children's upbringing, "is to impose the parents' notions of religious duty upon their children."²⁴⁵ He further argued that "[w]here the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views."²⁴⁶ Finally, he contended that "[o]n this important and vital matter of education . . . children should be entitled to be heard. . . . It is the future of the student, not the future of the parents," that is at stake.²⁴⁷

In sum, children clearly possess a Fourteenth Amendment due process right to public school education under the *Goss* holding.²⁴⁸ In addition, they may claim a right to be "masters of their own destiny" under the theory espoused by the dissent in *Yoder*.²⁴⁹

Although the discrete discussions of "parents' rights," "states' interests," and "children's rights," suggest that each party's rights or interests are clearly identified and easily balanced, that is not the case. In each home education case there is the potential for many constitutional concerns to arise, and the resolution of those issues is quite complex. The parents of the home-schooled child may claim one (or more) of three Fourteenth Amendment due process claims.²⁵⁰ The parents may argue that (1) their fundamental liberty to direct the education of their children is at stake;²⁵¹ (2) the regulation attempting to infringe upon their home education program is too vague to survive constitutional muster;²⁵² or (3) a state's decision regarding the parents' right to home school their child was not made by a neutral decision-maker and is therefore unconstitutional under the Due Process Clause.²⁵³ In addition, parents of a home-schooled child may raise First,²⁵⁴ Fourth,²⁵⁵ or Ninth Amendment²⁵⁶ claims in any litigation threatening their "right" to educate their child at home.

244. *Id.* at 241 (Douglas, J., dissenting in part).

245. *Id.* at 242 (Douglas, J., dissenting in part).

246. *Id.* (Douglas, J., dissenting in part).

247. *Id.* at 244-45 (Douglas, J., dissenting in part).

248. 419 U.S. 565, 576 (1975).

249. *Yoder*, 406 U.S. at 245 (Douglas, J., dissenting in part).

250. See *supra* notes 56-59 and accompanying text.

251. See *supra* notes 60-104 and accompanying text.

252. See *supra* notes 105-12 and accompanying text.

253. See *supra* notes 113-20 and accompanying text.

254. See *supra* notes 124-58 and accompanying text.

255. See *supra* notes 173-81 and accompanying text.

Of course, each time a parent claims that a fundamental liberty enjoyed under the Constitution should prevent the state from regulating their home school, the state will respond. The state typically replies to constitutional challenges to its education regulations either (1) by demonstrating that the fundamental liberty claimed by the parent is not abridged by the regulation²⁵⁷ or (2) by articulating a "compelling state interest" in regulating education under the state's police or *parens patriae* power to justify the regulation despite its burden on parental liberties.²⁵⁸

Finally, in any case involving a child's attendance in a public school, courts should recognize that the child has a Fourteenth Amendment right to a hearing before being deprived of public education.²⁵⁹ This mix of rights and interests belonging to each of the parties in home education cases must be sorted and balanced by courts before they can determine that a burden on constitutional rights will survive or that a state's regulations on education must fail.

IV. A RESOLUTION OF CONFLICTING INTERESTS: HOME SCHOOLING ESTABLISHED AS A LEGALLY RECOGNIZED ALTERNATIVE TO PUBLIC EDUCATION

The basic freedoms guaranteed by our Constitution apply to parents who elect to home school their children for both religious and "nonreligious" reasons.²⁶⁰ When such parents are challenged by state authorities, usually for a violation of compulsory attendance laws, courts apply the "compelling interest" test to the state regulations to determine whether the parents' liberties or the state's interests will prevail.²⁶¹ Under this analysis, if the parental liberty of home education is challenged by a state agency, the state must demonstrate that it

256. See *supra* notes 182-87 and accompanying text.

257. See *supra* note 215 and accompanying text.

258. See *supra* note 216-17 and accompanying text.

259. See *supra* notes 240-42 and accompanying text.

260. See *supra* notes 51-187 and accompanying text.

261. WHITEHEAD & BIRD, *supra* note 28, at 83-84; see also *Mozert v. Hawkins County Bd. of Educ.*, 647 F. Supp. 1194, 1202 (E.D. Tenn. 1986) (applying a compelling interest test to a state regulation of education and stating that if a home educator demonstrates a sufficient burden upon her fundamental rights, the government must then establish that a compelling governmental interest warrants the burden, and that less restrictive means to achieve the government's ends are not available), *rev'd*, 827 F.2d 1058, 1070 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). This test is also referred to as "strict scrutiny." *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2114 (1995) (explaining that the strict scrutiny analysis is a compelling interest test).

One author has argued that the "undue burden" standard articulated in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876-78 (1992), should be applied to confrontations between home educators and state officials, but no courts have applied this

possesses a compelling interest sufficient to override parental liberty. "However, even if it does demonstrate such an interest, the state must also show . . . that it has served its interest by the least burdensome means possible."²⁶²

In the end, most courts find either that the state does not have a compelling state interest sufficient to override the parents' substantial liberties or that despite a compelling interest, the state has not selected the least burdensome means to satisfy that interest.²⁶³ Generally, courts tend to ignore the children's rights when they compute this balance.²⁶⁴ Therefore, the expanding protections established by the home-schooling movement resulted primarily from courts favoring parental rights over state interests, with minimal emphasis placed on the rights of the children involved.²⁶⁵

Since the number of home-schooled students began to rise in the 1980s, state courts and legislatures have had to confront legal questions regarding home education.²⁶⁶ Legal challenges of state regulations by home educators have whittled away at the numerous barriers erected by state authorities to threaten the success of home education. In recent years, home educators have established precedent regarding not only the "fundamental" nature of the home education decision,²⁶⁷ but also regarding particular regulations that attempt to define the relationship between home and public education. Although a number of home educators have suffered criminal sanctions because of their commitment to home schooling, home schooling is now clearly legal in all fifty states,²⁶⁸ and various courts have determined that a number of

analysis. Jon S. Lerner, Comment, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363, 364 (1995).

262. WHITEHEAD & BIRD, *supra* note 28, at 84; *see also* Blackwelder v. Safnauer, 689 F. Supp. 106, 135 (N.D.N.Y. 1988) (finding New York regulation on home schooling the least restrictive means to serve the state's overriding interest in educating children for participation in the American political and economic systems), *aff'd*, 866 F.2d 548, 552 (2d Cir. 1989).

263. MAYBERRY ET AL., *supra* note 3, at 17 (stating that "[c]ourt cases generally favor parents").

264. Lotzer, *supra* note 29, at 477.

265. *Id.*

266. KLICKA, *supra* note 3, at 2, 19.

267. *See supra* notes 60-100 and accompanying text (explaining the development of parents' fundamental right under the Due Process Clause to control their children's education); *supra* notes 101-04 (describing the application of this fundamental right in a home-schooling context).

268. KLICKA, *supra* note 3, at 155. In fact, there are 31 states (and the District of Columbia) that by statute specifically allow some form of home education provided that certain requirements are satisfied. *See* ARIZ. REV. STAT. ANN. § 15-802 (Supp. 1995); ARK. CODE ANN. §§ 6-15-501 to -507 (Michie 1993 & Supp. 1995); COLO. REV. STAT. ANN. §§ 22-33-104(2)(i) to -104.5 (West 1995); D.C. CODE ANN § 31-402 (1993); FLA. STAT.

regulations that attempt to "control" home schools once they are established are unconstitutional.²⁶⁹ For example, state regulations requiring home schools or their teachers to be "essentially equivalent" to public schools are unconstitutionally vague;²⁷⁰ state compulsory attendance regulations that preclude home education have been declared unconstitutional;²⁷¹ state regulations that permit home schooling only if the instruction is satisfactory to the district superintendent of schools are unconstitutional;²⁷² and state regulations that permit "on-site" visits of home schools by state officials may be unconstitutional.²⁷³

ANN. § 232.02(4) (West Supp. 1996); GA. CODE ANN. § 20-2-690 (1992); HAW. REV. STAT. § 298-9(a)(5) (Supp. 1992); IOWA CODE ANN. §§ 299.1 & 299A.1 to .10 (West 1988 & Supp. 1996); LA. REV. STAT. ANN. §§ 17:236 & 236.1 (West 1982 & Supp. 1996); ME. REV. STAT. ANN. tit. 20-A, § 5001-A(3)(A)(3) (West 1993); MINN. STAT. ANN. § 120.101 (West 1993 & Supp. 1996); MISS. CODE ANN. § 37-13-91 (Supp. 1995); MO. ANN. STAT. § 167.031 (Vernon Supp. 1996); MONT. CODE ANN. § 20-5-102(e) (1995); NEV. REV. STAT. § 392.070 (1993); N.H. REV. STAT. ANN. § 193:1(I)(b) (Supp. 1995); N.M. STAT. ANN. § 22-12-2 (Michie 1993); N.C. GEN. STAT. §§ 115C-563 to -565 (1994); N.D. CENT. CODE §§ 15-34.1-06 to -11 (1993 & Supp. 1995); OHIO REV. CODE ANN. § 3321.04(A)(2) (Anderson Supp. 1995); OR. REV. STAT. § 339.030(3) (1995); PA. STAT. ANN. tit. 24, § 13-1327(d) (1992); R.I. GEN. LAWS § 16-19-1 (Supp. 1995); S.C. CODE ANN. §§ 59-65-40 & -45 (Law. Co-op. 1990 & Supp. 1995); TENN. CODE ANN. § 49-6-3001(C) (Supp. 1995); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (Supp. 1995); VT. STAT. ANN. tit. 16, § 1121 (1989); VA. CODE ANN. § 22.1-254 to -254.1 (Michie 1993 & Supp. 1995); WASH. REV. CODE ANN. § 28A.225.010(1)(b) (West Supp. 1996); W. VA. CODE § 18-8-1 (Supp. 1995); WIS. STAT. ANN. § 118.15(1)(a), (d)(5) (West 1991 & Supp. 1995); WYO. STAT. § 21-4-102(B) (1994).

269. See *infra* notes 272-76 and accompanying text.

270. See *Ellis v. O'Hara*, 612 F. Supp. 379, 381 (E.D. Mo. 1985) (holding that a requirement that home education be "substantially equivalent" to the instruction given to children in public schools was unconstitutionally vague), *rev'd*, 802 F.2d 462 (8th Cir. 1986) (reversing without opinion); *State v. Newstrom*, 371 N.W.2d 525, 532-33 (Minn. 1985) (holding that a requirement that home school teachers be "essentially equivalent" to public school teachers was too vague to serve as a basis for criminal conviction and that the requirement violated the right to due process guaranteed under the Fourteenth Amendment). *But see State v. Patzer*, 382 N.W.2d 631, 639 (N.D.) (holding that a legislative requirement that parents who teach their children at home obtain teaching certificates did not violate parents' free exercise rights), *cert. denied*, 479 U.S. 825 (1986).

State legislatures are responding to the courts' decisions that teacher qualification standards impinge upon parental rights to home school. "As of March 1995, forty states do not require home school parents to have any specific qualifications. In fact, of the ten states that do have [teacher] qualification requirements, eight of them require only a GED or high school diploma." KLICKA, *supra* note 3, at 137. North Carolina is in this category. See N.C. GEN. STAT. § 115C-564 (1994) ("The persons providing academic instruction in a home school shall hold at least a high school diploma or its equivalent.").

271. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

272. *Jeffery v. O'Donnell*, 702 F. Supp. 516, 520-21 (M.D. Pa. 1988) (mem.) (ruling unconstitutionally vague a statute which required home school teachers' qualifications to meet satisfaction of school superintendent).

273. *Kindstedt v. East Greenwich Sch. Comm.*, Op. Rhode Island Comm'r of Educ., at 7 (Aug. 7, 1986). *But see Blackwelder v. Safnauer*, 866 F.2d 548, 552 (2nd Cir. 1989) (expressing "no opinion on whether home visits conducted pursuant to New York's regula-

In response to the success of home educators in the courts, a trend has traveled "across the nation to lessen state control over private forms of education," including home education.²⁷⁴ Just as the Supreme Court in *Farrington v. Tokushige* held that the state could not regulate the "intimate and essential details," including "teachers, curriculum and text-books," of private schools,²⁷⁵ courts have established that states cannot control such details in home schools.²⁷⁶ Consequently, home schools are enjoying increased freedom in their operation. However, this recent trend is unlikely to continue indefinitely.

Now that home educators have established that home schools are legitimate, independent of the public schools (and the public school regulations) in their districts, substantial numbers of home educators are seeking a new kind of relationship with public schools on their own terms.²⁷⁷ Recall the hypothetical discussed in the introduction of this Comment, in which young parents with high school degrees home educate their child for religious purposes.²⁷⁸ As the child advances in her studies, she may find herself interested in a subject, chemistry, for example, in which her parents cannot offer her instruction either because they lack knowledge of the subject or because the home school is not equipped with the laboratory facilities to properly conduct a course in chemistry. Now, the home educators seek to return to public schools on their terms.

"[A] large percentage of parent educators wish to enroll their children part-time in extracurricular activities [eighty-one percent] and academic courses [seventy-six percent] [at the public schools in their districts], and they also desire to make use of public school libraries and curricular materials [sixty-four percent]."²⁷⁹ Clearly, these parent educators are more eager "to accept educational resources and assistance when it is not governed or regulated by government school district personnel."²⁸⁰

tions would comport with the requirements of the Constitution[,] but stating that "a challenge to such visits by persons subjected to them would present at least a colorable legal issue").

274. KLIČKA, *supra* note 3, at 156.

275. 273 U.S. 284, 298 (1927).

276. See *supra* notes 267-73 and accompanying text.

277. MAYBERRY ET AL., *supra* note 3, at 77 (stating that home schoolers want to use the resources of public schools "at their own discretion" and "without regulation").

278. See *supra* notes 18-22 and accompanying text.

279. MAYBERRY ET AL., *supra* note 3, at 71.

280. *Id.* Although home-schooling parents' perceptions of a "satisfactory relationship between home schools and conventional schools are characterized by a desire to protect the autonomy and independence of their home education program," many parents believe

This new issue, the possible integration of public and home education,²⁸¹ once again pits the rights of home educators against the interests of the state, but it has a different face. Parent educators are not struggling to keep their children out of public schools as they have in the past.²⁸² Instead, the home-schooling families are seeking permission to send their children to public schools on a "part-time" basis while retaining their home school status.²⁸³ On the other hand, public school administrators are no longer policing home schools to draw home-schooled children back into public schools. Instead, state officials are reluctant to welcome this new relationship between home and public education because of the administrative burdens of admitting a home-schooled child on a part-time basis.²⁸⁴

This new home-schooling challenge, the possible integration of home and public education, raises compelling new questions regarding the relationship between the parents' rights and the states' interests. Should public schools be obligated to accept home-schooled students on a part-time basis? Should parent educators be required to relinquish educational control over their children if their children surpass their knowledge base in a particular subject area or if the home school does not contain the equipment necessary to adequately instruct in a particular subject? Are the parents' rights to educate their child at home impermissibly burdened if public schools do not allow parents to continue to home school their children while permitting their child

that this independence is secured when "parents and their children use the resources and services provided by conventional schools at their own discretion, that is, flexibly and without regulation." *Id.* at 77.

281. *Id.* at 103 (stating that today's challenge for educators of all kinds is to begin to "raise[] issues and questions regarding the relationship between home schools and conventional schools").

282. See *supra* notes 60-104 and accompanying text (discussing the development of parents' right to control the education of their children).

283. Essentially, at this stage in the home education movement, home educators are shifting gears. The current focus is upon re-entrance, not upon exclusion. This shift in focus requires that the rights established by parents in the context of exclusion be re-examined from a new perspective. The rights established in the context of exclusion may not apply in the context of re-entry. See *infra* notes 298-381 and accompanying text.

284. See *supra* note 17 (discussing administrative burdens on a school system in which children may come and go throughout the day); see also Lotzer, *supra* note 29, at 478-79. One plan in Texas was rejected by both school officials and home-educating parents:

In 1984, Ross Perot, chairman of the [Texas] Governor's Select Committee on Public Education, announced a proposal to regulate homeschooling which included testing parents and students for competency and placing limitations on homeschooling for kindergarten thru sixth grade. The plan met with opposition from both school officials and homeschooling parents: school officials balked at the administrative burden, and homeschooling parents did not want restrictions placed on their educational plans.

Id.

to participate in limited portions of public school education? Do the states' interests in protecting the welfare of their communities and assuring the education of children justify preventing a home-schooled child from attending the public schools on a part-time basis?

Although no court has had an opportunity to address these issues, this "latest home education challenge" may be the point at which courts reverse the trend of deciding cases in favor of parents. Additionally, as courts reconsider the relationship between home and public education, children's rights should become a significant concern for the first time in the home school debate.²⁸⁵ In this circumstance, home educators and their children are not attempting to relinquish the child's right to attend a public school,²⁸⁶ instead, they are seeking to take advantage of that right on their own terms.²⁸⁷ The question of whether a home-schooled child may attend public schools on a part-time basis requires an analysis of the extent of the child's right to public education. Can public schools prohibit a child from attending classes in a public school merely because the child receives the majority of her education in a home school?

The final section of this Comment will address the contemporary challenge to home educators who seek admission for their children in public schools on a part-time basis. The analysis of this issue requires a new look at the rights and interests established over the past seven decades and the application of the "compelling interest" test in a new context. In addition, children's rights in educational decisions must be reviewed with renewed vigor in recognition of the increasingly significant role of those rights in this new context.

V. THE LATEST HOME EDUCATION CHALLENGE: THE RELATIONSHIP BETWEEN HOME SCHOOLS AND PUBLIC SCHOOLS

In recent judicial history, courts have been generous in passing the reins of educational control from state authorities to parents, permitting parent educators to gain increasing independence from the

285. Lotzer, *supra* note 29, at 477 (stating that "[c]urrently, the interest of the child in his own personal development receives the least emphasis, but this situation must change if the legislature and the courts are to address homeschooling in a meaningful manner").

286. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (recognizing that "a student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and which may not be taken away . . . without adherence to the minimum procedures required by that Clause").

287. *MAYBERRY ET AL.*, *supra* note 3, at 77.

state.²⁸⁸ However, after years in the courtrooms of America seeking independence from public schools, home educators may soon be back in the court seeking admission to those schools on their own terms.

Now that home schools are recognized as an independent and legitimate educational alternative,²⁸⁹ home schools and public schools should be viewed as equals in the debate concerning the possible integration of home and public schools. Home schools have rights that must be respected,²⁹⁰ but the states also have interests that deserve consideration.²⁹¹ Under the "compelling interest" test, these competing forces must be weighed against one another.²⁹² In addition, when considering whether children may be denied part-time access to public school, the rights of those children must be thrown into the balance as well.²⁹³

Do public schools have a legal obligation to accommodate home-schooled students who seek admission to one or two public school courses per term? There are three possible answers to this dilemma: (1) yes, public schools have a legal obligation to admit home-schooled students;²⁹⁴ (2) no, public schools have a legal obligation to exclude home-schooled students;²⁹⁵ or (3) public schools may use their discretionary and regulatory authority to admit *or* deny home-schooled students in accordance with the state's interests in educating children.²⁹⁶ As is often the case, the extreme positions, in which no flexibility ex-

288. Jack MacMullan, Comment, *The Constitutionality of State Home Schooling Statutes*, 39 VILL. L. REV. 1309, 1349 (1994) (stating that "home schoolers have made significant gains throughout the country over the last fifteen years"); see *supra* notes 266-76 and accompanying text (describing the relaxation of home school regulation).

289. MacMullan, *supra* note 288, at 1337 (stating that "all of the states and the District of Columbia now allow home schooling under certain conditions").

290. See *supra* notes 51-187 and accompanying text (discussing the rights of parents to educate their children at home).

291. See *supra* notes 188-237 and accompanying text (discussing states' interests in governing the education of the children within their borders).

292. See *supra* notes 260-73 and accompanying text (discussing the relationship between parents' rights and states' interests under the "compelling interest" test).

293. See *supra* notes 238-49 and accompanying text (discussing the rights of children to education in public schools).

294. See *infra* notes 298-352 and accompanying text. Suggesting that public schools have a duty to accept home-schooled students is the equivalent of suggesting that parents and children have a right to enter public schools.

295. See *infra* notes 353-58 and accompanying text. Suggesting that public schools have a duty to exclude home-schooled children seeking part-time admission is the equivalent of suggesting that home-educating parents and home-schooled children have no right to enter public schools on a part-time basis.

296. See *infra* notes 359-81 and accompanying text. It is important to note that permitting public schools to use their discretionary and regulatory authority to admit or deny part-time attendance by home-schooled children includes the caveat that if public schools abuse that authority, parents may seek redress from courts.

ists to recognize the equities of a specific situation, cannot provide satisfactory solutions to the possibility of integrating home and public education for some school-aged children. Instead, the third alternative, allowing public schools to use their discretionary authority to admit or deny home-schooled students on a part-time basis in a manner that best satisfies the state's interest in educating children is the best alternative. In considering the viability of each of these three alternatives, this Comment will continue to consider the hypothetical introduced at the outset of the Comment.²⁹⁷

Alternative One: Require Public Schools to Admit Home-Educated Students on a Part-Time Basis

A requirement that public schools admit home-schooled students may have some initial appeal because parents enjoy powerful rights to direct their children's educations, and children possess a right to public schooling once the state has acted to provide such schools.²⁹⁸ However, after taking a closer look at these rights and their limitations in conjunction with the states' interests in the education of children within their borders, it is clear that public schools cannot be *required* to admit home-educated students on a part-time basis.²⁹⁹

Home educators claim Fourteenth Amendment, First Amendment, Fourth Amendment and Ninth Amendment protections of their decision to home school their children.³⁰⁰ In determining whether home educators may legally require public schools to admit home-schooled students on a part-time basis, only the First and Fourteenth Amendment protections are relevant.³⁰¹ The Fourteenth Amendment

297. See *supra* notes 18-22 and accompanying text.

298. Of course, this is the solution that home educators will desire. Home educators want access to public resources "at *their own* discretion" (not at the discretion of public school officials) and "without regulation." MAYBERRY ET AL., *supra* note 3, at 77 (emphasis added).

299. Cf. *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (holding that public schools *may* release students for part-time religious instruction at a private school); *Lanner v. Wimmer*, 662 F.2d 1349, 1353 (10th Cir. 1981) (stating that "[p]ublic schools *may* permit the release of students during school hours" (emphasis added)). Although both cases addressed the issue of whether public schools may release (not admit) an enrolled student to a private (not home) school, they did consider part-time enrollment in public schools. They did not conclude that public schools are required to allow part-time enrollment. *Zorach*, 343 U.S. at 315; *Lanner*, 662 F.2d at 1359-60.

300. See *supra* notes 51-54 and accompanying text.

301. Although parents may theoretically rely on the Ninth Amendment for protection of their decision to educate their child at home, in reality, courts have not recognized such protection. See *supra* notes 182-87 and accompanying text. In addition, the right to privacy claimed by home educators would not be an issue in determining whether public schools have an obligation to admit home-schooled students on a part-time basis. Neither

protects the parents' right "to direct the upbringing and education of children under their control."³⁰² Home educators, seeking admission to public schools on their own terms, can claim that public schools must be required to admit their children for one or two classes per day because their decision to home educate would be burdened by any other resolution to their perceived need for public assistance.³⁰³ This argument begins with the premise that if home-schooled students seeking admission, for example, to a public school chemistry course,³⁰⁴ are not admitted to public school classes, then the home-educating parents are burdened because they must attend college to prepare to teach chemistry and buy laboratory equipment, continue to home educate their child and deny the child an opportunity to study chemistry, or forego home schooling entirely and send their child to public school as a full-time student. The argument suggests that any regulation placing the home educator in this position would burden her right to direct and control the education of her children, and that public schools are required to admit home-schooled children on a part-time basis to avoid this unconstitutional burden. Although this argument appears at first glance to have some merit, it cannot survive a more thorough analysis.

A state need not admit home-schooled students on a part-time basis to satisfy home educators' Fourteenth Amendment right to direct the education of their children for three reasons. First, when a public school does not provide a part-time enrollment policy for home-schooled children, home-schooling parents are left with choices regarding the child's education.³⁰⁵ The parents, in essence, still may

the privacy of the decision to home school nor the privacy of the home school itself is being invaded. In fact, the reverse is true. Instead of the state attempting to intrude into the privacy of the home school, they want to keep out of it altogether. *See supra* notes 159-81 and accompanying text (discussing the right to privacy in the home school context).

302. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). The Fourteenth Amendment also forbids laws or regulations that are impermissibly vague and that contain impermissible administrative discretion. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). However, neither of these constitutional protections is relevant to a regulation that would require public schools to admit home-schooled students on a part-time basis. An absolute requirement is not vague, and it does not allow for any discretion.

303. *See supra* notes 55-123 and accompanying text (discussing parents' Fourteenth Amendment right to direct the education of their children).

304. *See supra* notes 18-22 and accompanying text (summarizing the hypothetical situation discussed throughout this Comment).

305. When a state regulation of home schooling does not prohibit home education, but instead permits parents to choose to comply with specific regulations to facilitate the state's interest in educating children, courts have been reluctant to find state regulations unconstitutional. *See, e.g., Blount v. Department of Educ. & Cultural Servs.*, 551 A.2d 1377, 1385-86 (Me. 1988) (holding that a regulation permitting parents to choose home education as long as they assured approval from the state did not violate either the Equal Protection or

“direct the education of [their] children”³⁰⁶ without a requirement that public schools accept part-time students. A different situation would arise if the state determined that if parents had not studied a particular subject or did not have a particular kind of equipment, they must relinquish control of their child’s education to the state.³⁰⁷ Under that hypothetical situation, the parents’ choices to prepare to teach chemistry, to substitute an alternative course for chemistry and continue teaching subjects in which they are familiar and in which they possess all the requisite equipment are eliminated.³⁰⁸ A statute requiring public schools to admit part-time students does not eliminate those choices. Parents maintain control over how and where their child receives her education.³⁰⁹ Therefore, the parents’ constitutional right to direct their child’s education would not be impermissi-

the Due Process Clauses of the Fourteenth Amendment); *In re Charles*, 504 N.E.2d 592, 599 (Mass. 1987) (finding that parents’ right to control the education of their children was not infringed upon by a state regulation that permitted parents to choose home education with certain restrictions and recognizing that reasonable state regulations still allow parents to choose to exercise their right to home educate their child); *State v. DeLaBruere*, 577 A.2d 254, 274 (Vt. 1990) (holding that a reasonable regulation permitting parents to choose home education so long as they satisfied the state’s interests by complying with reporting requirements did not burden the parent’s due process rights).

306. *Pierce*, 268 U.S. at 534.

307. A regulation of this sort would parallel the teacher qualification statutes that required home educators to possess various degrees of certification before they could teach their children at home. Just as “[t]eacher certification requirements may prevent parents who do not have the time or resources to pursue teaching credentials but are competent to teach their children from exercising their constitutional rights,” Henderson, *supra* note 87, at 1006, forcing parents to study particular subjects or buy specific equipment might prevent parents without the time to take courses or money to buy equipment from enjoying their right to teach their children, even though they are competent teachers. These teacher qualification statutes have been found unconstitutional. See *supra* note 270 and accompanying text. Similarly, a requirement that parents relinquish control of their children’s education if they have not studied a particular course might be found unconstitutional.

308. When state regulations effectively eliminate home education as a choice for parents, courts tend to find that they unconstitutionally burden parental rights. For example, teacher certification requirements have been found unconstitutional because they “may prevent parents . . . from exercising their constitutional rights” to educate their children at home. Henderson, *supra* note 87, at 1006; see, e.g., *State v. Newstrom*, 371 N.W.2d 525, 532-33 (Minn. 1985) (holding that a requirement that home school teachers be “essentially equivalent” to public school teachers was unconstitutionally vague).

309. See *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) (recognizing that when parents retain their right to choose where their children attend school, reasonable regulation of teachers and pupils in all schools is constitutional); cf. *Evans v. Buchanan*, 416 F. Supp. 328, 348 (D. Del. 1976) (recognizing the need to preserve parental control over educational planning for children in the context of school desegregation and reasoning that a desegregation plan that eliminated parental control and political voice was defective), *aff’d*, 555 F.2d 373, 382 (3rd Cir.), *cert. denied*, 434 U.S. 880 (1977).

bly burdened without a mandatory policy allowing part-time attendance for home-schooled children in public schools.³¹⁰

In addition, even if one assumes that a home educator is unconstitutionally burdened by a state's refusal to admit a home-schooled child on a part-time basis, that burden is *not caused* by the absence of a public school part-time attendance policy.³¹¹ Instead, when a home educator seeks alternative sources of education for her child because she does not possess the requisite training to teach or because she does not have the requisite materials to teach, that home educator cannot suggest that public schools have *caused* her to suffer a violation of her constitutional rights.³¹² Instead, the home educator's lack of education and lack of resources are the origin of the parent's dilemma. If the home educators were prepared to teach chemistry, then there would be no problem in the home school.³¹³ Only when the home educators are not able to teach³¹⁴ does the question of integration with public schools arise.³¹⁵

Another point provides additional support for the proposition that parent educators have no constitutional claim necessitating a requirement that public schools admit part-time students: Any denial of

310. Although parents enjoy a right to direct the education of their children, they do not enjoy a constitutionally protected right to choose specific teachers to teach their children specific subjects. *Mount Sinai Union Free Sch. Dist. v. Board of Educ. Port Jefferson Pub. Sch.*, 836 F. Supp. 95, 101 (E.D.N.Y. 1993). Therefore, parents who elect home education for their children but also wish to choose a particular teacher in public schools for a particular subject cannot claim constitutional protection for that choice.

311. In order to have constitutional standing in a federal court, a plaintiff must demonstrate a "causal connection between the assertedly unlawful conduct and the alleged injury . . ." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). A plaintiff's claim will be dismissed if the plaintiff is without constitutional standing. *Id.* Therefore, if a home educator cannot prove that the failure of public schools to permit part-time attendance caused a burden on the home educator's rights, that individual will not have standing to bring an action to challenge the constitutionality of the part-time policy.

312. *Cf. Sheridan Rd. Baptist Church v. Department of Educ.*, 396 N.W.2d 373, 388 (Mich. 1986) (Boyle, J., concurring) (responding to a constitutional challenge to educational requirements for parochial school teachers and reasoning that the educational requirements had not caused harm because home educators could satisfy those requirements in a manner subject only to the home educators' choices and because they could be satisfied without violating fundamental religious beliefs), *cert. denied*, 481 U.S. 1050 (1987).

313. *See Dorman, supra* note 42, at 752-53 (recognizing that when home schools satisfy teacher and curricular requirements no problem arises regarding the legitimacy of the home school or the involvement of public school officials, but "if the home school ever falls below required standards" then questions of state involvement arise).

314. Parents may be unprepared to teach either because they lack the education and understanding necessary to teach a particular subject or because they lack the resources necessary to teach a particular subject.

315. Similarly, in states with teacher qualification requirements, only when the "home school [] falls below required standards" does the question of approval of the home school arise. *Dorman, supra* note 42, at 752-53.

part-time attendance does not prevent home educators from continuing to exercise their right to control their children's upbringing. The home educators would still enjoy the full range of educational choices for their children that are available to all parents of school-aged children.³¹⁶ They simply cannot demand a special choice not available to other parents to send their child to public school on a part-time basis, regardless of their motivation for desiring that choice.³¹⁷

Essentially, permitting public schools to deny part-time admission to students does not burden a home educator's fundamental right to control the education of their child,³¹⁸ does not *cause* any hardship for home educators,³¹⁹ and does not prevent home educators from enjoying the same educational choice available to all parents of school-aged children.³²⁰ Therefore, a requirement that public schools admit home-schooled students on a part-time basis is not necessary to satisfy parents' Fourteenth Amendment rights. Parents, however, may alternatively claim that such a requirement is mandated by the First Amendment, which also protects their choice to home educate their children in some contexts.³²¹

The First Amendment argument in favor of requiring public schools to establish a part-time attendance policy is quite similar to the argument under the Fourteenth Amendment, and it suffers from similar flaws. Home educators can claim that public schools must ac-

316. The absence of a part-time or dual enrollment policy between home and public schools does not eliminate parents' choice to educate their children via home education, *see Delconte v. State*, 313 N.C. 384, 402-03, 329 S.E.2d 636, 648 (1985) (finding that home education is a means of satisfying compulsory school attendance statute), public education, *see N.C. GEN. STAT. § 115C-366(a)* (1994) (conferring entitlement to public education on all school-aged children domiciled within local school districts), or private education, *see Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (finding that the right to attend private school was within the liberty guaranteed by the Fourteenth Amendment and prohibiting states from requiring children to attend public schools only). In theory, each of these options is equally available to all parents. This author recognizes that in reality, access to private education may be limited by financial or academic barriers, but a discussion of that issue is beyond the scope of this Comment.

317. In fact, students enrolled in a private school were enjoined from engaging in part-time attendance in public schools in *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2nd Cir. 1986). The United States Court of Appeals for the Second Circuit held that students enrolled in a private Jewish school who wanted to attend public school for remedial classes on a part-time basis were not entitled to such a dual enrollment program because it would violate the Establishment Clause of the First Amendment. *Id.* at 1241-42. The program would have allowed private school students exclusive use of an entire wing in a public school. *Id.* at 1237.

318. *See supra* notes 51-187 and accompanying text.

319. *See supra* notes 302-15 and accompanying text.

320. *See supra* notes 316-17 and accompanying text.

321. *See supra* notes 124-58 and accompanying text (discussing the First Amendment's relationship to home education).

cept their children for part-time attendance in courses in which the home school is not prepared to teach, because if the public schools will not accept those children, then the home school choice (made in compliance with a religious conviction or a personal ideology protected under the First Amendment)³²² is effectively eliminated. This occurs because parents must quit teaching their children at home to attend classes to learn chemistry, the subject that their child wants to study in the public schools.³²³ Although this may be true,³²⁴ parents cannot turn to the First Amendment to remedy their perceived dilemma.³²⁵

If parents choose to educate their children at home because "God commands them to educate their children"³²⁶ and the "worldly influences"³²⁷ of the public schools would "substantially interfer[e] with the religious development"³²⁸ of the child, the First Amendment pro-

322. See *supra* notes 124-29 and accompanying text.

323. See Lerner, *supra* note 261, at 382 (stating that teacher certification requirements for home school teachers can "pose unusually strong and sometimes insurmountable obstacles" to such parents and "can amount to a de facto prohibition of home schooling").

324. In reality, this should not be true. Parents may teach themselves any subject in the evenings after home school classes are completed. They may order books and supplies from which they might learn on their own without leaving the home school during the day and without relinquishing educational control over their children. WHITEHEAD & BIRD, *supra* note 28 at 133-43 (providing the names and addresses of organizations through which home educators may obtain educational materials). In addition, in many communities courses are available at colleges in the evenings, and "there are religious institutions in existence which . . . teach . . . classes in a manner unobjectionable to . . . religious beliefs." *Sheridan Rd. Baptist Church v. Department of Educ.*, 396 N.W.2d 373, 388 (Mich. 1986), *cert. denied*, 481 U.S. 1050 (1987).

325. See Lerner, *supra* note 261, at 382-86 (recognizing that although requiring home-schooling parents to obtain certification through academic endeavors of their own may place an insurmountable burden upon them, courts have upheld such requirements).

326. *Michigan v. DeJonge*, 501 N.W.2d 127, 137 (Mich. 1993).

327. *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972).

328. *Id.* at 218. Of course, the argument may be espoused that chemistry, unlike a course such as biology or possibly literature, does not directly offend the tenets of a particular religion, and therefore, that course (or a course such as algebra) does not violate the religious mandate to educate children according to the commandments of the Bible. However, the worldly influence of the public schools is not limited to the subject matter of particular courses. See generally SACHAR, *supra* note 242, at 11-14 (describing a math classroom in a public school). The public school atmosphere itself is worldly, and even a chemistry classroom may enjoy a "worldly" presence. *Id.* In most public school classrooms, individuals with different religions, backgrounds, races and beliefs share ideas with one another. In addition, in any particular school, the biology teacher may also be the chemistry teacher, and that teacher may bring examples and ideas from her biology class into the chemistry classroom. *Id.* at 27 (noting that 10,000 teachers in New York's public schools were assigned to teach outside their particular subject area). Therefore, the ideas present in a course on chemistry may, in reality, offend the religious tenets of the home-schooled student and her family.

fects their decision to educate their children at home.³²⁹ To earn this First Amendment protection, parents argue that their "religious convictions prohibit the use of certified [teachers]"³³⁰ and that the "scripture is the complete and inherit [sic] word of God . . . [and] to allow the State to insert [sic] God's authority . . . would be a sin."³³¹ Consequently, when public schools require that their teachers acquire certification from the state,³³² religious beliefs that "prohibit the use of certified instructors"³³³ would prohibit enrollment in all public school courses because all public school teachers would be certified. Public school teachers would possess the prohibited certification regardless of whether a student enrolled full-time or part-time in the public schools. Therefore, parents cannot logically rely on the First Amendment both to constitutionalize their right to keep their children *out* of public schools *and* to compel public schools to allow their children *into* the public schools on their own terms.

Although parents enjoy First and Fourteenth Amendment protections of their choice to educate their children at home,³³⁴ those protections do not extend to a desire by parents to elect an integrated home and public educational program.³³⁵ Thus, these constitutional

329. See *DeJonge*, 501 N.W.2d at 144 (holding that home educators whose religious convictions prohibit the use of certified teachers are protected by the Free Exercise Clause of the First Amendment from being required to obtain such certification).

330. *Id.*

331. *Id.* at 130 n.4.

332. "Every state currently has [a] certification program." Alisa Wabnick, *Educators Unwilling to Give up Teacher Certification*, ARIZ. DAILY STAR, Nov. 19, 1995, at 14A.; See, e.g., ALA. CODE § 16-3-16 (1995); ALASKA STAT. § 14.20.010 (1995); ARIZ. REV. STAT. ANN. § 15-532 (1995); ARK. CODE ANN. § 6-12-20 (Michie 1995); CAL. EDUC. CODE § 44203 (West 1995); COLO. REV. STAT. ANN. § 22-60-102 (West 1995); CONN. GEN. STAT. § 10-144 (d) (1994); DEL. CODE ANN. tit.14, §122 (1995); FLA. STAT. ch. 231.15 (1995); N.C. GEN. STAT. § 115C-298 (1995).

333. *DeJonge*, 501 N.W.2d at 129.

334. See *supra* notes 51-187 and accompanying text (discussing the constitutional protections enjoyed by parents who educate their children at home).

335. See *supra* notes 302-34 and accompanying text. In fact, if public schools established a part-time enrollment policy for home-schooled students who attended a "religious" home school, the policy could violate the Establishment Clause of the First Amendment. See *Americans United for Separation of Church and State v. Porter*, 485 F. Supp. 432, 444 (W.D. Mich. 1980) (holding that a dual enrollment program between public and parochial schools violated the Establishment Clause of the First Amendment). In *Porter*, the court stated that "public aid to [religious] schools is sharply circumscribed by the absolute terms of the First Amendment. Each attempt to aid a sectarian enterprise must be carefully scrutinized to determine whether it constitutes a 'law respecting an establishment of religion.'" *Id.* at 433; see also *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397, 389 (1985) (holding that public school district's programs which created a partnership between public schools and parochial schools were unconstitutional violations of the First Amendment Establishment Clause and stating that "[g]overnment promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—

amendments may not be relied upon by home educators in an effort to require public schools to accept home-schooled students on a part-time basis. Nevertheless, home educators may attempt to bring an action on behalf of their children relying upon their *children's* right to public education.³³⁶

Under the Due Process Clause, once a state has provided public education, a state has conferred a benefit upon the children of that state which cannot be taken away without due process of law.³³⁷ However, the due process right to public education contains inherent

or all—religious denominations as when it attempts to inculcate specific religious doctrines”).

336. See *supra* notes 238-49 and accompanying text (discussing children's rights to public education).

337. *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975); see *supra* notes 238-49 and accompanying text. State constitutions and state statutes may also provide children with an entitlement to public education. However, even specific state provisions granting children a “right” to public education do not require that public schools admit home-schooled students on a part-time basis. Consider North Carolina law, for example. Although the North Carolina Constitution provides that “[t]he people have a right to the privilege of education,” it does *not* provide an unlimited right to *public* education. See N.C. CONST. art. I, § 15. The constitution only requires that “every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, *unless educated by other means.*” N.C. CONST. art. IX, § 3 (emphasis added). Essentially, public schools in North Carolina are only obligated under the North Carolina Constitution to provide public education for a child if that student is not “educated by other means.” *Id.*

The state constitution presents a student and her parents with an educational choice. The student may attend public school, or she may be educated by “other means.” If a student chooses home education, an “other means” of education, that student is no longer automatically entitled to the privileges of public schools under the state constitution. Therefore, as long as families intend to maintain their status as home school families, the public schools should not be under any constitutional obligation to admit that child for one or two classes per day because the child is being educated by “other means.”

The North Carolina General Statutes also “entitle[] [students] to all the privileges and advantages of the public schools” N.C. GEN. STAT. § 115C-366(a) (1994). However, it is generally recognized that every statute is to be considered in light of the state constitution and to be interpreted consistently with the constitution's intent. *Faulkner v. New Bern-Craven Bd. of Educ.*, 311 N.C. 42, 58, 316 S.E.2d 281, 291 (1984); see also N.C. GEN. STAT. § 115C-1 (1994 & Supp. 1995) (requiring that the public school opportunities provided under Chapter 115C are designed “in accordance with the provisions of Article IX of the Constitution of North Carolina”). Under the state constitution and statute, the election of public education and the election of education by other means seem to be mutually exclusive options. In fact, under N.C. GEN. STAT. § 115C-378 (1994), a student must “attend school continuously” wherever she chooses to attend. *Id.* Similarly, state courts have supported the notion that once a family elects home education, public schools no longer have an obligation to educate the home-schooled children and the children no longer may claim a right to public education. See *Delconte v. State*, 313 N.C. 384, 402-03, 329 S.E.2d 636, 648 (1985) (holding that home schooling meets statutory requirements for compulsory school attendance). A child who has elected home education no longer enjoys a “right” to public school. Therefore, the public schools do not violate a child's “right” to public education under state law if they do not admit a student who has elected home education.

limits. In *Goss v. Lopez*,³³⁸ the case which established that children enjoy this property right, the Court was concerned about a "total exclusion from the educational process"³³⁹ The students in that case were suspended for ten days from the public schools in which they received all of their education.³⁴⁰ During that time period, the students were completely deprived of educational opportunity.³⁴¹

Unlike the students in *Goss*, home-schooled students seeking part-time admission into a public school chemistry course are *not* "total[ly] exclu[ded] from the educational process"³⁴² if they are denied admission to that particular public school course. Instead, they continue to receive education at home. Therefore, the holding of *Goss* does not extend to the circumstance in which home-schooled students wish to integrate their education with public schooling. The *Goss* holding is limited to situations in which children are denied their due process "rights to an education"³⁴³ by being completely denied any educational opportunity. Since the holding of *Goss* does not apply to children who seek one or two classes in public schools, home educators should not be able to rely on this constitutional precedent to argue that public schools must be required to admit their children on their terms.³⁴⁴

Neither the parents³⁴⁵ nor the children³⁴⁶ in home-educating families can claim that their constitutional rights require public schools to admit home-schooled children on a part-time basis. However, even if home educators could make such constitutional claims, the states' interests in education should override those claims.³⁴⁷ A requirement

338. 419 U.S. 565 (1975).

339. *Id.* at 576.

340. *Id.* at 568.

341. *Id.*

342. *Id.* at 576.

343. *Id.* at 569.

344. In addition to the fact that the *Goss* holding does not extend to situations in which a total exclusion of education is *not* at stake, it may be argued that children waive their right to public schools when they elect home education. In fact, some states have provided by statute that once a family elects home education, no other educational provisions, including those that provide "rights" to public education, shall apply to the home-schooled family. See, e.g., N.C. GEN. STAT. § 115C-565 (1994) (providing that no school under the home school statutes "shall be subject to any other provision of law relating to education except requirements of law respecting immunization").

345. See *supra* notes 302-35 and accompanying text (discussing constitutional claims that home educators may attempt to use to assure the availability of a part-time enrollment policy for their children).

346. See *supra* notes 336-44 and accompanying text (discussing the impact of a child's right to public education on a part-time attendance plan).

347. When home educators claim constitutional protection for a decision bearing upon their choice to home school their child, any regulation that "burdens" that decision may be

that public schools admit any student on a part-time basis for one or two classes per day creates numerous practical and administrative problems for the public school.³⁴⁸ Consider, for example, the situation above in which a student who attends a religious home school seeks admission to a single chemistry class at a public school. The public school offers chemistry during fourth period because the chemistry teacher teaches other courses during other periods and because offering chemistry during fourth period enables all of the full-time students who desire a chemistry course to enroll. However, the home-schooled student typically studies religion for religious reasons during that time. Must the public school either rearrange the schedule (preventing some of the full-time students from taking chemistry) or hire a new teacher to teach chemistry during a time in which the home-schooled student does not study religion? If the public school is required to admit home-schooled students on a part-time basis in accordance with the needs of that student, the public schools could be required to deprive full-time students of the accomplishment of their educational goals. Further, public schools could be required to use their limited resources inefficiently, spending money against the interests of the public school population at large and disserving the states' interests in assuring that all of its children receive the best education the schools may provide.³⁴⁹

If public schools were required to admit home-schooled students on a part-time basis, they would be required to spend their limited funds inefficiently at the expense of their full-time students in a

subject to the "compelling interest" test. *See supra* notes 261-76 and accompanying text. Under that test, a regulation may override the constitutional challenge if the state demonstrates that the regulation serves a "compelling interest" and the regulation is the least burdensome means to satisfy that interest. *See supra* notes 261-76 and accompanying text; *see also* *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 899 F. Supp. 1443, 1451 (M.D.N.C. 1995) (recognizing that although parents have a right to direct the education of their child, "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

States' interests in the education of children, *see supra* notes 219-26, might even justify a requirement that home schoolers attend public school part-time for a course on governmental affairs. *See Easterly, supra* note 88, at 102 (noting that "it would not be unreasonable to require under statute that all students complete a publicly sponsored course to discuss the organization of government and citizen participation in the political process").

348. Without this added complication, public schools already suffer from numerous administrative burdens. *See generally* SACHAR, *supra* note 242, at 25-59 (describing daily administrative and practical realities in a public school).

349. A requirement that public schools spend money to satisfy the part-time attendance needs of home-schooled students (for whom the public schools do not receive funding) provides a specific educational advantage to home-schooled students at the expense of the general school-aged population attending public schools in the state.

number of circumstances. If a home-schooled child attends chemistry for one period in the public schools, someone must pick up the child from public school after that course is over. What is the public school's responsibility to the home-schooled child if, after the class period has ended, the child's parents do not arrive to pick her up and return her to her home school classes? The public school cannot send the home-schooled child to a literature course, for example, with the other students in the class, because that class may contain material that is incompatible with the religious convictions of the home-schooling family. The public school cannot leave the child unattended because that leaves an opportunity for the child to disrupt the entire educational process in the school. Essentially, the public school would have to establish a child-care service for home-schooled children who arrive early for their class or who stay late after their class. The cost of hiring such a supervisor would come at the expense of the public school students at large, and it would be a benefit provided exclusively for home-schooled students.

Similarly, if the home-schooled student sought admission to a chemistry course in which the public school had already enrolled the maximum number of students permitted under federal and state laws, the public school would have to hire a teacher's aide to accommodate the home-schooled student's desire. Again, the cost of hiring this new employee solely for the benefit of the home student would come at the expense of the public school population at large.

In addition to the practical and financial burdens placed upon the public schools if they are *required* to admit home-schooled students into courses at the public schools, the opportunity for individuals to exploit the public schools under these circumstances is readily apparent.³⁵⁰ If the public school *must* admit home-schooled students seeking part-time enrollment, then a home educator could, for example, bring her child to the public schools for a gym class simply to get a "break" from her children during the afternoon. Essentially, the public schools would have to admit children in and out of their classrooms throughout the day for any reason.³⁵¹ In fact, if parents wanted to sleep late in the mornings, they could use the public schools part-time

350. This author does not wish to imply that members of the home education community are prone to exploit an opportunity to attend public school on a part-time basis. However, a rule requiring admission of part-time students in public schools could attract a new, non-traditional kind of home educator seeking to "take advantage" of the part-time rule.

351. In addition to the financial problems in such a situation, public schools would have difficulty enforcing an attendance policy because they could not simply check attendance for each class period to assure that all the children were present in each class. Instead, they would have to monitor each child individually under his or her particular schedule.

in the afternoons and home school their children in the evenings, simply to avoid waking up in time for morning classes. If a student did not like her math teacher, the family could decide to use the public schools part-time for all classes except math, teaching the child at home during math period. Under these circumstances, no state interest in education is served by permitting part-time enrollment because the children are not satisfying *educational* goals through their educational choices;³⁵² however, the financial and administrative burdens inherent in a part-time enrollment structure would still threaten the school.

Alternative Two: Require Public Schools to Deny Admission to Students Seeking Part-Time Attendance

Just as no constitutional authority or state interest supports a policy requiring that public schools *admit* home-schooled students on a part-time basis, no authority or interest supports a policy requiring public schools to *exclude* all students who seek part-time admission. Although there is no constitutional barrier to denying part-time admission in every case, the states' interest in assuring that all school-aged children within their borders receive an effective education³⁵³ should prevent states from instituting a blanket denial of all home-schooled students seeking part-time admission to the public schools.

Under some circumstances, the educational interests of the states are best served by permitting a home-educated student to attend a class in the public schools. If a home-schooled student lives within walking distance of the school and plans to attend a college following completion of her home school curriculum, and if the public school has empty space in chemistry (the course desired by the home-schooled student) at the time desired by the student, the states' interests are best served by admitting that student. Since the student lives within walking distance of the school, there would be no problem with supervision of the child after her chemistry course was over. The child could walk home as soon as class ended. Additionally, the school would not need to fund a teacher's aide because the child would not fill the class beyond the student enrollment limitations imposed upon public schools. Further, because the student is willing to attend the class in the period planned for the course, the public school would not

352. See *supra* notes 219-26 and accompanying text (identifying the states' interests in education).

353. See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (identifying states' interests in preparing children effectively for participation in our political system and for making self-sufficient life choices as adults).

be burdened with adding a new chemistry class or re-scheduling the original course. Finally, since the home-schooled student is seeking admission to the public schools for academic reasons, the public schools are not being exploited by the child's attendance in that school. The student, using the education provided at the public schools, should have a better opportunity to succeed in college and become a productive member of the community.³⁵⁴

Thus, under certain circumstances, the states' interests in assuring that their citizens are properly educated to become self-sufficient, contributing members of the communities of the state³⁵⁵ are best served by allowing home-schooled students admission into the public schools on a part-time basis. This is particularly true when the full-time public school students will not bear the burden of lost expenditures devoted exclusively to particular home-schooled individuals.

In circumstances in which no students suffer a loss of opportunity or a loss of revenue, but all students receive enhanced educational experience, the states' interests are best served by permitting part-time enrollment.³⁵⁶ Under these circumstances, "involving home-educating parents and their children in conventional school programs will enhance both the performance of home-educated children and the academic and social environment of conventional schools."³⁵⁷ Therefore, any policy obligating public schools to deny all home-schooled students seeking part-time admission would contravene the states' interests in providing the optimum education for its school-aged children.³⁵⁸

354. If the student is seeking admission into a course such as algebra, that course may be determinative of whether the child can gain admission into college. The Scholastic Aptitude Test used by most colleges to determine admission of students includes material covered in algebra. If the child does not have an opportunity to study algebra, the child may not be able to attend college because the child may not be able to complete problems on the entrance exam. See MITCHEL WEINER & SHARON WEINER GREEN, *HOW TO PREPARE FOR THE SAT I* 243 (18th ed. 1994) (noting that the math section of the SAT requires knowledge of algebra).

355. See *Yoder*, 406 U.S. at 221.

356. See *supra* notes 188-237 (discussing states' interests in regulating education).

357. MAYBERRY ET AL., *supra* note 3, at 80.

358. See *infra* notes 368-81 and accompanying text (discussing examples of home and public school cooperation working effectively to maximize educational opportunities for all children).

Alternative Three: Permit Educational Officials to Use Their Regulatory and Discretionary Authority to Admit or Deny Part-Time Enrollment of Home-Educated Students on a Case-by Case Basis

When asked the general question whether public schools should have an obligation to accommodate home-schooled students who seek part-time admission into public schools, the answer should be neither yes nor no. An extreme or absolute response to the proposed integration of public and home education does not permit an examination of the equities and interests involved in a particular case. Extreme positions fail to recognize that some situations exist in which public schools should admit home-schooled students on a part-time basis and that some situations exist in which public schools should not admit such students. States should recognize that their public school officials possess both regulatory and discretionary authority to admit or deny a request for part-time attendance in conjunction with the state's interests.³⁵⁹

Although no constitutional barrier prevents public schools from implementing a policy in which all part-time enrollment applications are denied or in which all part-time enrollment applications are accepted,³⁶⁰ home educators may attempt to challenge a policy in which public school officials have discretion to accept or deny their part-time enrollment application under the Fourteenth Amendment.³⁶¹ The Due Process Clause of the Fourteenth Amendment requires that decisions which *affect fundamental rights* be made by a neutral decision-maker.³⁶² Consequently, parents may claim that if public school offi-

359. See, e.g., N.C. GEN. STAT. § 115C-40 (1994) ("Local boards of education . . . shall have general control and supervision of all matters pertaining to the public schools in their administrative units."). Courts have recognized the discretionary authority of local boards of education in other contexts. See *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (holding that public schools *may* release students for part-time religious instruction at a private school); *Lanner v. Wimmer*, 662 F.2d 1349, 1353 (10th Cir. 1981) (stating that "[p]ublic schools *may* permit the release of students during school hours" (emphasis added)). Although both *Zorach* and *Lanner* addressed the issue of whether public schools may release (not admit) a student to a private (not home) school, they did consider part-time enrollment in public schools. However, they did not conclude that public schools "may" release students at their discretion. *Zorach*, 343 U.S. at 315; *Lanner*, 662 F.2d at 1359-60.

360. See *supra* notes 298-358 and accompanying text.

361. See *supra* notes 113-20 and accompanying text (discussing situations in which home educators may claim a right to a neutral and detached decision-maker as well as situations in which the bias of public school officials bears upon educational decision-making).

362. *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972) (examining the role of the neutral decision-maker as it bears upon a defendant's right to a fair trial); *Jessen v. Village of Lyndon Station*, 519 F. Supp. 1183, 1190 (W.D. Wis. 1981) (recognizing the requirement of a neutral and detached decision-maker to protect rights to due process).

cial determine whether a home-schooled student should be permitted to enroll part-time in public schools, the officials have violated their Fourteenth Amendment right to a "neutral and detached judge."³⁶³ However, such a claim by home educators would be ill-founded. The Fourteenth Amendment only requires a neutral decision-maker in decisions bearing upon an individual's life, liberty, or property interests protected by the Due Process Clause.³⁶⁴ As discussed above, the decision regarding admission or denial of a home-schooled student into public schools does not threaten a fundamental right of either the home educators or their children.³⁶⁵ The "rights" enjoyed by parents when they are attempting to withhold their children from public schools do not extend to the inverse situation in which parents are attempting to return their children to public schools on their own terms. Therefore, the Fourteenth Amendment right to a neutral and detached judge for decisions affecting fundamental rights does not apply to this situation.³⁶⁶ Consequently, the Constitution permits a policy in which public school officials use their discretionary authority to

363. *Ward*, 409 U.S. at 62.

364. U.S. CONST. amend. XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property, without due process of law"); see *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."). Furthermore, even if a Fourteenth Amendment life, liberty, or property interest is implicated, a "neutral and detached judge" may not always be required. *Id.* at 335. The constitutionality of procedural safeguards afforded to any official government decision requires a balancing of three distinct factors:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. This balancing test has been used to uphold a statute under which the Secretary of Health, Education, and Welfare could serve as the decision-maker in a hearing on whether to terminate an individual's disability benefits, even though the Secretary himself was a party to the hearing. *Id.* at 327, 349.

365. See *supra* notes 298-358 and accompanying text.

366. Public school board discretionary authority over home schools has been upheld in a number of other contexts. See, e.g., *State v. Brewer*, 444 N.W.2d 923, 926 (N.D. 1989) (holding that a statute granting school boards power to determine whether students are entitled to exemptions from compulsory school attendance did not violate the Due Process Clause); *State v. Anderson*, 427 N.W.2d 316, 320 (N.D.) (holding that a statute granting school boards power to monitor attendance of home school children did not violate the Due Process Clause), *cert. denied*, 488 U.S. 965-66 (1988); *In re Charles*, 504 N.E.2d 592, 597-98 (Mass. 1987) (holding that a statute delegating power to approve home schools to school boards was constitutional).

admit or deny part-time enrollment of home-schooled students on a case-by-case basis.³⁶⁷

In recent years, in a few localities in California, public and home schools have begun a slow movement toward cooperation in recognition of the desire of both parties to maximize educational opportunities for children.³⁶⁸ In these locations, public officials have maintained control and discretion over the initial stages of the integration of home and public education.³⁶⁹ For example, in several California county departments of public education, local officials have "instituted independent study programs [to] enroll home-educated children in public schools."³⁷⁰ Under such programs, "[t]he home education families receive services such as consulting assistance from state-employed teachers, newsletters, ideas for field trips, and some instructional materials. In turn, public schools receive 'average daily

367. In fact, most courts "constru[e] the school board's function as ministerial rather than discretionary, [label] the superintendent's decision-making authority as 'not unbridled,' or find[] that the probability of actual bias on the part of school officials is not high enough to be unconstitutionally intolerable." MacMullan, *supra* note 288, at 1333. Since the school board serves a ministerial function, they may use their authority to make decisions regarding home education without violating the constitutional requirement of a neutral and detached decision-maker for decisions bearing upon fundamental rights. *Anderson*, 427 N.W.2d at 320.

368. In other states, where no statute or regulation mandates that public school officials maintain discretionary control over part-time enrollment of home-schooled children, state law suggests that such a policy should be the rule. Consider North Carolina, for example. Recognizing that public schools are not required under either the state constitution or the state statutes to accept home-schooled students on a part-time basis does not mean that public schools are *prohibited* from accepting those home-schooled students in particular circumstances. See *supra* note 337. No North Carolina statute directly defines guidelines to govern the possibility of part-time admission of home-schooled students into public school classes. However, according to North Carolina General Statute § 115C-40, "[l]ocal boards of education . . . shall have general control and supervision of all matters pertaining to the public schools in their administrative units." N.C. GEN. STAT. § 115C-40 (1994). Therefore, "[i]n the absence of any statute or regulation to the contrary, the authority to determine questions regarding the public schools generally rests with local boards of education." 57 Op. N.C. Att'y Gen. 26 (1987) (stating that it is within the discretionary power of local boards of education to release public school students for part-time attendance at private (not home) schools). Given the absence of other statutory direction, § 115C-40 gives local boards in North Carolina discretion to accept or deny part-time admission to home-schooled students. This conclusion regarding home and public school integration in North Carolina is consistent with the state's opinion regarding the integration of public and private schools. The North Carolina Attorney General determined that the authority of the local board of education included "the power to permit or refuse the release of students to private schools for part of the school day." 57 Op. N.C. Att'y Gen. at 26.

369. Although this author is only aware of a few instances in which home-schooled students are officially permitted to enroll in classes in public schools, these instances should serve as an example for other localities.

370. MAYBERRY ET AL., *supra* note 3, at 81.

attendance' money for each student" who participates in the independent study program and enrolls in class in public school.³⁷¹

This independent study program avoids the pitfalls of a mandatory admission policy in which public schools are forced to incur financial loss to accommodate the various desires of home-educating families by permitting states to enroll students only when they receive sufficient funding to accommodate the home-schooled student without cost to the other students in the school. Similarly, it avoids the dangers of a policy excluding all part-time applicants because students who are seeking necessary and beneficial educational resources are able to receive them if certain requirements are satisfied. Finally, this policy does not deprive public school students of the opportunity for enhanced diversity in the classroom, nor does it deprive home-schooled students of their desired educational opportunity. By allowing the public school officials to regulate the integration of home and public education, the needs of the children and of the state are efficiently served under this independent study program.³⁷²

In San Diego, home school educators and public school district officials established a more extensive home and public school integration program after year-long negotiations.³⁷³ This program, called the Community Home Education (CHE) program, "is explicitly designed to benefit both home-educating parents and public schools."³⁷⁴ Under CHE, home schools receive public services and resources, and the "public schools receive extra funding per student and the commitment of the home education parents who use public services."³⁷⁵ However, the public officials retain control over the program and establish their own requirements for participation.³⁷⁶ Home educators must comply with the regulations of the public officials in order to participate:

The San Diego School District notifies parents who are considering home educating their children about the CHE program and advises them of the district's expectations for parents who enroll. Once in the program, the district provides parents with a complete set of textbooks for each child, as well as in-service activities and curriculum guides for their own use. These materials are to be used as the home school's core curriculum, but parents may supplement them

371. *Id.*

372. *Id.* at 80.

373. *Id.* at 82.

374. *Id.*

375. *Id.*

376. *Id.* at 82-83 (noting that home educators may only participate in the program if they satisfy the curricular demands of the public school administration).

with any other materials they wish. Parents are asked to prepare weekly lesson plans and submit copies to the program coordinator each month, along with samples of their children's work. In addition, the CHE program offers weekly hands-on science experiences for home-educated students; operates a computer laboratory staffed with a full-time teacher and teacher's aide; organizes frequent field trips for home-educating families; conducts networking meetings for parents . . . meets with individual parents three times a year to evaluate the progress of the home school program . . . and provides books and audiovisual materials to parent educators.³⁷⁷

By working with home educators, while recognizing their independence from public schools, public school officials are able to assure that the interests of the state are served in both the home and public school environments.³⁷⁸

Advocates of home education have lauded the independent study program found in some California districts and the Community Home Education program in San Diego despite the fact that public school officials have maintained regulatory and discretionary control over certain aspects of home schooling under those programs.³⁷⁹ Home educators appear willing to "give in" to state regulations in return for educational resources from public schools, and public school officials appear willing to accommodate the needs of home-schooled students in return for assurance that home school curriculums satisfy state standards.³⁸⁰

Although neither program focuses solely upon the admission of home-schooled students on a part-time basis, they demonstrate that public school officials are capable of cooperation with home educators and that public school officials can, under specified guidelines, exercise their discretionary authority to the benefit of both public school students and home-schooled students. These programs "remind us of the often-overlooked fact that parent educators and educational pro-

377. *Id.*

378. Some legislatures, although neglecting to provide statutory regulation for integration of home and public school students in public classrooms, have provided for the integration of home and public students in interscholastic athletics. Naturally, under the state's regulations, the home-schooled students must satisfy the state provisions before they may participate in the state's athletic programs. See, e.g., OR. REV. STAT. § 339.460 (1995) (providing home-schooled students with an "opportunity to participate in all interscholastic activities if the student fulfills" specified conditions).

379. MAYBERRY ET AL., *supra* note 3, at 80-83.

380. See *id.* at 82 (discussing a cooperative education in which home educators give up some educational control in exchange for public schools providing them with curricular support).

professionals do successfully cooperate. . . [and that they can] find[] a balance between the individualistic stance of many home-educating parents and the state's interest in educational matters."³⁸¹

VI. CONCLUSION

Over the past few decades, the home education movement has boomed.³⁸² Increasing numbers of families are selecting home education for their children.³⁸³ As more and more American children are educated in homes instead of public or private schools, home schools will become increasingly prominent in the educational scene in this country.³⁸⁴ Although home educators may recall their recent history of struggle against public school officials, home schooling has clearly become an independent and legitimate educational choice, standing on equal ground with public and private schools.³⁸⁵ However, now that home schools have established themselves as independent institutions protected in varying degrees by several constitutional provisions, some home-schooling families are preparing to confront the public schools in a new academic battle in which home schools and public schools face one another as equals. Many home educators would like the opportunity to enroll their children part-time in public schools,³⁸⁶ and the public schools are resisting that possibility.³⁸⁷

Although public schools are under no legal obligation to admit home-schooled students,³⁸⁸ it is not in the best interest of the schools or the children to deny all requests for part-time admission by such students.³⁸⁹ Instead, the ideal educational result may be reached if public school officials consider each application, on a case-by-case basis, and admit only those home-schooled students seeking a genuine educational opportunity in the public schools who can enter public school classes without disadvantaging full-time public school stu-

381. *Id.* at 83.

382. Adams, *supra* note 3, at 30 (observing that there has been a dramatic increase in the number of children home schooled in the past decade and estimating that the increase has been tenfold).

383. MAYBERRY ET AL., *supra* note 3, at 7 (tracking the growth of home-based instruction from the 1980s, when 60,000 to 125,000 children were in home schools, to 1994, when 450,000 to 800,000 children were educated at home).

384. Manning, *supra* note 8, at 01D (explaining that the home education movement is a "trend" that will carry our nation into the twentieth century).

385. KLICKA, *supra* note 3, at 155.

386. MAYBERRY ET AL., *supra* note 3, at 71.

387. Proctor, *supra* note 14, at 1326 (observing that most educators would prefer to prohibit home education entirely).

388. *See supra* notes 298-352 and accompanying text.

389. *See supra* notes 353-58 and accompanying text.

dents.³⁹⁰ Essentially, when faced with the question of whether to admit a home-schooled student on a part-time basis, as long as school officials exercise their discretion in a manner consistent with the states' interests in providing the best possible education for all of its school-age children, both home-schooled students and public-schooled students may benefit from the integrated environment that results. In a sense, both home schools and public schools may "win" in the latest battle between the two educational systems.³⁹¹

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390. *See supra* notes 359-81 and accompanying text.

391. MAYBERRY ET AL., *supra* note 3, at 81-83 (recognizing that there are several ways in which public schools and home schools could serve each other advantageously).

